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

MARIELLE ("Molly") KRONBERG,
Plaintiff,

v. Civil Action No. 1:09-cv-00947-AJT-TJR

LYNDON LAROUCHE,
BARBARA BOYD,
EIR NEWS SERVICE, INC., and
LYNDON LAROUCHE POLITICAL
ACTION COMMITTEE,
Defendants.

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

Plaintiff's Opposition to Defendants' Motion to Disqualify Former AUSA John Markham ("Markham") misinterprets the law applicable to disqualification, asserts facts that are untrue about witnesses identified in the First Amended Complaint and the scope of classified and otherwise confidential documents he reviewed, and improperly attempts to narrow the scope of relevant confidential government information he held. This Reply addresses:

- Markham's central role in the criminal proceedings and ability to recollect prejudicial confidential government information during the pursuit of this action;
- Incorrect statements asserted in Plaintiff's Opposition and Declarations;
- The basis of Markham's disqualification under Va. R. Prof. Conduct 1.11(b), (c) and (e)(2); and
- Markham's failure to rebut Defendants' *prima facie* showing that he obtained confidential government information about the Defendants and the claims of obstruction of justice that Markham has pled in this case.

I. MARKHAM'S CENTRAL ROLE IN THE CRIMINAL PROCEEDINGS, AND ABILITY TO RECOLLECT CONFIDENTIAL GOVERNMENT INFORMATION

Plaintiff's Opposition suggests, inaccurately, that Markham's role was limited and that his knowledge of the prior criminal prosecutions is a mere faded memory that has no relevance to this action despite the fact that the Amended Complaint is predicated upon the veracity of Kronberg's testimony in those prosecutions, and alleges that the Defendants continue to engage in similar practices to conspire, harass, and publish false statements to harm others and obstruct justice.

There can be no dispute that AUSA Markham played a central role for more than three years in the federal government's multi-jurisdictional investigation and prosecution of, *inter alia*, these same individual Defendants and witnesses in Boston and Alexandria, and that Markham coordinated those efforts with state prosecutions in Virginia, New York, and other states. *See People v. Kronberg*, 672 N.Y.S.2d 63 (N.Y. App. Div. 1998). After a mistrial was declared in Boston on May 4, 1988, AUSA Markham "obtained approval to combine the Boston Obstruction of Justice case with the RICO charge in Virginia." (Exhibit 33.) U.S. Attorney Henry Hudson then sought funding for AUSA Markham to assist and be present in the Alexandria trial in a request which states the Boston and Alexandria prosecutions "have a national importance and a high priority under the present Department of Justice priority guidelines." (Exhibit 34 at 1). U.S. Attorney Hudson also described the interlocking nature of the charges, national press coverage and extensive trial record (*id*. at 2 and 3), and declared with respect to witnesses that:

> **AUSA Markham has spent hundreds of man-hours preparing their grand jury and trial testimony, and examining them in the grand jury and during trial**. ....

(*Id*. at 4) (emphasis added).

While prosecutors may not remember every case they tried, it strains credibility to believe that Markham does not have a detailed memory of confidential government information he reviewed, or will not refresh his recollection as this case progresses, particularly because Markham dedicated most of his career with the Department of Justice to a near full-time pursuit of prosecution for more than three years of what he called the "LaRouche Organization."[1]

Indeed, given Markham's first hand knowledge of the events central to the claims in this action and his participation as an AUSA in the Alexandria prosecution in which Kronberg testified, it is beyond question that Markham will be able to give Kronberg "an unfair advantage" because, as the Second Circuit has explained, he can, at the very least, "subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross-examination." *United States v. Locascio*, 6 F.3d 924, 932 (2d Cir. 1993). Although Plaintiff's Opposition at 11 recognizes that counsel may be disqualified because of "the unsworn witness problem," she fails to explain to the court why this "problem," which clearly is present in this case, does not require the disqualification of Markham.

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[1] In her Opposition and declaration, Kronberg states that she was subpoenaed by the Internal Revenue Service in 2000 to testify in a tax case involving Lyndon LaRouche, and she "was assigned by LaRouche organization lawyers the law firm of DiMuro Ginsburg [sic], PC," which presently represents Defendants Boyd and LaRouche PAC in this case. (See Plaintiff's Opposition at 2-3, citing Kronberg Decl. ¶ 11.) Kronberg further states that she sent DiMuroGinsberg documents under a Constitutional Defense Fund ("CDF") cover sheet (Decl. ¶ 12), but she does not assert that DiMuroGinsberg should be disqualified.

