IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

FILED

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Mary Alice Busby
CIRCUIT CLERK
BY ________ D.C.

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

V. — CIVIL ACTION NO. L07-135

RICHARD SCRUGGS, Individually; DON BARRETT, Individually; SCRUGGS LAW FIRM, P.A.; BARRETT LAW OFFICE, P.A.; NUTT & McALISTER, PLLC; and LOVELACE LAW FIRM, P.A. — DEFENDANTS

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM BRIEF IN RESPONSE TO MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION

Plaintiff Jones, Funderburg, Sessums, Peterson, & Lee, PLLC (hereinafter "Plaintiff"), by and through counsel, submits this Supplemental Memorandum Brief in opposition to Defendants' Motion to Stay Proceedings and Compel Arbitration.

INTRODUCTION

Since the submission to this Court of the original briefs by the Plaintiff, additional issues have arisen. These issues add weight to the Plaintiff's position and are supported by newer, additional facts and authority. The Defendants have already waived arbitration by their actions. There are even more reasons that arbitration is not appropriate.

The Mississippi Supreme Court addressed the scope of arbitration agreements in its June 14, 2007, opinion Smith v. Captain D's, LLC, 2007 Miss. LEXIS 343 (Miss. 2007). The dispositive issue in Smith was whether the parties' dispute was within the scope of the arbitration agreement. Plaintiff asserts in its First Amended Complaint causes of action that fall outside the scope of the arbitration agreement, and, therefore, support Plaintiff's contention that arbitration is not appropriate.

Since the time that Plaintiff brought suit against Defendant Scruggs, individually, and against

his law firm, actions taken by Defendant Scruggs on behalf of the joint venture have been become the focus of a criminal contempt investigation ordered by a federal judge in Alabama. A copy of the Order and its Memorandum Opinion are attached as Exhibits A and B. Members of Plaintiff firm may be witnesses to ethical violations that not only will have an impact in the Alabama criminal investigation, but may become evidence in support of the claims brought here by Plaintiff. Actions taken by Scruggs have caused State Farm Ins. Co. to seek removal of Scruggs and all partner law firms in the joint venture from further representation in some Katrina litigation against State Farm. A copy of the Motion is attached as Exhibit C. This may further impact Plaintiff and its right to recover damages - that is, depriving Plaintiff its share of future joint venture profits derived from representation of Katrina plaintiffs against State Farm.

Plaintiff incorporates its arguments from its previous briefs, in particular the assertion that Defendants impliedly and expressly waived their right to arbitration. These additional arguments bolster Plaintiff's assertion that this case should be in a Mississippi court.

ARGUMENT

In Smith v. Captain D's, LLC, the plaintiff Smith and her guardian signed an employment agreement with her employer Captain D's. 2007 Miss. LEXIS 343 at *1-3 (Miss. 2007) ("Smith"). After being assaulted and raped by another employee named Howell during work hours, Smith brought causes of action for negligence in hiring, supervising, and retention of Howell. Id. at *4. The Captain D's employee agreement included an arbitration provision. Id. at *10-11.The Smith case squarely addresses the issue of whether the parties agreed to arbitrate the dispute. Id. at *6.

Plaintiff in the case sub judice now brings forth this same issue and states definitively that many of its causes of action fall outside of the scope of the arbitration provision in the Joint Venture

Agreement ("Agreement").

When confronted with arbitration issues, the court must first determine whether the parties have agreed to arbitration of the dispute and if it is determined that they have, then a determination must be made as to whether legal constraints external to the parties' agreement foreclosed arbitration of those claims. Smith at *8 (internal quotations omitted). This first prong has two sub-factors: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement. Id. The court analyzes whether a reasonable person would have agreed to arbitrate the disputes. Id. at *9. Here there are issues as to whether or not the Agreement is unconscionable because of its removal provision.

While there is a strong and liberal federal policy favoring arbitration agreements, such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract. Id. at *7. The court analyzed the provision in the agreement and characterized it as either being "broad" or "narrow." Id. at *11. Language in the contract provision in Smith was quoted as being "any and all previously unasserted claims, disputes, or controversies arising out of or relating" to the employment agreement. Id. at 10. Because broad arbitration language is capable of expansive reach, courts have held that it is only necessary that the dispute "touch" matters covered by the contract to be arbitrable. Id. at 12.

Ultimately, the Mississippi Supreme Court recognized the breadth of the language in the arbitration provision, but found that the causes of action as alleged in Smith's complaint fell outside the scope of the arbitration agreement - that is, that Smith's claim of sexual assault resulting in causes of action for negligent hiring, supervision, and retention of the alleged rapist did not pertain to nor had a connection with Smith's employment. Id. at *12-13.

