UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MARIELLE ("Molly") KRONBERG, Plaintiff, v. LYNDON LAROUCHE, BARBARA BOYD, EIR NEWS SERVICE, INC., and LYNDON LAROUCHE POLITICAL ACTION COMMITTEE, Defendants.	:	Civil Action No. 1:09-cv-00947-AJT-TJR

MEMORANDUM IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISQUALIFY FORMER AUSA MARKHAM

John J. E. Markham, II, Esquire ("Markham") should be disqualified as counsel for Plaintiff because he obtained "confidential government information" about this matter while employed as the Assistant United States Attorney who led multi-jurisdictional investigations and prosecutions of all parties, witnesses, events, and practices relevant to this action. As an additional ground for disqualification, he has failed to obtain the requisite consents to proceed in this matter.[1]

I. INTRODUCTION

In this case, Plaintiff claims that the Defendants conspired to cause injury to her for having testified against Defendant Lyndon LaRouche in a federal prosecution in Alexandria federal court ("Alexandria Federal Prosecution") by making defamatory statements that she had

[1] Even if the requisite consents were obtained, this would not cure the first, independent ground for disqualification.

testified falsely in the Alexandria proceeding and that she had caused the death of her husband, Ken Kronberg. Plaintiff further alleges that her husband committed suicide after being harassed by the Defendants. First Am. Compl., ¶¶ 1, 14(i).

This memorandum demonstrates that during the federal and state prosecutions described below, Markham obtained confidential government information about the following matters relevant to this action:

- The veracity of Marielle Kronberg's grand jury and trial testimony in the Alexandria Federal Prosecution, which lies at the heart of this entire action;
- The fear Ken Kronberg expressed about being sent to prison shortly before he committed suicide because he had failed to pay employee tax withholdings owed by his company which became the subject of criminal tax violations and were made part of Markham's efforts to prosecute the Defendants in the Alexandria Federal Prosecution;
- Markham obtained detailed information about "Gus," who is referenced in the First Amended Complaint, and other witnesses relevant to this action which may affect the substance and manner in which they testify; and
- Markham developed unique personal relationships through his position as the lead prosecutor which are believed to have increased hostility in Criton Zoakos and other former supporters of Lyndon LaRouche who have information about matters relevant to the allegations in this case.

The federal and state prosecutions in which Markham was a key player began in the 1980's, when Lyndon LaRouche and certain affiliated persons and entities became the subject of various federal and state criminal investigations. AUSA Markham was directly involved in these investigations, having been appointed in May 1986 to lead the federal investigations with a

"mandate to bring this case to indictment."[2]

A Boston grand jury indicted Lyndon LaRouche in June 1987.[3] AUSA Markham was part of the prosecution team[4] and gave opening argument in the case on December 17, 1987.[5] The matter was tried for 94 days before a mistrial was declared ("the Boston Federal Prosecution").[6]

AUSA Markham also coordinated with AUSA Kent Robinson in pursuing an Alexandria federal grand jury investigation of Lyndon LaRouche and others. On October 14, 1988, the grand jury handed down a 13 count indictment against Lyndon Larouche and six other individuals.[7] AUSA Markham assisted and was co-counsel in the subsequent four-week trial in Alexandria federal court ("the Alexandria Federal Prosecution").[8]

In September 1988, Marielle Kronberg and others were indicted on felony charges in New York.[9] AUSA Markham assisted in the prosecution of these felony charges against

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[2] *See*, App. 20 (redacted Secret Service Memo dated June 30, 1986), and App. 21 (redacted memo dated May 30, 1986).

[3] *See*, Second Superseding Indictment, App. 6 and Markham's testimony, App., 8, p. 28 given on April 24, 1990 in *Comm. of Virginia v. Welsh* (Roanoke Circuit Court).

[4] Markham Testimony, App. 8, p. 28:6 – 31:2.

[5] App. 29.

[6] Markham Testimony, App. 8, pp. 30-31.

[7] App. 7, Alexandria Indictment.

[8] *See*, Markham testimony, App. 8, pp. 28:6 – 31:2, p. 35; and *People v. Kronberg*, 672 N.Y.S.2d 63, 69 (N.Y. App. Div. 1998).

[9] See, App. 9, Amended Superseding Indictment.

Kronberg and 14 other defendants in the New York action ("the New York State Prosecution").[10]

Finally, Barbara Boyd and 15 other individuals and four related organizations were indicted in Virginia state court.[11] AUSA Markham assisted in the prosecution of these charges ("the Virginia State Prosecution").[12]

As part of each of these prosecutions, AUSA Markham had access to and reviewed classified and other confidential government information obtained under governmental authority by the FBI, CIA, Secret Service, National Security Counsel, IRS, other intelligence gathering agencies, and a prior Boston grand jury investigation about these Defendants. This confidential government information has been withheld from the Defendants and the public under claims of law enforcement and other executive privileges. (See, e.g., App. 1: the Government's status report in the Boston Federal Prosecution, signed by Markham, reporting on various U.S. agencies' searches for exculpatory information; App. 2: the Government's Notice of In Camera Submissions in the Boston Federal Prosecution signed by Markham; App. 3: excerpts of documents redacted under claims that the material is classified or subject to other governmental privileges; App. 4: the Government's *in camera, ex parte* affidavit of S.A. [name redacted], with redactions); *LaRouche v. Kelley*, 522 F. Supp. 425 (S.D.N.Y. 1981);[13] *LaRouche v. U.S. Dept. of*

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[10] *See, e.g.*, *People v. Kronberg*, 672 N.Y.S.2d at 63, 69.

[11] App. 10.

[12] See, e.g, *People v. Kronberg*, 672 N.Y.S.2d at 69. See also Amended Indictment issued on August 29, 1988, App. 10. The matter was transferred to Roanoke Circuit Court and attached at App. 10 is a partial hearing transcript with the full case caption. Finally, App. 10, a Virginia Case Information Case Detail reflects that all charges against Barbara Boyd were dismissed on 8/19/1991.

[13] Affirming FOIA exemptions claimed by FBI in response to LaRouche requests made in 1975 for FBI investigatory files of NCLC.