DiMuroGinsberg, P.C. records reflect a charge of $122.50 billed to CDF for a .7 hour telephone conversation between Nina J. Ginsberg and Kronberg on April 5, 2000, and that CDF paid this charge. A declaration from Ms. Ginsberg, who presently is out of town, will follow.

II. PLAINTIFF'S FALSE TESTIMONY SUPPORTED COUNT 13 OF THE ALEXANDRIA INDICTMENT

Plaintiff's Opposition does not address material facts Kronberg knew to be false, including the following exchanges concerning her knowledge of whether LaRouche had constructive receipt of income by virtue of checks Kronberg wrote on the New Benjamin Franklin Publishing House Co. account in 1979 and 1980:

> Q: What happened to the checks that you wrote to Mr. LaRouche for royalties?
> A: Actually I don't remember. I have no idea.
> ....
> Q: Do you know whether or not these checks were ever given to Mr. LaRouche?
> A: I have no idea.
> Q: Do you have any idea of whether Mr. Larouche actually had any knowledge of the proposal or the fact that the checks were actually written or any other idea as to the discussions or whatever that led up to them?
> A: No.
> Q: In fact, did you learn a later date that those checks were never in fact cashed?
> A: Yes.
> Q: When did you learn that?
> A: With the indictment for this, this indictment.

(Doc. 30-3 at pp. 14 and 33-34 [Kronberg Trial Trans. at 69:19-21, and 88:17-24].)

Contrary to Kronberg's testimony, she knew, years before she read the indictment, that the checks were never cashed. She also knew that AUSAs Markham and Robinson would use her false testimony to support Count 13 of the Alexandria Indictment, which charged Lyndon LaRouche with conspiring to defraud the United States by impeding and obstructing the IRS in its assessment and collection of taxes. (*See* Exhibit 35 [Alexandria Indictment at pp. 39-40 and 42].)

Kronberg testified further that she wrote the checks at the request of Felice Merritt (Doc. at 13 [Tr. Trans. at 68:13-16]), who left the National Caucus of Labor Committees ("NCLC") with Kostandinos Kalimtgis, a/k/a "Gus Axios," the same person named in paragraph 14(xi) of

the Amended Complaint.

III. PLAINTIFF'S FACTUAL ASSERTIONS LACK CREDIBILITY

In addition to downplaying the critical role of Kronberg's testimony in supporting Count 13 of the Alexandria Indictment, Plaintiff's Opposition also contains factual assertions which are untrue or misleading. For example:

– Deportation Proceedings against Criton Zoakos. Criton Zoakos, another former Greek national, had close relations with the Kronbergs, and would have been a person of interest to AUSA Markham during the criminal prosecution. (See Doc. 26-2 at 5, [Boyd Decl. at ¶ 17]). Plaintiff has proffered a declaration from Criton Zoakos averring that "[t]here has never been a deportation proceeding against me" (Doc. 30-4 at p. 1, ¶ 2), and a declaration from Markham asserting that he met Criton Zoakos only once and obtained no information (Doc. 30-2 at p, 4, ¶ 6). The first averment is false, and other evidence refutes the second. Exhibit 36 is a copy from the "Deportation Proceedings under Section 242" brought by the United States against "Criton Michael Zoakos," INS Deportation File A13 932 081 (Apr 22, 1987). (*See* Exhibit 36.) Exhibit 36 clearly establishes that Zaokos's averment that no deportation proceeding occurred is false. Further, on October 6, 1987, the Acting New York INS Director wrote to then U.S. Attorney Giuliani recommending that the Zaokos deportation proceeding be terminated, and that AUSA Kent Robinson advised the INS on September 29, 1987 "that criminal proceedings are contemplated by his office against Zoakos." (Exhibit 37.) By this time, AUSAs Markham and Robinson knew that Criton Zoakos held information relevant to the Boston charges against defendants LaRouche, EIR, and others because Criton Zaokos was a member of the NCLC Executive Committee, editor of EIR Magazine, and director of NCLC's political intelligence

division (Doc. 26-2 at 5 [Boyd Decl. at ¶ 17). Markham placed Zoakos on the witness list for the retrial of the Boston obstruction of justice charges. (See Exhibit 38 [Revised Witness List for Retrial].) In December 1988, AUSA Robinson told this Court "we" had just met with Criton Zoakos' wife, Vivian, the preceding Sunday before putting her on a witness list that also included Criton Zoakos. (*See* Exhibit 39 [Tr. Trans. at 3-5.) Under these circumstances, Markham's assertion that he met with Criton Zoakos only once in 1987 to ask only if LaRouche had sent witnesses overseas strains credulity. (Doc. 30-2 at p. 4, ¶ 6.)