The Smith case follows the court's decision this year in Rogers-Dabbs Chevrolet-Hummer v. Blakeney, 950 So. 2d 170 (Miss. 2007) ("Rogers-Dabbs"). In Rogers-Dabbs, the plaintiff had executed a purchase agreement that included an arbitration provision in which the parties agreed to arbitration of "all claims, demands, disputes or controversies of every kind or nature between them arising from, concerning or relating to" the transaction, including negotiations, financing arrangements, extended warranties, performance of the vehicle, "or any other aspect of the vehicle and its sale, lease, or financing." Smith at *8-9. The court in Rogers-Dabbs found that while the purchaser no doubt had agreed to arbitrate claims originating from or relating to the sale of vehicle, **no reasonable person would agree** to submit to arbitration any claims concerning a vehicle to which he would never receive title, a scheme of using his name to forge vehicle titles and bills of sale to sell stolen vehicles, and the commission of civil fraud against him by misappropriating his title to the vehicle he purchased and forging his name on fake titles and bills of sale on various stolen vehicles. Id. at *9-10. (emphasis added). No reasonable person would agree to submit to arbitration the fraudulent, capricious, and unconscionable acts of the Defendants in this situation.

When conducting its two-pronged analysis of arbitrability, the court must not consider the merits of the underlying action. Primerica Life Ins. Co. v. Brown, 304 F.3d 469, 471 (5th Cir. 2002). But the analyses in both Smith and Rogers-Dabbs were based on the causes of action filed and the factual claims that supported them. The Mississippi Supreme Court clearly used an objective, reasonable person standard.

In the case sub judice, Plaintiff and Defendants signed a joint venture agreement ("Agreement") that brought the Scruggs Katrina Group into existence. The Agreement included an arbitration provision that states, in its entirety:

> Disputes - Any dispute arising under or relating to the terms of this agreement shall be resolved by mandatory binding arbitration, conducted in accordance with the guidelines of the American Arbitration Association. The site of the arbitration shall be Oxford, MS.

Joint Venture Agreement, p. 3. Plaintiff here has stated claims that do not "touch" matters within the contract, that is, the instant case includes causes of action outside of and unrelated to the Agreement which brought the Scruggs Katrina Group into existence.

Each firm was a partner in the partnership. The group was brought into existence upon the signature of a representative attorney for each firm. The partnership was not comprised of any individual attorney, but the firms to which the attorneys belonged. Plaintiff goes beyond suing each individual firm as a partner of the SKG and includes individual causes of action against Richard "Dickie" Scruggs and Don Barrett.

With the exception of a thirty-five percent (35%) share of the profits to be taken by Defendant Nutt & McAlister for funding the joint venture, the Agreement was silent as to the share of profits to be shared among the other partner law firms. Under the undisputed facts and Mississippi law, all partners were thus entitled to equal shares of all profits from the venture.

In December 2006, individual Defendants Scruggs and Barrett conspired among themselves and others to set Plaintiff's fee allocation at a ridiculously low portion of the net earnings of the Joint Venture from the State Farm settlement. See First Amended Complaint ("FAC"), p. 5, para. 20. After substantial performance by Plaintiff from October 2005 through all pertinent times during which substantial legal work was logged, Defendant Scruggs called Jones on December 6, 2006 and dictated Scruggs's "decision" on a division of attorney fees. FAC, p. 5, para. 21. Scruggs told Plaintiff that it would receive one payment of $1,000,000 to be paid by Defendant Nutt **outside the**

venture and that Plaintiff would then be paid nothing else. FAC, p. 5, para. 22. (emphasis added). Defendant Scruggs told Jones that Scruggs and his firm would pay nothing for Plaintiff's share and that Defendants **Scruggs, Barrett and Nutt had agreed** to split approximately $26,500,000 in fees from the State Farm settlement by each defendant taking 32% but paying nothing to Plaintiff nor Defendant Lovelace. FAC, p. 6, para. 23. (emphasis added).

Over the following three months, Defendant law firms and **the individually-named Defendants attempted to leverage, bully and cajole Plaintiff** into taking less than what Plaintiff was rightfully due in legal fees under the common law and Mississippi statutory law governing division of income in a joint venture when no percentages are set. FAC, pg. 6, para. 25. (emphasis added). Further, Defendants began a course of conduct intended to "freeze out" Plaintiff from further involvement in the Joint Venture. FAC, p. 6, para. 27. Plaintiff raised matters in an SKG meeting relevant to the criminal contempt proceedings, which, proof will show, directly led to the intentional "freeze out" and marginalization of Plaintiff's right of equal control in the management of SKG affairs.