Treasury, 112 F. Supp.2d 48 (D.D.C. 2000);[14] *Billington v. U.S. Dept. of Justice*, 301 F. Supp.2d 15 (D.D.C. 2004).[15])

The "confidential government information" Markham acquired while serving as an Assistant U.S. Attorney prosecuting the Defendants and relevant witnesses in the above described criminal prosecutions has direct bearing on this action, and includes: evaluations of Marielle Kronberg's prior testimony; prior actions taken by the Internal Revenue Service ("IRS") against Ken Kronberg; information about all parties to this action and potential witnesses; and other witness statements that were not produced to the Defendants. In the course of the underlying criminal prosecutions, Markham developed personal relationships with former members of LaRouche's political association who became witnesses or sources in Markham's investigation.

In sum, Markham holds an unfair advantage because while serving as a prosecutor, he obtained detailed confidential government information directly, and indirectly through others, about this matter and about each witness which is not available to the Defendants and which could affect witness testimony. Markham can use confidential government information to undermine the Defendants' credibility at trial by asking questions based on false or incomplete statements in documents Markham reviewed but cannot produce to Defendants. Further, because the jury will know Markham spearheaded the criminal prosecutions that convicted Lyndon LaRouche and six others, this will unfairly affect the manner in which each Defendant

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[14] Appeal from FOIA requests for tax return information related to the Alexandria Federal Prosecution.

[15] Appeal from decision to withhold statements referred by Department of State to FBI about NCLC under various privileges.

may testify and their perceived credibility before a jury. Finally, as the prosecutor in both the Boston Federal Prosecution and the Alexandria Federal Prosecution, Markham's participation in those cases will be used to vouch for the testimony of Plaintiff Kronberg and the outcome of the proceedings in the Alexandria Federal Prosecution which lies at the heart of this civil matter. Indeed, this is precisely what is done in the First Amended Complaint where Markham, as counsel for Kronberg, specifically asserts that she "testified truthfully in all respects" in the Alexandria Federal Prosecution. See First Am. Compl., ¶ 11.

These events and other factors, described in greater detail below, give Plaintiff an impermissible advantage that requires former AUSA Markham to be disqualified because:

1. a lawyer [Markham] having information that the lawyer knows is confidential government information about [Defendants] acquired when the lawyer was [an Assistant U.S. Attorney], may not represent a private client [Kronberg] whose interests are adverse to [Defendants] in a matter in which the information could be used to the material disadvantage of [the Defendants], see, Va. R. Prof. Conduct 1.11(c);

2. a lawyer [Markham] shall not represent a private client [Kronberg] in connection with a matter in which the lawyer participated personally and substantially as [an Assistant U.S. Attorney], unless the private client and the appropriate government agency consent after consultation, see, Va. R. Prof. Conduct 1.11(b); and

3. No former [Assistant U.S. Attorney] shall knowingly, with the intent to . . . influence, make any . . . appearance before [a federal court] in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest, see, Va. R. Prof. Conduct 1.11(e)(2), incorporating 5 U.S.C. § 2641.201(a).

II. BACKGROUND

Principal Persons

Lyndon LaRouche expresses economic and political viewpoints, and is an editor of the

"Executive Intelligence Review," which is published by defendant EIR News Service, Inc. ("EIR"). See, App. 11 and Boyd Decl. at ¶ 2. Lyndon LaRouche is a leader of a political movement (First Am. Complaint, ¶¶ 6-7), and ran for President in several elections that included 1980 and 1984. See, *United States v. LaRouche*, 896 F.2d at 818.

The "National Caucus of Labor Committees" ("NCLC") is a voluntary political association which supports political and economic views expressed by Lyndon LaRouche. Lyndon LaRouche, Marielle and Ken Kronberg, Barbara Boyd, individuals named in the First Amended Complaint, and all other individual defendants in the Boston, Alexandria, New York and Virginia criminal actions were members of the NCLC. See, Boyd Decl. at ¶ 3.

Ken Kronberg owned and ran PMR Printing, Inc. ("PMR") and World Composition Services, Inc. ("World Composition")[16] which were used to print materials for EIR and other entities associated with the NCLC.[17]

Barbara Boyd also is the current Treasurer of defendant Lyndon LaRouche Political Action Committee, which was formed in 2004.[18]

The Beginnings of Investigations into the LaRouche Campaign

Redacted communications produced by the United States in response to FOIA Requests demonstrate that a "classified" inquiry was directed to the FBI as early as 1982 questioning whether Lyndon LaRouche and the Executive Intelligence Review were backed by the Russian

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[16] See, e.g., App. 11: New York State Report for PMR and a Virginia State Corporation Commission Report for World Composition.

[17] See, e.g., App. 27 at 61 and Boyd Decl. at ¶ 4.

[18] See, App. 12: Virginia State Corporation Commission Report.

Intelligence Service ("RIS") or other foreign intelligence agencies.[19] These requests resulted in classified investigations of Lyndon LaRouche, "members of his organization, and the various publications of the National Caucus of Labor Committees (NCLC)."[20] These investigations found no evidence of such conduct. (*See*, App. 13.) While the FBI has stated that it did not have an active investigation on Lyndon LaRouche or the NCLC, Markham's Report in the Boston Federal Prosecution on searches for exculpatory evidence (App. 1) and other redacted documents produced by the United States demonstrate that classified and other confidential files concerning Lyndon LaRouche and other defendants in the Boston case were later held by the CIA, FBI, National Security Council, the White House, the Secret Service, and other Defense Department agencies.

In 1982, the State of New York searched offices occupied by PMR. See, *In re The Grand Jury Subpoenas served upon Ken Kronberg, et al.*, 464 N.Y.S.2d 466 (N.Y. App. Div. 1983), *aff'd*, 466 N.E.2d 165 (N.Y. 1984). AUSA Markham would have reviewed this investigation before filing in the Boston Federal Prosecution a Notice of Intention to Offer Evidence of Other Crimes, Wrongs or Acts and a Second Notice of Intention to Offer Other Act Evidence, which described the underlying charges and acts to obstruct the New York grand jury investigation. (See, App. 14).

In 1984, William F. Weld, then U.S. Attorney for Massachusetts, launched a grand jury

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[19] See, App. 13 (redacted FBI Memo): "We discussed briefly the other day when we met the phenomenon of Lyndon LaRouche and the Executive Intelligence Review. . . . Our interest is primarily to determine whether there could be an RIS hand somewhere in or behind this bizarre organization."