– Markham has averred that he personally never met "Gus." (Doc. 30-2 at 4 [Markham Decl. at ¶ 5].) While Markham himself may not have interviewed Kostandinos Kalimtgis ("Gus") personally, that limited assertion does not mean he did not obtain confidential government information from others who did interview "Gus." Notes from a meeting on January 9, 1987, demonstrate that AUSAs Markham and Robinson met with Special FBI Agent Klund and others on Markham's trial team during which "Gus Axios" was identified as one of the initial witnesses to be interviewed by the Alexandria prosecutors. (*See* Exhibit 40 at 2.) Kronberg worked with Kalimtgis on the 1980 LaRouche campaign and other financing, and while under a grant of immunity, Kronberg testified in the Alexandria Grand Jury that "Gus" was responsible for any illegalities in which she may have been involved in 1980. (*See*, Boyd Decl. at ¶¶ 13-14.) Given Kronberg's testimony about Gus's role in the financing and its relevance to charges in the Boston and Alexandria trials, it again strains credibility to believe that Markham did not review information about Gus' role in alleged criminal activities in the 1980 campaign. (See App. 5.)

– Markham's averment that he never reviewed records of defendant EIR, except for

EIR's published writings and those filed publicly with Virginia (*see*, Doc. 30-2 at 6 [Markham Decl. at ¶ 13]) is not credible. In the Government's Status Report Re Searches, at App. 1, Markham reports that defendants in the Boston case, including EIR, were the subject of classified searches at the CIA and that all such files were pulled and reviewed by CIA personnel, by the prosecution, and by the Court. The same document states that prosecutors reviewed classified FBI files pertaining in whole or in part to EIR. (See App. 1.)

– Markham's averment that he was not involved in the state prosecutions (Doc. 30-2 at 10 [Markham Decl. at ¶ 23]) is contradicted by the court's opinion in *People v. Kronberg*, *supra*, which found that Markham did meet with state prosecutors from New York and Virginia and provided them with evidence he had gathered.

– Michael Minnicino's declaration that he did not hear Ken Kronberg report that PMR or World Composition had been investigated by the IRS and other agents as part of the prior criminal prosecutions demonstrates either a lack of candor or knowledge, particularly when Ken Kronberg discussed these issues with Boyd (*see* Doc. 26-2 at 3 [Boyd Decl. at ¶¶ 5 and 6), and in light of the letters written by Special IRS Agent Lucey and AUSA Robinson at Apps. 23 and 24.

IV. MARKHAM SHOULD BE DISQUALIFIED UNDER RULE 1:11(b) BECAUSE HE IS REPRESENTING A PRIVATE CLIENT IN CONNECTION WITH A MATTER IN WHICH HE PARTICIPATED PERSONALLY AND SUBSTANTIALLY AS AN AUSA AND HE HAS NOT OBTAINED GOVERNMENT AGENCY CONSENT

In contending that Markham should not be disqualified under Virginia Rule of Professional Conduct 1.11(b), Kronberg acknowledges Markham "participated substantially" in the 1986-1988 prosecutions of Defendant LaRouche and others in Boston and Alexandria. However, she argues that because this case is "simply not the same matter" as the LaRouche

prosecutions, disqualification is not warranted. See Plaintiff's Opposition at 6-7.[2] Kronberg's argument, however, misses the mark and is based upon a clear misreading of Rule 1.11(b).

By its terms, Rule 1.11(b) does not limit disqualification of counsel to those situations where a former government attorney is representing a private client in the same matter in which the lawyer participated personally and substantially as a public officer and employee.[3] Rather, Rule 1.11(b) makes disqualification mandatory in the following situation:

> a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and appropriate government agency consent after consultation.

(Emphasis added.) Kronberg's reading of Rule 1.11(b), eliminates the words "in connection with" from the Rule.