At the March 2, 2007 meeting of the joint venture, Defendants Scruggs, Barrett, Nutt, and Lovelace (via telephone) informed Plaintiff representatives Jones and Funderburg that the meeting was intended to force Plaintiff to take a sum determined by the other venturers or the Plaintiff would face immediate termination of all further involvement. FAC, pp. 8-9, para. 43. Defendant Barrett in bad faith demanded that Plaintiff accept a six percent (6%) share of the fees earned by the Joint Venture in a take-it-or-leave-it fashion and in a further act of bad faith stated that failure to accept the "offer" would result in immediate termination and the withholding of funds to which even the Defendants admitted Plaintiff was entitled. FAC, p. 9, para. 44. From that day to the present,

Defendants have paid nothing to Plaintiff for their seventeen (17) months of concentrated work on behalf of the joint venture.

Plaintiff has sued Defendant Scruggs as an individual and not as a partner of the SKG (the Scruggs Firm is the partner, not Scruggs himself). One of Plaintiff's causes of action is based on the fact that Scruggs has done this in the past to other members of other joint ventures entitling Plaintiff to punitive damages from Scruggs as an individual. See FAC, p. 11, paras. 61-63. Don Barrett has engaged in the same type of conduct on multiple occasions where he would engage and be a part of a joint venture to pursue wrongful conduct by tortfeasors on behalf of various clients and when funds became available for distribution would attempt to renegotiate or shortchange his joint venturers. FAC, p. 11, para. 64. As will be shown in discovery, the Defendant Nutt has also engaged in the same type of conduct. The distinction in this case is that this Plaintiff refused and rejected such a post-settlement, post-fee-generation attempt by Scruggs and Barrett to avoid paying a fair share of the venture profits while some of the previous victims were not in a position to decline and seek redress. As a direct consequence of such refusal, the Plaintiff was summarily ejected from the venture and deprived of any and all recovery for their work on behalf of the joint venture. It is the intention of Plaintiff to expose and forever stop this modus operandi of the individual defendants.

Causes of action stated in the FAC that go beyond and do not "touch" the contract include claims for conspiracy, usurpation, conversion, fraud, and constructive trust, among others. The fraud claim is, in part, a cause of action against Scruggs and Barrett, individually. FAC, p. 17, para. 144. A claim for constructive trust is extra-contractual in this case and a creature of statute. That is, Miss. Code Ann. § 79-13-404 (b)(1) states that a partner's duty of loyalty to the partnership and the other partners includes to account to the partnership and **hold as trustee for it any property, profit, or**

benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity. And, while the duty of good faith and fair dealing attends all contracts interpreted under Mississippi law, see Baker, Donelson, Bearman & Caldwell, P.C. v. Muirhead, 920 So. 2d 440, 451 (Miss. 2006), these duties also arise under the Uniform Partnership Act. See Miss. Code Ann. § 79-13-404 (d). But it is the statutory duty of loyalty that was breached when the Plaintiff was denied its fair share of profits derived the work of the group. See Miss. Code Ann. §§ 79-13-404 (b) and 79-13-401 (b) (stating that each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits).

As well, Plaintiff demands punitive damages from Richard Scruggs and Don Barrett as individuals. The law firms of Scruggs and of Barrett act as the partners of the joint venture partnership. But these causes of action are against the defendants as individuals. The punitive damages requested would be for such an amount as would deter such conduct in the future and would serve as an example to others that such conduct would not be tolerated. FAC, p. 20, para. 137. The facts will show that such conduct has been a practice by these individual defendants in the past and punitive damages should be awarded in such an amount that would deter these two tortfeasors and others from engaging in such conduct in the future. Id.

In its Complaint, Plaintiff also claims that **Defendant Scruggs** engaged in various activities such as the wrongful expenditures of funds belonging to the joint venture including the unauthorized hiring of personnel for SKG without approval of all members of SKG and continued to do so without authority. FAC, p. 8, para. 38. (emphasis added). Many details of these acts came to light June 15, 2007, when Defendant Scruggs was referred by District Judge William M. Acker, Jr., to the United

States Attorney for the Northern District of Alabama for prosecution for criminal contempt. See Order, p. 1, attached as Exhibit A, and Memorandum Opinion, attached as Exhibit B.

Judge Acker, in a case styled E.A. Renfroe & Co., Inc., v. Moran et al in the northern district of Alabama, requested that the United States Attorney for the Northern District of Alabama prosecute the criminal contempt of non-parties Richard F. Scruggs and the Scruggs Law Firm. Ex. A, p. 1. If the government declines this request, Judge Acker stated that he will appoint another attorney to prosecute Scrugg's criminal contempt. Id. Judge Acker, citing testimony presented at a contempt hearing, states definitively that in **July 2006**, Cori Rigsby Moran and her sister Kerri Rigsby ("Rigsbys" or "the sisters") became paid consultants for the Scruggs Katrina Group. Ex. B, p. 3. Judge Acker states that Scruggs (not the SKG) became the sisters' attorney in February 2006. Id. at 2.