[20] See, e.g., App. 13: redacted FBI Response marked Classified, copy to Legat, London at 1 (9/24/1982).

investigation which targeted Lyndon LaRouche, The LaRouche Campaign, members of the NCLC, and related entities for deceptive fund-raising tactics. See, *In re Grand Jury Proceedings*, 795 F.2d 226 (1st Cir. 1986), vacated and remanded, 871 F.2d 156 (1st Cir. 1989). This first Boston grand jury expired without an indictment when Campaigner Publications, Inc., Caucus Distributors, Inc., Fusion Energy Foundation, the National Democratic Policy Committee, The LaRouche Campaign,, and Independent Democrats for LaRouche failed to produce campaign donor records ("index cards"). See, *id*.

By August 1985, Weld had called for expanded criminal and tax investigations of "all LaRouche organizations" in Baltimore, Chicago, Los Angeles, and San Francisco. See, e.g., App. 15: redacted FBI communication dated 8/16/1985. FBI communications reflect that as a result of "interviews provided by other divisions and by U.S. Secret Service" the list of "principals of various LAROUCHE related organizations" was expanded to include "Barbara M. Boyd" and 12 other persons and seven other organizations. (See, *id*., p. 2). One month later, the FBI Office in Alexandria had identified the "Executive Intelligence Review" and "World Com" as being among the entities "affiliated with the LAROUCHE ORGANIZATION" it was investigating, and that "Alexandria will coordinate with Boston and Newark regarding development of further intelligence in connection with this matter."[21] In November 1985, Weld made a further request for assistance in his investigations to the Criminal Tax Division and the IRS,[22] which resulted in the IRS Office in Northern Virginia investigating "Lyndon LaRouche's

[21] App. 16: redacted FBI communication dated 9/13/85.

[22] See, App. 17: redacted DOJ Memorandum to Chief of the Tax Division, Criminal Section dated 12/19/1985.

organizations and their compliance with the tax laws."[23]

On January 17, 1986, the FBI Boston Office announced to the FBI Director and eight other offices that Weld would hold a two-day conference in Boston on February 12-14, 1986, which was supported by the Assistant Attorney General for the Criminal Division of the U.S. Department of Justice, to explore legal theories and coordinate federal, state, and local efforts to indict and convict Lyndon LaRouche.[24] By March 1986, the FBI had identified "Molly Kronberg" and "Barbara Boyd" to be among more than 30 other persons and organizations who were under investigation.[25]

Markham's Appointment to Lead the Investigations and
Prosecutions and His Access to Confidential Government Information

On or about May 22, 1986, Weld assigned AUSA Markham to take over, and work exclusively on, the "LaRouche Campaign" investigations,[26] "with a mandate to bring this case to indictment"[27]

During or about May 1986, a second federal grand jury investigation was commenced in Boston. (See, e.g., Apps. 23, 24). AUSA Markham redesigned the questionnaires used to interview victims (see, App. 20), and by June 22, 1986, he was introduced by the FBI Boston Office to "disaffected LAROUCHE members," and other persons whose names were redacted

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[23] App. 18: Meyers DOJ, Tax Division Memorandum to the File dated 1/21/1986.

[24] See, App. 18: redacted FBI communication dated 1/17/1986.

[25] See, App. 19: redacted FBI Memorandum.

[26] See, App. 20: redacted Dept. of Treasury Memorandum dated 6/30/86.

[27] See, App. 21: redacted Memorandum dated 5/30/1986.

but described by the FBI to include "deprogrammed members of a cult." [28]

AUSA Markham was actively involved in the criminal investigations of the Defendants as demonstrated by the list of witnesses AUSA Markham sent to FBI Special Agents concerning interviews with defectors from the LaRouche organization and other investigative leads.[29] While the names on that list were redacted, the headings demonstrate AUSA Markham had interviewed witnesses for different charges, had reviewed information provided to him by other government agents, and had determined which witnesses he would use to "channel disinformation from us to Steinberg." (See, App. 5 at ¶ 13).

Weld was appointed to Assistant Attorney General for the Criminal Division of the U.S. Department of Justice during or about July 1986. (See, Boyd Decl. at ¶ 10). On July 18, 1986, AUSA Kent Robinson sought IRS participation in a "joint tax/non-tax grand jury investigation" of Lyndon LaRouche, PMR, World Composition, and others in Alexandria, Virginia.[30] By August 1986, there were on-going tax and non-tax criminal investigations, with the IRS office in Virginia reporting that "a federal grand jury in Boston has already gathered some evidence . . ." and that a "number of federal agencies are already pursuing the investigation by the grand jury process . . . ."[31]

Redacted documents demonstrate that the Boston and Alexandria grand juries

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[28] See, App. 22: redacted FBI communication dated 6/26/1986.

[29] See, App. 5: Markham, redacted memorandum to FBI Special Agents dated July 30, 1986 entitled "Defector Interviews and Other Investigative Leads."

[30] See, e.g., App. 23: AUSA Robinson, request for IRS participation in joint tax/non-tax grand jury investigation dated 7/18/1986.

[31] App. 24: SA Lucey, IRS Request for Grand Jury Authorization dated 8/7/1986.

investigated Lyndon LaRouche, Ken Kronberg, PMR, World Composition, Marielle Kronberg, Barbara Boyd, The LaRouche Campaign, Caucus Distributors, Inc., EIR, the NCLC, and more than 20 members of the NCLC on a wide range of charges that included conspiracy, obstruction of justice, fraud, mail and wire fraud.[32] In addition, Lyndon LaRouche, Ken Kronberg, PMR, and World Composition were investigated with others for tax law violations.[33]

The Boston grand jury investigated alleged fund-raising fraud, obstruction of justice, and tax law violations involving Lyndon LaRouche, EIR, and related individuals and entities. (See, e.g., Apps. 6 and 25.) The Alexandria grand jury focused on criminal charges and acts that included loan fraud, and tax investigations of Lyndon LaRouche, Ken Kronberg, PMR Printing Company and World Composition Services run by Ken Kronberg, defendant EIR, and other members of the NCLC.[34]

These investigations "uncovered the interchanging of the various LaRouche corporations and commingling of funds under the umbrella of the National Caucus of Labor Committees ("NCLC"), *People v. Kronberg*, 672 N.Y.S.2d at 69, and were used to support the application "for a warrant to search the LaRouche offices in Leesburg, Virginia, which when executed in conjunction with the one obtained by the Virginia Attorney General, led to the seizure of the more than 400 boxes of documents, including over 3,000 loan files." *Id.*

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[32] See, App. 6: Second Superceding Indictment in the Boston Federal Prosecution; App. 7: Indictment in the Alexandria Federal Prosecution; App. 14: Notice of Intention to Offer Evidence of other Crimes in the Boston Federal Prosecution signed by Markham.