This is a critical omission and one that highlights the fatal flaw in Kronberg's contention that Rule 1.11(b) does not apply to her case. As the U.S. Supreme Court has explained, it is a "cardinal principle of statutory construction that a statute ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence or word shall be superfluous void, or

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[2] In her opposition, Kronberg does not dispute that Markham had "personal and substantial" involvement in the 1988 Alexandria Prosecution in which Kronberg was a witness as well as the Boston Prosecution. In fact, Kronberg acknowledges that Markham "participated substantially" in both the Boston and Virginia Prosecutions. Plaintiff's opposition also acknowledges that the "appropriate government agency" has not consented to Markham's representation of her. Hence, the only question is whether the matter in which Kronberg testified -- the 1988 Virginia Prosecution -- is in "connection with" her present lawsuit which, as discussed above, it clearly is.

[3] Rule 1.11(b), unlike Rule 1.11(c) discussed in Section VI, also does not require the former government attorney to have any “confidential government information.” See Va. 12. Prof. Conduct 1.11, Cmt. 2.

insignificant." *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001).[4] Kronberg's reading of Rule 1.11(b), which eliminates the words "in connection with," however, would do just that.

Taking the language of Rule 1.11(b) as a whole, it is beyond dispute that Markham's representation of Kronberg in this case violates Rule 1.11(b) because Kronberg's present federal claim for witness retaliation under 42 U.S.C. §1985(2) is predicated upon, and involves similar facts and parties, as the Alexandria and Boston Prosecutions in which Markham participated "personally and substantively" as an AUSA. Kronberg's testimony as a witness in the Alexandria Prosecution is the linchpin of her federal claim that Defendants' defamed her in retaliation for that testimony. Indeed, in opposing Defendants' Motion to Dismiss her section 1985(2) claim as being insufficiently plausible under *Iqbal*, Kronberg has argued that there is a clear connection between her testimony as a witness in the Alexandria Prosecution and the Defendants' alleged defamatory statements. Hence, it is Kronberg, herself, who has forged the connecting link between the two cases: her present federal court action and the prior federal court proceedings in which she testified.

Simply put, Kronberg should not be able to have it both ways: arguing for a clear connection between the Alexandria Prosecution and her present claims against Defendants in seeking to avoid dismissal of her §1985(2) claims, but then, turning around and arguing that there is no connection between the two matters in seeking to convince this Court that Markham should not be disqualified. Markham must be disqualified absent a letter of consent from the Department of Justice, which Kronberg acknowledges Markhum has not obtained.

That Markham should be disqualified under Rule 1.11(b) is confirmed by comparing

[4] Settled principles of statutory construction have been applied by the courts in interpreting the rules of professional conduct applicable to attorneys. See, e.g., *Babineaux v. Foster*, 2005 U.S. Dist. LEXIS 4844, *15 (E.D. La. Mar. 21, 2005).

prior Virginia Disciplinary Rule DR9-101(B) with the current language of Rule 1.11(b). In this regard DR9-101(B) required a former government attorney to obtain consents only "in a matter in which he had substantial responsibility while he was a public employee." The former rule did not contain the phrase "in connection with." By contrast, the present rule, which became effective January 1, 2000, contains the phrase "in connection with." The reason this language was added to the former disciplinary rule was explained in Virginia Legal Ethics Opinion 1746, which noted that Rule 1.11(b) is broader than the former requirement, in part, because the new rule "expanded the potential for conflicts by moving to the 'in connection with a matter' test." See LEO 1746 (Exhibit 40).

As LEO 1746 emphasizes "the new rule [Rule 1.11(b)] does not simply trigger conflicts where the private client is represented in the same matter, but rather 'in connection with' the same matter." Thus, the LEO opines that "a conflict should be found not only where the same litigation is involved but also where the same issues of fact involving the same parties in the same situation are involved." *Id.*, citing ABA Former Opinion 342 (1975). In addressing various factual scenarios, the LEO found there to be a "sufficient factual nexus to trigger Rule 1.11" in those situations where "the former proceeding and the new proceeding share the same parties and share some of the same significant facts, with the latter proceedings dependent upon the prior." *Id.*

This type of similarity is found in this case, where Kronberg asserts that Defendants violated her federal civil rights under § 1985(2) by defaming her in retaliation for having testified in the Alexandria Prosecution. Kronberg's §1985(2) claim indisputably is "dependent upon the prior proceeding" in Alexandria and "the former proceeding [the Alexandria

Prosecution] and the new proceeding share the same parties and some of the same significant facts." See LEO1746.