Scruggs did not inform Plaintiff as a member of the SKG until Oct. 6, 2006 that he wanted the sisters to work for the SKG. Before the meeting on Oct. 6, 2006, an agenda was prepared and circulated by Sid Backstrom that included agenda item number #3 - "The Girls." That meeting was attended by Steve Funderburg, John Jones and Stewart Lee on behalf of Plaintiff. At the meeting, whether the SKG could ethically pay the sisters was raised as an issue and Scruggs said that he had told the sisters that the SKG would "take care of them." No amount was discussed. Plaintiff was not told that the sisters had already been paid by Scruggs and were on his firm's payroll as of the date of the meeting at which the issue of paying them was first brought before the group. Plaintiff was also not told when the group was expected to start paying the sisters, how they would be paid, and what service they would purportedly perform to each such pay. Scruggs simply stated that the sisters had taken great risk and he felt a personal obligation to them and that Scruggs expected the group

to share the expense because he had already told Moran and Rigsby that he would "take care of them." The ethics over paying material witnesses was again raised and the group decided an opinion letter would be sought from Mississippi attorney Cham Trotter. No opinion letter was ever received, or, as far as Plaintiff knows, requested. Then, in January 2007, when Plaintiff received a partial accounting from the SKG, an expense of $150,000 per sister was listed as an expenditure. Plaintiff immediately raised an objection, again questioning whether the group ethically could employ the sisters. No response to this objection and inquiry was ever received from Defendants, and Defendants' efforts to "freeze out" Plaintiff were redoubled.

Judge Acker stated succinctly in his Order: "Scruggs is an experienced attorney and an officer of the court. His brazen disregard of the court's preliminary injunction is precisely the type of conduct that criminal contempt sanctions were designed to address." Id. pp. 19 - 20. Actions by Don Barrett in the Renfroe litigation were questionable as well. Judge Acker found that Defendant Don Barrett on Jan . 27, 2007, as a member of the Scruggs Katrina Group, called counsel for Renfroe - the former employer of the sisters and the plaintiff in Renfroe v. Moran and offered to turn over additional documents as part of a settlement offer. Exhibit B, pp. 9, 24. But Judge Acker did not find Barrett in criminal contempt. Id.

As a result of Scruggs's actions, on June 19, 2007, State Farm in a case styled McIntosh v. State Farm, moved to disqualify not only Scruggs and the Scruggs Law Firm from representation in that suit, but the entire Scruggs Katrina Group. See Motion to Disqualify, attached as Ex. C. If the SKG is not allowed to represent the McIntoshes against State Farm, this will interfere with the profit potential to which Plaintiff was entitled. State Farm charges that Scruggs has violated multiple state and national ethical standards. Ex. C, p. 1. He testified that (1) he has had regular ex parte contacts

since February 2006 with the two sisters who were State Farm insiders (2) the sisters stole thousands of confidential State Farm documents for use in "his litigation" against the company, and (3) the sisters are now being generously compensated by Scruggs to serve as "trial consultants" in his litigation against State Farm and other insurance companies. Id. at 1-2. State Farm presents arguments supported by testimony that all other member law firms of the SKG should be disqualified as well from representing the McIntoshes in their claim against State Farm.

A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in **grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law**. Miss. Code Ann. § 79-13-404 (c) (emphasis added). Scruggs, individually, has violated his duty of care to Plaintiff, the partners and the partnership. These violations are outside the scope of the arbitration provision as provided in the Agreement.

CONCLUSION

To address all of the issues, the circuit court, not an out-of-state arbitrator with limited powers to control the conduct of attorneys, is essential. Under the Mississippi Supreme Court's objective, reasonable person analysis, Plaintiff, in his Complaint and First Amended Complaint, made factual assertions, stated causes of action, and named individual defendants that take this case outside the scope of the arbitration provision in the Agreement. Therefore, the Motion by Defendants to Compel Arbitration should be denied.

RESPECTFULLY SUBMITTED, this the 27th day of June, 2007.

JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, PLLC

By and through its attorneys,

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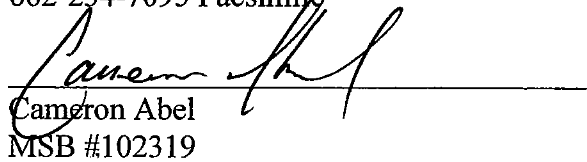
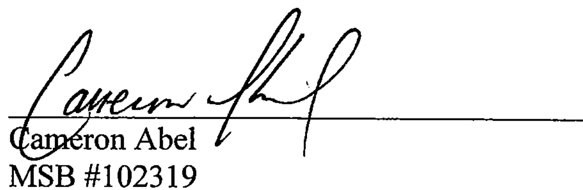


Cameron Abel
MSB #102319

CERTIFICATE OF SERVICE

I, Cameron Abel, hereby certify that I have this date caused to be hand delivered, a true and correct copy of the foregoing document on this the 27th day of June, 2007:

Mr. Wilton V. Byars, III
DANIEL COKER HORTON & BELL, P.A.
265 North Lamar Boulevard, Suite R
Oxford, Mississippi 38655