[33] See, App. 7: Indictment in the Alexandria Federal Prosecution; App. 25: Robinson, Notice to Defendants dated 11/1/1988 (identifying Kenneth Kronberg as one of 13 "unindicted co-conspirators in Count 13 of the Alexandria Indictment).

[34] See, App. 25: Notice of Unindicted co-Conspirators in Count 13 of the Alexandria Indictment dated 11/1/1988.

The application for the search warrant was based on the affidavit of Richard J. Egan, special agent for the FBI. (App. 27). AUSA Markham was the primary drafter of the Egan search warrant affidavit.[35] The affidavit listed 30 John Doe informants.[36] The affidavit further averred diversions of funds to support LaRouche's "lavish lifestyle," tax fraud within the LaRouche organization, fund-raising, fraud and obstruction of justice, and made specific reference to IRS actions against PMR and World Composition Services. (See, *id*. at 2-7.) The identity of these John Does and their complete statements to Markham or law enforcement agents working for him have been withheld by the United States under claims of law enforcement and other privileges. (See, e.g., Boyd Decl. at ¶ 11; see also, *United States v. The LaRouche Campaign*, 695 F. Supp. 1290 (D. Mass. 1988); *LaRouche v. U.S. Dept. of Treasury*; *Billington v. U.S. Dept. of Justice*, *supra.*

The October 6, 1986 "raid" was conducted by the FBI, Secret Service, IRS, Postal Service, BATF, Virginia State Police, and the Loudoun County Sheriff's Department, see, *People v. Kronberg*, 672 N.Y.S.2d at 67, and was coordinated with the Virginia Attorney General's Office which was conducting its own investigation while "cooperating with the ongoing Federal investigations in Massachusetts and Virginia" (*id*. at 67) in a "joint State and Federal investigation of the LaRouche organization in Virginia" (*id.* at 69). (See also, App. 28: IRS Memorandum dated 2/16/1988 reporting that the October 6, 1986 raid was conducted primarily by "agents of IRS and FBI assisted by agents of the Secret Service and the Postal Service").

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[35] See, App. 26: transcript in the Boston Federal Prosecution at 23:21–24:7; Boyd Decl. at ¶ 6.

[36] App. 27: excerpts from Egan Affidavit dated October 6, 1986.

After the initial indictment was handed down on October 6, 1986, the Boston grand jury continued to hear additional evidence and issued a second superceding indictment on June 30, 1987 to charge Lyndon LaRouche, The LaRouche Campaign, Independent Democrats for LaRouche, Campaigner Publications, Inc., Caucus Distributors, Inc., the NCLC, and seven members of the NCLC with conspiracy to obstruct justice. The same indictment charged the entities and four individual fund-raisers with wire fraud related to soliciting unpaid campaign loans, mail fraud related to unpaid promissory notes owed by the entities, and also charged one individual with criminal contempt for not producing campaign donor index cards. (See, App. 6).

While the above federal proceedings were ongoing, in December 1986, Virginia prosecutors met with the New York Attorney General's Office, which was investigating the LaRouche organization, see, *People v. Kronberg*, 672 N.Y.S.2d at 69, after which, Marielle Kronberg was indicted on March 3, 1987. See, *People v. Kronberg*, 672 N.Y.S.2d at 67.

While Marielle Kronberg was under indictment by New York, she was immunized and called to testify before the Alexandria grand jury on December 16, 1987. See, *People v. Kronberg*, 672 N.Y.S.2d at 69.

One day later, on December 17, 1987, AUSA Markham delivered his opening trial statement in the Boston case, which included the following assertions that parallel the assertions in Paragraphs 5-7, 10, 12, 13, 14(i) of the First Amended Complaint:

> (a) "Members of the National Caucus of Labor Committees do what Mr. LaRouche wants them to do, go where Mr. LaRouche wants them to go, think what Mr. LaRouche wants them to think, and agree with everything he wants them to agree with";
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> (b) "LaRouche lives in a very heavily-guarded estate . . in a lavish house";
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> (c) "When LaRouche and the National Executive Committee make a decision, that is the law of the organization, and their decisions are communicated down to the ranks of the

followers . . . by a document called the daily briefing";

(d) As a result of two "decrees" by LaRouche in 1984, fund-raisers were pressured to raise more money and "crossed the line from aggressive but legal fund-raising to the illegal bilking of other people's credit cards" and taking loans without any intention to repay them;

(e) "Even though LaRouche lives on a lavish estate, stays in first class hotels, flies around the world, has a swimming pool, has horses, has guards, has servants, he has not filed a tax return or paid taxes for a least the last five years . . . Caucus Distributors and Campaigner Publications had not filed tax returns for years and had not withheld wages, FICA, on their employees;"

(f) Defendants respond to inquiries or perceived threats by "counterattacks" and harassment.

(See, App. 29, transcript in the Boston Federal Prosecution at 19-30-35 – 19-74-75).

The Boston case ended in a mistrial on May 4, 1988, after 94 days of trial and following hearings on the government's alleged failure to produce exculpatory evidence. See, *United States v. The LaRouche Campaign*, 695 F. Supp. 1317 (D. Mass. 1988). The *Boston Herald* reported that the jurors took a straw poll and found they would have acquitted all defendants. (See, Boyd Decl. at ¶ 12). A retrial was scheduled to begin on January 3, 1989. See, *United States v. LaRouche*, 896 F.2d at 820.

Virginia cooperated with the federal investigations, and Markham assisted the Virginia prosecution of Barbara Boyd, EIR and other entities and individuals associated with LaRouche. Markham also produced copies of the Boston trial records, FBI 302s, and other information to the New York Attorney General's Office for their prosecution of Marielle Kronberg. See, *People v. Kronberg*, 672 N.Y.S.2d at 70.