In short, just because Kronberg's present lawsuit is not the same matter as the 1988 Alexandria Prosecution, this does not end the inquiry as to whether Markham has violated Rule 1.11(b) in representing Kronberg without obtaining the requisite government consent. Rather, the inquiry is whether Kronberg's present lawsuit has a "connection with" the Virginia Prosecution in which Markham admits he participated "personally and substantially." Given Kronberg's theory of her §1985(2) claim, there can be no question that it is. Without the connection, Kronberg has no a viable federal § 1985(2) claim. Accordingly, Kronberg's counsel, John Markham, should be disqualified pursuant to Rule 1.11(b). *Cf. James v. Mississippi Bar*, 962 S.2d 528, 534 (Miss. 2007) (en banc) (disqualifying attorney from serving as former wife's counsel in post-divorce custody case because attorney, in previous role as chancellor, has presided over abuse case involving the spouses; court found that custody case was "in connection with a matter" in which the attorney had participated as a judge and that the two cases shared "the same parties, the same issues, and the same concerns.")

V. MARKHAM'S REPRESENTATION OF KRONBERG VIOLATES RULE 1.11(c)(2), 18 U.S.C. § 207(a), AND 5 C.F.R. § 2641.201(a).

Just as Kronberg's contention that Markham's representation of her does not violate Virginia Rule of Professional Conduct 1.11(b) is based upon a misreading of the rule, her contention that Markham should not be disqualified pursuant to Rule 1.11(e)(2), which incorporates 18 U.S.C. § 207(a) and 5 C.F.R. § 2641.201(a), is founded upon another flawed premise.[5] That premise is that the federal statute limiting a former government employee's

[5] Like Rule 1.11(b), disqualification of Markham under Rule 1.11(e)(2) does not depend upon his having "confidential governmental information."

conduct applies only to situations in which an attorney is "switching sides," that is, where a former government attorney is now representing a private party against the government. See Plaintiff's Opposition at 8-9.

Although 18 U.S.C. § 207(a) often is invoked in situations where a former government attorney has switched sides, the courts have made clear that disqualification of former government attorneys is not limited to "switching sides" cases. Indeed, in numerous decisions, the courts have disqualified former government attorneys who, like Markham, after leaving government practice seek to represent private plaintiffs in lawsuits against defendants who were the subject of the government attorney's investigation or prosecution. See *Securities Investor Protection Corp. v. Vigman*, 587 F.Supp. 1358, 1364 (C.D. Cal. 1984) (discussing ABA Rule 1.11(a) addressing disqualification of former government attorneys and stating that "the drafters of the Model Rules did not intend that Rule 1.11(a) be limited to switching sides cases"); *Allied Realty of St. Paul, Inc. v. Exchange Nat'l Bank*, 283 F.Supp. 464 (D. Minn. 1968) (former government lawyer who had investigated and passed upon subject matter of real estate mortgage transaction in prior criminal trial was disqualified from acting as attorney for private plaintiff in subsequent civil action to set aside claimed fraudulent mortgage); *Hilo Metals Co. v. Learner Co.*, 258 F.Supp. 23 (D. Haw. 1966) (former DOJ attorney who had been engaged in antitrust investigation and prosecution against company disqualified from representing private plaintiff in antitrust action against same company); *Telos, Inc. v. Hawaii Tel. Co.*, 397 F.Supp. 1314 (D. Haw. 1975) (disqualifying plaintiff's attorney who as former deputy attorney general had filed and participated in prior action by state against defendant for monopolization).

The reason that disqualification of former government attorneys is not limited to cases of "switching sides" was explained by the West Virginia Supreme Court of Appeals in interpreting Rule 1.11(a) of that state's rules of professional conduct, which is identical to Virginia Rule 11.1(b):

> Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. Certainly this is perfectly proper and ethical. Were it not so, it would be a distinct deterrent [sic] to lawyers ever to accept employment with the government. This is distinguishable, however, from a situation where, in addition, a former government lawyer is employed and is expected to bring with him and into the proceedings a personal knowledge of a particular matter-for which the government paid him while he was learning it and for which now the client who employs him theoretically will not have to pay.

State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes, 221 W. Va. 432, 440-41, 655S.E.2d178,186-87 (2007), *quoting Allied Realty of St. Paul, Inc. v. Exchange National Bank*, 283 F.Supp. 464 (D.C. Minn. 1968).