Cameron Abel
MSB #102319

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U.S. DISTRICT COURT
N.D. OF ALABAMA

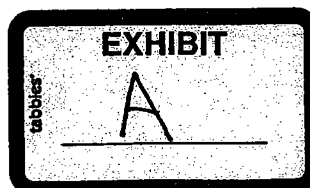
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

E.A. RENFROE & COMPANY, INC.,	}	
	}	
Plaintiff,	}	
	}	CIVIL ACTION NO.
v.	}	06-AR-1752-S
	}	
CORI RIGSBY MORAN, et al.,	}	
	}	
Defendants.	}	

ORDER

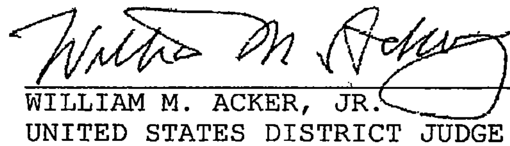
In accordance with the accompanying memorandum opinion and with Rule 42(a), Fed. R. Crim. P., the court hereby requests that the United States Attorney for the Northern District of Alabama prosecute the criminal contempt of non-parties Richard F. Scruggs and the Scruggs Law Firm, P.A. (together, "Scruggs"). If the government declines this request, the court will appoint another attorney to prosecute Scruggs's contempt. Plaintiff's second supplement to its motion for defendants and their attorneys and agents to show cause why they should not be held in contempt of court (Doc. No. 91), insofar as the relief plaintiff requests is not granted herein, is DENIED. Scruggs's motion to dismiss or quash preliminary injunction (Doc. No. 79) is DENIED. Plaintiff's motion for a finding of civil contempt as a coercive sanction in DENIED, and as a compensatory sanction is STAYED.

Defendants' and Scruggs's motions to strike certain evidentiary submissions filed by plaintiff (Doc. No. 141), to the extent directed at evidence the court considered in referring



Scruggs for prosecution for criminal contempt, are DENIED. In all other respects, the motions to strike are MOOT.

DONE this 15th day of June, 2007.



WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

cc: Alice Martin
United States Attorney's Office
Northern District of Alabama

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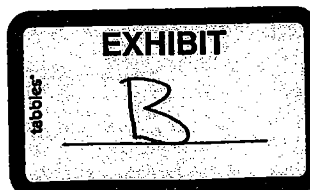
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

E.A. RENFROE & COMPANY, INC.,	}	
	}	
Plaintiff,	}	
	}	CIVIL ACTION NO.
v.	}	06-AR-1752-S
	}	
CORI RIGSBY MORAN, et al.,	}	
	}	
Defendants.	}	

MEMORANDUM OPINION

On January 19, 2007, the court ordered defendants Cori Rigsby Moran ("Cori Rigsby") and Kerri Rigsby, who are sisters, and non-parties Richard F. Scruggs and the Scruggs Law Firm (together, "Scruggs"), to show cause why they should not be held in contempt of court. Plaintiff, E.A. Renfroe & Company, Inc. ("Renfroe"), maintains that the Rigsbys and Scruggs should be held in contempt for failing to comply with the preliminary injunction entered in the above-entitled action on December 8, 2006. Upon consideration and review of the evidence and of the arguments of the parties, the court will decline to impose civil contempt sanctions as an enforcement tool against either the Rigsbys or Scruggs, but will leave the door open to a consideration of Renfroe's request for compensatory contempt sanctions after the Eleventh Circuit decides upon the validity of the preliminary injunction. Meanwhile, however, the court will refer Scruggs to the United States Attorney for the Northern District of Alabama for prosecution for criminal contempt. The court will decline to refer Cory Rigsby or Kerri



Rigsby for criminal contempt proceedings.

Background

The Rigsbys are former employees of Renfroe, a company that provides support services to insurance companies during times of disaster. One of Renfroe's most important clients, if not the most important client, is State Farm Insurance Company ("State Farm"). The Rigsbys were employees of Renfroe after Hurricane Katrina devastated many coastal areas of the United States in August 2005, and they worked on behalf of State Farm as claims adjusters in Mississippi during Katrina's aftermath. Among their duties as claims adjusters was to assist in the processing and evaluation of insurance claims submitted by owners of damaged or destroyed property.

While adjusting claims in Mississippi, the Rigsbys witnessed what they believed to be fraudulent practices by State Farm vis-à-vis its policy holders. In early 2006, the Rigsbys began to photocopy documents that they thought contained evidence of egregious misconduct by State Farm. In February 2006, they retained Scruggs, a private attorney in Mississippi, to act as their lawyer. Tr. of March 19-20, 2007 Contempt Hr'g (herein, "March 19-20 Hr'g Tr.") (Doc. No. 130), at 133:15-23. The attorney-client relationship between the Rigsbys and Scruggs still existed as of March 19-20, 2007, when the Rigsbys and Scruggs testified in the contempt hearing held by this court. *Id.* Scruggs

is not, and never has been, an attorney of record in this case. Scruggs was determined to be subject to the jurisdiction of this court in the memorandum opinion that accompanied the court's January 19, 2007 show-cause order.