AUSA Markham assisted AUSA Robinson in preparing the Alexandria indictment, which resulted in the convictions of Lyndon LaRouche and others in December 16, 1988:

> On Friday, October 14, 1988, a federal grand jury in the Eastern District of Virginia, Alexandria Division, handed down a thirteen-count indictment against Lyndon LaRouche, Jr., Edward Spannaus, William Wertz, Michael Billington, Dennis Small, Paul Greenberg, and Joyce Rubinstein. Count One was Conspiracy to Commit Mail Fraud, on which all of the defendants were charged; Counts Two through Twelve were various counts of mail fraud charged to various defendants; and Count Thirteen was Conspiracy to Defraud the Internal Revenue Service, on which only LaRouche was charged. On December 16, 1988, a jury in the United States District Court for the Eastern District of Virginia found the seven defendants guilty on all of the counts with which they had been charged.

United States v. Lyndon LaRouche, 896 F.2d at 818. Marielle and Ken Kronberg were unindicted co-conspirators on the tax count. (See, App. 25).

After LaRouche was sentenced to prison, Marielle Kronberg was tried and convicted on the New York felony charges in 1989,[37] but was not sentenced until July 13, 1998, at which time she was sentenced to five years probation.[38] All charges against Barbara Boyd were dismissed. (See, App. 10).

Notices, reports, and other redacted documents produced by the United States during the above criminal proceedings and in subsequent Freedom of Information Act litigation demonstrate that Markham personally reviewed "classified" and other confidential information about every personal, interpersonal, and financial aspect of Lyndon LaRouche's life and the lives of others associated with NCLC – information that can only be obtained under governmental authority from the FBI, CIA, National Security Agency, Secret Service, White House, IRS, and other federal and state agencies and which the government claimed it was prohibited by law from disclosing to the public and asserted state secrets and other law enforcement privileges (see, e.g., Apps. 13, 16-24, 28, *People v. Kronberg*, 672 N.Y.S.2d at 67), and which remain unavailable to

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[37] *Kronberg v. U.S. Department of Justice*, 875 F. Supp. 861 (D.D.C. 1995).

[38] See, *People v. Kronberg*, 716 N.Y.S.2d 653 (N.Y. App. Div. 2000).

the Defendants and the public (see, e.g., Boyd Decl. at 5, 6, 7, 8, 11, 13, 14, 16, 20); see also, *LaRouche v. U.S. Dept. of Treasury*; *Billington v. U.S. Dept. of Justice*. Additionally, Markham had access to the confidential information known to agents of various governmental agencies derived from their separate investigations and inquiries.

III. MARKHAM SHOULD BE DISQUALIFIED UNDER RULE 1.11(c) BECAUSE HE ACQUIRED "CONFIDENTIAL GOVERNMENT INFORMATION" ABOUT THIS MATTER WHILE SERVING AS THE LEAD ASSISTANT U.S. ATTORNEY WHO PROSECUTED THE DEFENDANTS.

The Virginia Rules of Professional Conduct govern the ethics standards of practice before this Court. See, L.R.-Civ. 83.1(I). Former prosecutors must also comply with Rule 1.11, which, in part, states that:

> a lawyer [Markham] having information that the lawyer knows is confidential government information about a person [Defendants] acquired when the lawyer [Markham] was a public officer or employee [Assistant U.S. Attorney], may not represent a private client [Kronberg] whose interests are adverse to that person [Defendants] in a matter in which the information could be used to the material disadvantage of that person [Defendants].

Rule 1.11(c). "This Rule prevents a lawyer from exploiting public office to the advantage of the lawyer or a private client." Rule 1.11, Comment 1.

Prior decisions from this District have stated:

> the moving party bears a "high standard of proof" to show that disqualification is warranted. *Government of India v. Cook Industries, Inc.*, 569 F.2d 737, 739 (2d Cir.1978); *see also Evans v. Artek Systems Corp.*, 715 F.2d 788, 794 (2d Cir.1983).
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> The high standard of proof is fitting in light of the party's right to freely choose counsel, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753 (2d Cir.1975), and the consequent loss of time and money incurred in being compelled to retain new counsel. *See Government of India*, 569 F.2d at 737. **However, this Court has held that the right of one to retain counsel of his**

> **choosing is "secondary in importance to the Court's duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar." *In re Asbestos Cases,* 514 F. Supp. 914, 925 (E.D.Va.**1981), *citing Silver Chrysler,* 518 F.2d at 757; *Hull v. Celanese Corp.*, 513 F.2d 568, 569 (2d Cir.1975); *Telos, Inc. v. Hawaiian Telephone Co.,* 397 F. Supp. 1314 (D.Haw.1975). There must be a balance between the client's free choice of counsel and the maintenance of the highest ethical and professional standards in the legal community. *In re Asbestos Cases,* 514 F. Supp. at 914.

Tessier v. Plastic Surgery Specialists, Inc., 731 F. Supp. 724, 729 (E.D. Va. 1990) (emphasis added), cited with approval in, *Dacothah Marketing and Research, L.L.C. v. Versatility, Inc*., 21 F. Supp.2d 570, 582 (E.D. Va. 1998).

While *In re Asbestos Cases*, 514 F. Supp. 914 (E.D. Va. 1981) and *Tessier* were decided under the former canons, state decisions under the new Rules still hold:

> the right of the public to retain counsel of its choice is secondary in importance to the Court's duty to maintain the highest standards of professional conduct to ensure and preserve trust and integrity of the bar." *In re Asbestos Cases*, 514 F. Supp. 914, 925 (E.D. Va. 1981).

Arriba Corp. v. Bostic, 69 Va. Cir. 505 (Va. Cir. Ct. 2002) (former corporate counsel who worked on unrelated matters was disqualified under Rule 1.9(a) from representing shareholders against a former officer and director for mismanagement and misappropriation of funds).

A. Markham is a lawyer having information that the lawyer knows is confidential government information about a person [Defendants] acquired when the lawyer [Markham] was a public officer or employee [Assistant U.S. Attorney].