Indeed, as Plaintiff's Opposition acknowledges, § 207(a) was designed to prevent government officials from using "specific knowledge" (as opposed to "general expertise") obtained during their employment by the United States. Plaintiff's Opposition at 8, quoting *United States v. Rosen*, 599 F.Supp.2d 690, 699 (E.D. Va. 2009). In this case, Markham is not trading merely upon his "general expertise" as a former AUSA in pursuing this action against the Defendants on behalf of Kronberg. Rather, there can be no question that in representing Kronberg, Markham is and will be using the specific knowledge he obtained as part of his multi-year effort to prosecute LaRouche and other members of the LaRouche organization both in the Boston and Alexandria Prosecutions.

Finally, Kronberg's contention that her lawsuit is not one in which the government has an interest (Plaintiff's Opposition at 9), totally disregards the fact that her federal court lawsuit seeks to transform a garden variety common law defamation claim into a federal civil rights cause of action by claiming retaliation for having been a witness in the Alexandria Prosecution. Having claimed the protections of § 1985(2) of the federal civil rights laws and alleging that the conduct of the Defendants in purporting to defame her was to retaliate against her for being a federal witness, Kronberg should not be able to do an about face and now argue that this is not a matter in which the United States has any interest. Once again, Kronberg is attempting to have it both ways.

Thus, the conclusion is inescapable that Markham, who had substantial involvement in and "specific knowledge" of the events underlying both the Alexandria and Boston Prosecutions, may not continue to represent Kronberg consistent with § 207(a). Federal law requires that Markham be disqualified.

VI. MARKHAM SHOULD BE DISQUALIFIED BECAUSE RULE 1.11(c) PROTECTS THE USE OF "CONFIDENTIAL GOVERNMENT INFORMATION" WHICH MIGHT BE USED TO BENEFIT PRIVATE CLIENTS

Comment 3 to Virginia Rule of Professional Conduct 1.11(c) makes clear that the protected interest is against the use of "confidential government information" which "might be used for the special benefit of a private client" by stating in full that:

> Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, 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.

> However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The private client should be informed of the lawyer's prior relationship with a public agency at the time of engagement of the lawyer's services.

This is consistent with ABA Formal Opinion 97-409, which explained that:

> **Rule 1.11 is thus concerned** 1) to limit the possibility that a lawyer might be tempted to use the power of public office to secure for herself lucrative private employment after leaving government service, and be distracted from her current public duties by the prospect of eventually going to work for the other side; **and 2) to ensure against the possibility that "substantial unfair advantage could accrue to the private client by reason of access to information about the client's adversary obtainable only through the use of public resources available during the lawyer's government service.** ... This explains why the disqualification standard of Rule 1.11 does not depend upon adverseness towards the former government client, or upon the possibility that a lawyer might in a subsequent related private representation breach her government client's confidences. It is narrowly and precisely drawn to address the particular dangers associated with the use of public office to further private ends.

Id. at 10 and 11 (without footnotes) (emphasis added).

Here, there can be no dispute that Markham reviewed confidential government information about these Defendants (*see, e.g.*, Apps. 1-5), and that his investigations would have focused on the charges he prosecuted in Boston, which included allegations that these same Defendants conspired to obstruct justice, harassed others, and made false statements. *See, e.g., United States v. The LaRouche Campaign*, 695 F. Supp. 1290 (D. Mass. 1988).

It is inconceivable to believe that Markham, who pursued LaRouche nearly full-time for three years, would not have reviewed any information about the credibility of Kronberg's testimony, particularly where her testimony was the basis for the overt acts alleged in support of Count 13 of the Alexandria Indictment (Exhibit 35), which Markham helped draft and in which

Marielle and Ken Kronberg were unindicted co-conspirators (*see* Exhibit 25).

The strength of Markham's continuing influence over witnesses relevant to this action resulting from his prosecutorial control in the prior criminal matters is a matter that should be considered by this Court, *see, In re Asbestos Cases*, 514 F. Supp. 914, 918 (E.D. Va. 1981), and is demonstrated to exist by the Declaration from Criton Zoakos which asserts, falsely, that "there has never been a deportation proceeding against me." (Doc. 30-4 at 1 [Zoakos Decl. at ¶ 2]; *but, c.f.*, Exhibit 36.)