Renfroe and the Rigsbys agree that the Rigsbys delivered to Scruggs documents that they had copied in four distinct "batches." The Rigsbys produced the first batch to Scruggs in February 2006. *Id.*, at 100:15-18. They delivered a second batch of copies, consisting of emails, engineering reports, and other miscellaneous documents, to Scruggs and to other lawyers in April 2006. *Id.*, at 100:22 – 101:5. They did not retain any copies of either of these first two batches. *Id.*, at 100:19-21; 101:6-7; 107:17-21. During the weekend of June 3-4, 2006, the Rigsbys printed several thousand pages from an electronic database stored on State Farm's computers. *Id.*, at 101:9 – 103:10. Using photocopy machines, the Rigsbys made two additional sets of these "data dump" documents. *Id.*, at 106:19 – 107:10. On June 5, 2006, the Rigsbys provided one set of the data-dump documents to Mississippi Attorney General Jim Hood ("Hood") and another set to the FBI. *Id.*, at 107:19 – 108:4; 109:1-12. In July 2006, defendants became paid consultants for the Scruggs Katrina Group, a team of Mississippi lawyers headed by Scruggs that joined together soon after Hurricane Katrina to pursue claims against insurers, including State Farm. *Id.*, at 114:10-17. The Rigsbys stored the third and final set of the data-dump

documents at a friend's house until they delivered it to Scruggs on or about August 1, 2006. *Id.*, at 109:19 – 110:11. The Rigsbys delivered a fourth batch of documents, consisting of a small number of training aids and miscellaneous documents that Cori Rigsby found while cleaning out her home office, to Scruggs in the fall of 2006. *Id.*, at 118:23 – 119:25. The documents in batch four predated Katrina and did not contain any claims-related information. *Id.* Scruggs subsequently shared the documents that defendants delivered to him with other members of the Scruggs Katrina Group. *Id.*, at 175:16 – 176:3.

The documents brought to Scruggs by the Rigsbys are the focus of this lawsuit and the related contempt proceedings. Renfroe filed the action on September 1, 2006, seeking injunctive relief and monetary damages. In its amended complaint, Renfroe alleges that "[d]efendants have admitted that they copied approximately 15,000 pages of claims information and provided them to a plaintiff's lawyer [Scruggs] who is a friend of their mother. Defendants provided these many pages of claims-related information to this plaintiff's lawyer and his firm knowing that this lawyer had filed or was preparing to file civil lawsuits against insurance companies including Renfroe's clients." The Rigsbys responded that "[a]fter seeing insurance company documents that Defendants believed to reflect criminal fraud, Defendants provided such documents to their lawyer – someone they had known for many years.

Upon advice of counsel, Defendants provided those documents to the FBI and to the Mississippi Attorney General." The Rigsbys's counsel in this case indicated during the March 19-20, 2007 contempt hearing that "[t]he sum total of those three copies was 15,000 pages of documents, approximately. Five thousand each, approximately," and that "there's been just a huge misunderstanding in the number of documents copied on that data dump weekend . . . ." March 19-20 Hr'g Tr., at 19:24 – 20:4. Cori Rigsby testified that she was "guessing that the total amount [of documents copied] was right around 15,000, and that would be all three sets of copies." *Id.*, at 39:5-5. Cori Rigsby further testified that she "believed" that each of the three identical sets of documents filled two complete and one partial box of copy-machine paper, so that all three sets together filled six complete and three partial boxes. *Id.*, at 39:19 – 41:20. The Rigsbys had earlier appeared on the television program *20/20*, where a reporter stated that the Rigsbys had "downloaded thousands of documents from State Farm computer files." Nov. 21, 2006 Prelim. Inj. Hr'g, Pla.'s Ex. 6. In an AP article that was published on August 26, 2006, news reporter Michael Kunzelman wrote that "[t]he sisters [Cori Rigsby and Kerri Rigsby] say they ultimately printed out and copied roughly 15,000 pages of claims records." *See* Pla.'s Mot for Prelim. Inj., Ex. E (Doc. No. 30-6). Cori Rigsby clarified during the contempt hearing that this 15,000 figure consisted of the sum

total of all three identical sets. March 19-20 Hr'g Tr., at 45:9-11; 107:7-10.