There can be no dispute that while Markham was employed by the United States as an Assistant U.S. Attorney from May 1986 through March 1989, he reviewed documents that contained information about these Defendants which could be obtained only under governmental authority and which were not produced to the defendants during their criminal prosecutions, nor

available to these Defendants or the public due to claims of law enforcement and other privileges that have been upheld by the courts. (See, e.g., Apps. 1-5, 13, 16, 17, 19, 21 and 24; *United States v. The LaRouche Campaign, et al.*, 695 F. Supp. at 1301 (Defendant's motion for statements received by government agents denied); *United States v. Lyndon LaRouche, et al.*, 896 F.2d at 825-6 (Defendant's motion for production of reports and comments regarding interviews of witnesses denied); *People v. Kronberg*, 672 N.Y.S.2d at 69, 72-73 (describing Markham's role in Boston and assistance in providing documents and information to New York; internal evaluations not produced to Defendants); *LaRouche v. U.S. Dept. of Treasury*, 112 F. Supp. 2d at 54-51 (documents requested from U.S. Department of Treasury related to federal criminal cases were properly withheld under FOIA Exemption 3)*; Billington v. U.S. Dept. of Justice, supra*.

Copies of court records in the Appendix demonstrate Markham knows he reviewed classified and otherwise confidential records gathered by the CIA, FBI, Secret Service, IRS, ATF, White House and other government agencies obtained under governmental authority, which were not produced to the defendants and which concern Lyndon LaRouche, EIR, Barbara Boyd, and all entities and individuals associated with the LaRouche Political movement, including other persons identified in the First Amended Complaint. (See, Apps. 1-5.)

The term "confidential government information" is defined as:

> information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Rule 1.11(f).

The Second Superseding Indictment issued by the Boston grand jury on June 30, 1987

demonstrates that Markham also reviewed prior investigations commenced by U.S. Attorney Weld, as demonstrated by charges of obstruction of justice and criminal contempt related to that grand jury investigation. (See, App. 6.)

App. 1 is the "Government's Status Report re Searches" submitted by AUSA Markham in the Boston Federal Prosecution which reports he reviewed classified and other records about the defendants and other witnesses that Markham obtained from the CIA, National Security Council, White House, Office of the White House Legal Task Force, Office of Vice President, Office of Independent Counsel – Walsh and that were not produced to the defendants. Markham filed other notices of documents he provided to the court *ex parte* and *in camera* that were withheld from the Defendants and have not been made available to the Defendants or the public under claims of privilege. (See, Apps. 1 and 2).

App. 3 contains a small sample of documents Markham reviewed in the course of the criminal proceedings which were produced subsequently in highly redacted form to Defendants under the Freedom of Information Act. Some documents are mere cover-sheets asserting that the referenced documents cannot be produced in any form because they are "classified." (See, App. 3). Other exemplars within Tab 3 include FBI 302 reports that are so heavily redacted no meaningful information was produced to Defendants. (See, *id*.).

Markham reviewed other confidential government information not produced to Defendants nor otherwise available to the public under claims of privilege which includes:

> – IRS investigations of targets of the Boston and Alexandria grand juries, including LaRouche, PMR, and World Composition, and an IRS action taken against Ken Kronberg for not paying tax withholdings owed by PMR[39] (See, App.

[39] Ken Kronberg told Boyd shortly before he committed suicide that he believed he would be sent to prison because he could not pay taxes he owed on PMR withholdings and had a

23, 25; Boyd Decl. at ¶ 5);

– the impact of "sting" operations in which AUSA Markham participated with FBI and other government agents that targeted persons working within the NCLC (see, e.g., *United States v. The LaRouche Campaign*, 695 F. Supp. at 1301 (finding that AUSA John Markham knowingly failed to disclose his personal role in conceiving the Emerson "cover story")); and

– the impact of disinformation Markham spread among NCLC members that deepened hostilities held by potential witness in this action against LaRouche and the other Defendants, as evidenced by a redacted Memorandum from AUSA Markham to Special Agents about Defector Interviews and other Investigative Leads (7/30/1986), which contains headings for redacted names of persons Markham used to"channel disinformation from us to Steinberg" and who were identified as "defectors" related to the 1980 campaign,[40] (see, App. 5).

By necessity, AUSA Markham developed personal relationships with government witnesses and other undisclosed persons Markham determined to be "defectors" whom Plaintiff may call against the Defendants in prosecuting this action. (See, *e.g.*, Apps. 5 and 22). These concerns were raised in *In re Asbestos Cases*, where a former Department of Justice attorney, who had coordinated the nationwide asbestos litigation for three years, was later disqualified from representing private litigants in asbestos claims involving the United States, in part, because one agency believed his "constant contact" with witnesses allowed him to "assess the strengths and weaknesses of our position and to even formulate the manner in which the factual . . . portion of the cases will be presented." 514 F. Supp. at 916-17. Markham was in direct contact for three years with the government's witnesses and others he identified as "defectors,"

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history of not paying, dating from the June 1986 Alexandria grand jury investigations in which Markham participated. IRS files and internal deliberative comment, which Markham would have reviewed, are not available to the Defendants. (See, Boyd Decl. at ¶¶, 5-6).

[40] This information has direct bearing on the veracity of Marielle Kronberg's testimony about checks she wrote during or about 1980, which is at the core of Kronberg's claims in the First Amended Complaint.

and in the course of those proceedings, developed personal relationships.

For example, "Gus," who is named in paragraph 14(xi) of the First Amended Complaint is Kostos Kalimtgis. Kalimtgis was a high ranking member of the NCLC and was a leader in the NCLC during the 1980 campaign events. (See, Boyd Decl. at ¶15). Plaintiff worked extensively with Kalimtgis during this period, and, while under grant of immunity, testified in the Alexandria Federal Prosecution that "Gus" was the person with whom she worked most closely and described Gus' role in raising funds that were investigated in the Alexandria proceedings. (See, excerpts at App. 30).

Criton Zoakos, who is the godfather of Plaintiff's son, was a member of the National Executive Committee of the NCLC until March of 1988 when he resigned. At the time of the government's investigation of LaRouche, Zoakos was the subject of a deportation proceeding. (See, Boyd Decl. at ¶18). He was interviewed by Markham and was called by Markham, together with his wife Vivian, as a witness against LaRouche in the Alexandria case, although he did not ultimately testify at trial. (See, Boyd Aff. at ¶¶ 19-20).