VII. PLAINTIFF HAS FAILED TO REBUT DEFENDANTS' *PRIMA FACIE* SHOWING THAT MARKHAM HAS CONFIDENTIAL GOVERNMENT INFORMATION ABOUT THE DEFENDANTS AND THE CLAIMS PLED IN THIS ACTION.

Defendants have made a *prima facie* showing that Markham obtained confidential government information relevant to disputed issues in this action. (*See, e.g.*, Apps. 1-5.) The burden now shifts to Markham to come forward with evidence to rebut the fact that he did obtain confidential government information about these Defendants and the patterns of conduct he asserted in the prior criminal prosecutions and re-alleged in this action.

While Markham claims to recall nothing that he believes to be of relevance at this time, this Court can take judicial notice of the fact that Markham will remember confidential government information he did review as his recollection is refreshed, as demonstrated by the existence of Fed. R. Evid. 612 [Writing Used to Refresh Memory]. (*See* Fed. R. Evid. 201.) In that event, Markham will be legally precluded from disclosing such classified and otherwise confidential government information, which would include the extent to which he was involved personally in the criminal investigation of these same Defendants. (*See, e.g.*, App. 5; *United*

States v. The LaRouche Campaign, 695 F. Supp. 1290, 1301-2 (D. Mass. 1988) (Markham's failure to disclose his personal involvement in Emerson "Cover Story").

Unlike various cases where the United States knew what classified and other confidential government information was produced to the offending government attorney, *see, e.g., In re Asbestos Cases, supra*; *In re Sofaer*, 728 A.2d 625 (D.C. 1999); *United States v. Philip Morris Inc.*, 312 F. Supp.2d 27 (D. D.C. 2004), the Defendants in this action were denied access to all classified information reviewed by Markham, and have not received responsive replies from the Department of Justice to FOIA Requests seeking Markham's timesheets (*see* App. 32).

Notwithstanding the foregoing impediments which prevent Defendants from proving exactly what confidential government information was produced to Markham, Defendants clearly have exceeded the burdens placed on the United States when the government is seeking to disqualify former Assistant United States Attorney's on the same grounds. In those cases, the courts have held that upon a prima facie showing that the former government attorney had access to information:

> 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).

Here, Markham pursued what he called the "LaRouche Organization" almost exclusively for more than three years. (See, Apps. 8 and 20-21.) That pursuit would exceed 6,000 hours, nearly 20 times the number of hours in *Phillip Morris*. Further, court opinions and documents produced by Defendants demonstrate 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. (*See, e.g.*, App. 1 [Government's Status Report re Searches]; App. 2 [Government's Notice of In Camera Submissions]; App. 3 [Excerpts of Redacted Documents under claims material is Classified or subject to other governmental privileges]; App. 4. [Redacted In Camera, Ex Parte Affidavit of S.A.]; *LaRouche v. Kelley*, 522 F. Supp. 425 (S.D.N.Y. 1981); *LaRouche v. Federal Bureau of Investigation*, 677 F.2d 256 (2nd Cir. 1982); *LaRouche v. U.S. Dept. of Treasury*, 112 F. Supp.2d 48 (D.D.C. 2000); *Billington v. U.S. Dept. of Justice*, 301 F. Supp.2d 15 (D.D.C. 2004)).

VII. CONCLUSION

Defendants have produced overwhelming evidence demonstrating that Markham reviewed classified and other confidential government information about these Defendants and the claims and practices at issue in this action, and that those records and information have not and will not be produced to these Defendants, nor made available to the public.

It makes no difference whether Markham recalls confidential government information either at this time or later during the course of this action. The effect will be to unfairly damage

the integrity of this judicial process because former AUSA Markham will have been permitted to use confidential government information not available to the Defendants to the material advantage of Kronberg in violation of Va. R. Prof. Conduct 1.11(c). Further, Markham has failed to obtain necessary government agency consent as required by Va. R. Prof. Conduct 1.11(b) and (e)(2), 18 U.S.C. § 207(a) , 5 C.F.R. § 2641.201(a).

Wherefore, Defendants, by counsel, respectfully request this Court to disqualify John Markham, pursuant to Va. Rules of the Professional Conduct 1.11(c) and (b), and pursuant to Rule 1.11(e)(2), 18 U.S.C. § 207(a) and 5 C.F.R. § 2641.201(a).

Respectfully submitted,

All Defendants
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 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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