On December 8, 2006, the court entered a preliminary injunction and protective order. That injunction and order, which took effect when Renfroe posted an injunction bond on December 11, 2006, stated:

Preliminary Injunction

> [D]efendants, Cori Rigsby Moran and Kerri Rigsby, and their agents, servants, employees, attorneys, and other persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise **(with the express exception of law enforcement officials)** are hereby MANDATORILY ENJOINED to deliver forthwith to counsel for plaintiffs all documents, whether originals or copies, of each document and tangible thing, in any form or medium, that either of the defendants or anyone acting in conjunction with or at the request or instruction of either of them, downloaded, copied took or transferred from the premises, files, records or systems of Renfroe or of any of its clients, including, but not limited to State Farm Insurance Company and which refer or relate to any insurance claims involving damages caused or alleged to have been caused by Hurricane Katrina in the State of Mississippi.
>
> Defendants and their agents, servants, employees, attorneys, and other persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are further ENJOINED not to further disclose, use or misappropriate any material described in the preceding paragraph unless to law enforcement officials at their request.
>
> This injunction shall become effective upon the posting by plaintiff of an injunction bond in the amount of $50,000 for the payment of such costs and damages as may be suffered by defendants or any persons found to have been wrongfully enjoined. The said bond shall be in a form, and with a corporate surety, approved by the Clerk.

Protective Order

> Because the documents and information in the possession or control of defendants and/or their agent or, or may be, relevant to an ongoing criminal investigation by the Attorney General of Mississippi, the court finds that there is a compelling interest in protecting the use and disclosures of those certain documents and information to anyone not needing that information for the criminal investigation or for preparation of the above-entitled case. Therefore, plaintiff's counsel shall not disclose to State Farm or any of its agents, including E.A. Renfroe & Company, Inc., any of the material delivered to them pursuant to the mandatory injunction without first obtaining the express written approval of the court after *in camera* inspection. The documents shall be kept by counsel for plaintiff in a separate, locked location, and no copies shall be made and the contents thereof shall not be revealed without express authorization of the court.

(emphasis in original). Defendants filed a motion to stay enforcement of the injunction on December 15, 2006. The court denied defendants' motion on December 18, 2006.

Although Scruggs does not appear as an attorney of record for either of the Rigsbys in the instant action, there is no dispute about the fact that Scruggs was an attorney for the Rigsbys in relation to the subject of the documents when the injunction was issued. *Id.*, at 133:15-23. Scruggs is not a named party in this action, but he received notice of the injunction the day the court entered it. *Id.*, at 188:25 – 189:4. Scruggs spoke to Hood over the phone about the injunction that night. *Id.*, at 192:17 – 193:2. Scruggs testified that Hood interpreted the injunction to permit Scruggs to send him the documents rather than to counsel for Renfroe, and Scruggs did not disagree with Hood's erroneous interpretation. *Id.*, at 195:14-20.

On December 12, 2006, Special Assistant Attorney General Courtney Schloemer, of Hood's office, sent a letter to Scruggs indicating that she is "not comfortable that the protective measures put in place by the Court will be effective in keeping these documents out of the grasp of State Farm," and requesting that Scruggs send the set of documents acquired by the Rigsbys to Hood's office. *Id.*, at 200:15 – 201:1; *See* Scruggs's Mot. to Dismiss or Quash, Ex. 2 (Doc. No. 79-3). Schloemer's letter was a followup to the conversation that Scruggs had with Hood on December 8, 2007. March 19-20 March 19-20 Hr'g Tr., at 202:18-20. Scruggs received the letter via email the same day Schloemer sent it. *Id.*, at 202:24 – 203:4. Scruggs sent the documents to Hood via Federal Express later that day. *Id.*, at 166:21-23; 202:14-20; 203:10-16. The Rigsbys's present counsel spoke to Scruggs about the injunction after it was entered but before Scruggs sent the documents to Hood, but Scruggs does not recall whether or not he revealed during that conversation that he intended to send the documents to Hood in order to place the documents outside the purview of the injunction. *Id.*, at 229:16 – 230:19. At the direction of her present counsel, Cori Rigsby contacted Scruggs on or shortly after December 12, 2006 for the purpose of making arrangements to obtain the documents and deliver them to Renfroe's counsel as ordered. *Id.*, at 222:6-10. Scruggs informed Cori Rigsby at this time that the documents had been sent to Hood, and that he no longer had possession of them.

Id.

Renfroe wrote to the Rigsbys on December 14, 2006, demanding return the purloined documents in compliance with the injunction. *See* Pla.'s Mot. for Contempt of Court, Ex. 2 (Doc. No. 68-4). The Rigsbys told Renfroe on December 21, 2006 that they no longer had the documents because they had turned them over to Scruggs, although Scruggs had told them several days prior that he had sent them to Hood. *See id.*, Ex. 5 (Doc. No. 68-8). Renfroe wrote to the Rigsbys and to Scruggs on December 28, 2006, again demanding return of the documents. *See id.*, Ex. 4 (Doc. No. 68-6). The Rigsbys responded on January 3, 2007 by informing Renfroe that Scruggs had sent the documents to Hood. *See id.*, Ex. 7 (Doc. No. 68-9). On January 27, 2007, Don Barrett, a member of the Scruggs Katrina Group, called counsel for Renfroe and offered to turn over additional documents as part of a settlement offer. *See* Pla.'s Second Supplement to Mot. for Defs. to Show Cause (Doc. No. 91-1) and accompanying exhibits.