The documents described in the above-referenced reports and notices as well as information were not provided to the Defendants during the criminal trials. (See, Boyd Decl. at ¶¶ 5, 7-8, 11, 13-14, 16, 20; *United States v. The LaRouche Campaign, et al.*, 695 F. Supp. 1290 (D. Mass. Aug. 10, 1988) (Markham reviewed documents not produced to defendants)). The United States has continued to withhold these documents from the Defendants and the public in response to FOIA requests under claims of law enforcement and other privileges that have been upheld by the courts. (See, e.g., Apps. 1-5, 13, 16, 17, 19, 20 and 24; see also, *LaRouche v. U.S. Dept. of Treasury; Billington v. U.S. Dept. of Justice*.)

Thus, these records demonstrate that Markham knows he has confidential government

information acquired while he was the Assistant U.S. Attorney prosecuting these Defendants.

B. Markham is now representing a private client [Kronberg] whose interests are adverse to that person [Defendants] in a matter in which the information could be used to the material disadvantage of that person [Defendants].

The First Amended Complaint demonstrates that Markham now represents Marielle Kronberg as a private litigant whose interests are adverse to the Defendants and that Plaintiff intends to use confidential government information obtained by former AUSA Markham to the material disadvantage of the Defendants. The First Amended Complaint combines allegations of retaliation against Plaintiff for testifying in the same LaRouche criminal trial matter in which Markham participated (the Alexandria Federal Prosecution), and makes the same allegations Markham made in his opening statements and indictments to prosecute these same individual Defendants. (Compare First Am. Compl. ¶¶ 5-7, 10, 12-13, 14(i) with App. 29).

Rule 1.11(c) prohibits former government attorneys from using "confidential government information" they obtained while in government office in "any judicial or other proceeding," Rule 1.11(e),[41] where "unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service," Rule 1.11, Comm. 3.

No stronger case can be made for imposing Rule 1.11(c) to disqualify a former government attorney from representing a party in this action than exists against Markham.

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[41] Va. R. Prof. Conduct Rule 1.11(e) defines the term "matter" to include:

> (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
>
> (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Markham spent three years in a full-time effort to investigate and prosecute these Defendants on criminal charges. Markham has personal knowledge of the prior IRS actions against Ken Kronberg, and reviewed internal IRS deliberations related to the dispositions in that action. (See, e.g., Apps. 23, 24, 25, 27, 28). Governmental deliberations are privileged and, to the extent such records may be released by the United States, Markham still holds additional confidential government information from meetings he conducted with IRS Agent Lucey and others about deliberative processes he cannot disclose without being disqualified under Rule 3.7. (See, *id*.)

Markham holds confidential government information obtained from his impressions of those witnesses he interviewed as a prosecutor and from confidential evaluations he reviewed from other government agents, specifically including those that pertain to Plaintiff's prior testimony during Markham's federal prosecutions. (See, e.g., Apps. 19, 22, 23, 24; Boyd Decl. at ¶¶ 7 and 8). Markham knows witnesses who are predisposed to testify against LaRouche and who will support Marielle Kronberg and her version of events. See, *In re Asbestos Cases*, 514 F. Supp. at 916-17.

Markham obtained from the FBI, CIA, IRS and other government agencies classified and other confidential government information about each Defendant and other potential witnesses, which when coupled with his prior discussions about how they would respond in cross-examination, provides Markham with impermissible information in this action that will allow him to affect how each witness will react on the witness stand. These concerns were the basis for disqualifying a former prosecutor from representing a defendant in *Commonwealth v. Miracle*, 10 S.W.3d 117, 118 (Ky. 2000). In that case, the court made particular note that the former prosecutor had "discussed anticipated cross-examination from defense counsel and how

Ms. Abner would respond. Further, the attorney and Ms. Abner discussed Ms. Abner's eleven-year-old son's testimony and how he would react on the witness stand." *Id*. at 118.

Markham's constant contact with government witnesses over a three-year period also allowed him to establish "a close working relationship and unique rapport" with Criton Zoakos and other witnesses Plaintiff is expected to call or otherwise obtain information in this case. (See, Boyd Decl. at ¶¶ 17-20). Markham's unique relationships with those witnesses is a material factor that should be considered in disqualifying him from this action. See, *In re Asbestos Cases*, 514 F. Supp. at 918.

Further, AUSA Markham has first-hand knowledge of what other witnesses stated about the credibility of Marielle Kronberg's testimony before the Alexandria Grand Jury and at trial, and the tax actions described on page 61 of the Search Warrant Affidavit at App. 27, which resulted from requests for IRS Investigations at App. 23 and 24, and which resulted in Ken Kronberg being named as an unindicted co-conspirator in Count 13 of the Alexandria Federal Prosecution (see, App. 25). Markham's first-hand knowledge about these events, central to the claims in this action (see, e.g., First Am. Compl. at ¶¶ 1, 5, 11-14), require that Markham be disqualified because it gives Plaintiff Kronberg "an unfair advantage, because the attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear and/or be subject to cross examination. [Cites omitted.]" *United States v. Locascio*, 6 F. 3d 127 (2d Cir. 1993) (defense counsel disqualified under DR 5-102(A) because his prior representation of one defendant made him a possible witness to proving a common enterprise), cited with approval in *United States v. Evanson*, 584 F. 3d 904 (10th Cir. 2009) (applying *Locascio* to disqualify defense counsel from representing a possible co-conspirator under Rule 3.7).

IV. MARKHAM SHOULD BE DISQUALIFIED BECAUSE HE HAS NOT

OBTAINED CONSENT FROM THE UNITED STATES AS REQUIRED UNDER RULE 1.11(b).

Virginia Rule of Professional Conduct 1.11(b) prohibits former government attorneys from later representing private parties "in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation." Unlike Rule 1.11(c), Rule 1.11(b) does not require the former government attorney to have any "confidential government information," but does make disclosure and agency consent mandatory. See, Va. R. Prof. Conduct 1.11, Cmt. 2.

Markham's three-year, full-time investigation and prosecution of the Defendants and other witnesses relevant to this action translates to approximately 6,000 hours.[42] This level and scope of effort while serving as a former Assistant U.S. Attorney is more than sufficient to find that Markham's participation in the investigations and criminal prosecutions was both personal and substantial, as demonstrated by *United States v. Philip Morris Inc.*, 312 F. Supp.2d 27 (D.D.C. 2004), where the government's motion to disqualify a former Department of Justice attorney was granted after the court found that the 382 hours spent by the attorney on related rulemaking activities was both "personal and substantial participation." *Id*. at 41.[43]

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[42] Requests made under FOIA to the Department of Justice for copies of time records Markham submitted to the Department while working on these matters have been futile, as demonstrated by the Department's response that Assistant U.S. Attorney time records submitted to the Department of Justice "pertains to state or local matters, the records for which are maintained by state or local agencies and, therefore, are outside the scope of the Act. You should contact the pertinent state or local agency for a response to your request." William Stewart, Assist. Dir., U.S. Department of Justice Executive Office for the U.S. Attorneys, FOIA Response Letter to Ladd (10/20/09). (See, App. 31.)

[43] D.C. Rule of Professional Responsibility 1.11(a) differs from Virginia Rule 1.11(a), provides that "[a] lawyer shall not accept other employment in connection with a matter which is

Moreover, there can be no serious dispute that Plaintiff's present action has a "connection with" Markham's investigation and prosecution of the Defendants since Kronberg contends that the Defendants conspired to retaliate against her because of her testimony in the LaRouche criminal trial, and her Complaint, without any evidentiary support, repeats the fund-raising fraud allegations which were at the center of the former prosecution.

A request for a copy of Markham's disclosure letter to the Department of Justice and the government agency's response was made on November 16, 2009. (App. 31). Markham has not produced a copy of any consent he obtained from the United States prior to filing this action.

V. MARKHAM SHOULD BE DISQUALIFIED BY AGENCY RULES AT 5 C.F.R. § 2641.201(a) FROM REPRESENTING ANY PARTY TO THIS ACTION

Va. Conduct Rule 1.11(e)(2) incorporates any other matter covered by the conflict of interest rules of the appropriate government agency, which, in the case of former Assistant U.S. Attorneys, are the restrictions stated in 18 U.S.C. § 207(a)(1) and 5 C.F.R. § 2641.201(a).

These agency regulations bar former AUSA Markham from representing any private party before this federal court "in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest." 5 C.F.R. § 2641.201(a).

The analysis under Part II of this Memorandum demonstrates this action is "in connection with a particular matter involving specific parties." The record also demonstrates Markham "participated personally and substantially as an employee," having worked almost exclusively on the LaRouche prosecutions from May 1986 through the convictions in Alexandria

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the same as, or substantially related to, a matter in which the counsel participated personally and substantially as a public official or employee."

in December 1989. See, App. 8, 20-21; *United States v. Philip Morris Inc.*, 312 F. Supp. at 41.

Further, while there are no reported cases that address whether the government has interest in claims brought under 42 U.S.C. § 1985 for purposes of 18 U.S.C. § 207, it would be unreasonable to assert that the United States does not have a substantial interest in this litigation given that subject matter jurisdiction before this Court is predicated upon claims that these Defendants conspired in violation of 42 U.S.C. § 1985 to interfere with testimony given in a federal criminal proceeding before this Court.

VI. DEFENDANTS HAVE MET THEIR BURDEN OF PRODUCTION

Defendants have more than established a *prima facie* showing that Markham obtained confidential government information relevant to disputed issues in this action. (See, e.g., Apps. 1-5).

In analogous cases where the degree of the former Assistant United States Attorney's participation in the matter was substantially less, and the United States had access to records and declarations from former co-workers showing the nature and extent of the former attorney's actions, the courts have held that:

> [I]n cases where the complainant's evidence shows that the factual contexts of the two (or more) transactions overlap in such a way that a reasonable person could infer that the former government attorney may have had access to information legally relevant to, or otherwise useful in, the subsequent representation, we conclude that the complainant will have established a *prima facie* showing that the transactions are substantially related. The burden of producing evidence that no ethical impropriety has occurred will then shift to the former government attorney, who must rebut complainant's showing by demonstrating that he or she could not have gained access to information during the first representation that might be useful in the later representation. Absent sufficient rebuttal, the complainant will have carried the burden of persuasion as the moving party.

Brown v. D.C. Board of Zoning Adjustment, 486 A.2d 37, 49-50 (D.C. 1984), cited with approval in *United States v. Philip Morris*, 312 F. Supp.2d at 39 (holding that after the Department showed a former DOJ attorney worked 382 hours on related matters, the attorney was disqualified because he was unable to account for the details involving 83 hours of that time). Further, in close cases, Bankruptcy Judge Tice has declared "I resolve all doubts in favor of disqualification. *In re Stokes*, 156 B.R. at 185." *In re Kent Island Ltd. Partnership v. Kent Island Ltd. Partnership*, Bankr. No. 94-12643, 1994 WL 507706 (Bankr. E.D. Va. 1994).

Markham worked almost exclusively for over three years on the LaRouche investigations and prosecutions. (See, Apps. 8 and 20-21.) That effort would exceed 6,000 hours, nearly 20 times the number of hours in *Phillip Morris*. Further, the Defendants have produced reports and notices filed by Markham, as well as reported case decisions, which state that Markham reviewed what can only be "confidential government information" obtained by the FBI, CIA, Secret Service, NSC, White House, and other entities which, to this day, the United States will not release under claims of law enforcement and other privileges.

VII. CERTIFICATION OF GOOD FAITH EFFORTS TO RESOLVE DISPUTE

Counsel for Defendants have attempted in good faith to resolve this dispute with Markham in a letter sent November 19, 2009. (App. 32). Mr. Markham has not specifically responded to the request that he withdraw.

VIII. CONCLUSION

Defendants have produced documentary evidence from the United States and other reports drafted by AUSA Markham which declare that Markham reviewed classified and other confidential government information during his prosecution of the criminal proceedings, and that those records and information have not and will not be produced to these Defendants, nor made

available to the public.

It is fundamentally unfair and will damage the integrity of this judicial process if former AUSA Markham is now permitted to use confidential government information not available to the Defendants to the material disadvantage of Kronberg. Further, Markham should not be allowed to represent any party in this action which arises out of the events he prosecuted while a former Assistant United States Attorney because he failed to obtain necessary government agency consent.

Defendants' motion to disqualify Markham, pursuant to Va. Rules of the Professional Conduct 1.11(c) and (b), and pursuant to Rule 1.11(e)(2), 5 C.F.R. § 2641.201(a), therefore, should be granted.

Respectfully submitted,

All Defendants
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_____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing (NEF) to the following:

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