On January 5, 2007, Renfroe filed a motion for an order to show cause why defendants and Scruggs should not be held in civil contempt for failing to abide by the terms of the injunction. The court granted that motion on January 19, 2007, and called upon the Rigsbys and Scruggs to show cause. On February 1 2007, Hood sent to Renfroe's counsel the documents that Scruggs had sent to him on December 12, 2006, and the documents were delivered on February 2,

2007. *See* Pla.'s Br in Support of Mot. for Scruggs to Show Cause, Ex. B (Doc. No. 129-2). After a contempt hearing on March 19-20, 2007, Renfroe's counsel left this third set of documents with the court. As the court informed the parties in an order entered on March 28, 2007, that set consisted of the following, plus several compact discs ostensibly containing complete or partial copies in electronic format:

First/Second/Fourth Batches (Non-Data-Dump Documents)

- **6** complete, multi-page "documents," consisting of **262** total pages.
- **1** complete duplicate set of **two** of the above multi-page documents, consisting of **222** total pages.
- **5** partial duplicate sets of **the same two** multi-page documents, with each partial duplicate set consisting of **24** pages, for a total of **120** pages.

Third Batch (Data-Dump Documents)

- **853** or **2559** documents, depending on what is considered one "document" (each data-dump "claim" consists of three parts, and each individual part might be thought of as one "document"), consisting of **6,538** total pages. **219** of these pages are duplicates of other pages within this set.
- **1** complete duplicate of **148** or **444** documents (depending on what is considered one "document," as explained above), consisting of **1,220** total pages.

Total number of pages in the two boxes ostensibly containing one complete set of data-dump documents:

- **6,538** pages, **219** of which are duplicate copies of documents within the complete set. There are

therefore **6,319** (6,538 - 219) unique pages within this set.

Total number of pages provided to Renfroe as of March 28, 2007:

- 262 + 222 + 120 + 6,538 + 1,220 = **8,362** total pages.

On or about April 18, 2007, Renfroe received an additional 1520 pages of documents from Jason L. Nabors. Renfroe had subpoenaed these documents from attorneys Nabors and Richard T. Phillips. *See* Pla.'s Br. in Supp. of Mot. for Civil Contempt (Doc. No. 128-1), at 4-5. For aught appearing, Nabors, Phillips, and/or Phillips's law firm are members of or work with the Scruggs Katrina Group. The documents sent by Nabors constitute a copied subset of the 6,319 unique data-dump documents that Hood had sent to Renfroe on February 1, 2007.

Scruggs sent a letter to Hood on March 23, 2007 requesting that Hood send him "copies of all State Farm documents that your office voluntarily provided E.A. Renfroe last month." Pla.'s Br in Support of Mot. for Scruggs to Show Cause, Ex. B (Doc. No. 129-3). Hood refused Scruggs's request. *See* Scruggs's Reply Br. on Pla.'s Mot. for Contempt (Doc. No. 138), at 4 n.2.

At some point after the preliminary injunction took effect, a television commercial for the Scruggs Katrina Group featuring Kerri Rigsby began airing in areas affected by Hurricane Katrina. *See* Pla.'s Supplement to its Br. in Supp. of Mot. for Scruggs to Show Cause (Doc. No. 131-1) and accompanying exhibits. In the ad, Kerri

Rigsby says:

> If I were you I wouldn't expect to find any good news from my insurance company in here [nodding towards the mailbox]. Even after their tactics of delay, deceit and denial, the insurance companies are asking you to come to mediation even after they were caught shredding documents subpoenaed by the grand jury and changing engineering reports, they still expect you to trust them. This mediation is a sweetheart deal between the Insurance Commissioner and insurance companies. It's rigged against you. How do I know? I'm Kerri Rigsby and I used to work for State Farm. I know firsthand how far they will go to avoid paying your claim. Take it from me you need a lawyer not the Insurance Commissioner's mediation program. Think twice before you believe what you find here [nodding towards the mailbox]. Check with a lawyer and make sure you get a fair settlement. Don't give in to mediation. Don't give in to big insurance.

Id.

Analysis

Civil Contempt

Civil contempt may serve two purposes. It "can be either coercive, which is intended to make the recalcitrant party comply, or compensatory, which reimburses the injured party for the losses and expenses incurred because of his adversary's noncompliance . . . ." *Sizzler Family Steak Houses v. Western Sizzlin Steak House, Inc.*, 793 F.2d 1529 (11th Cir. 1986) (citations omitted); *see also Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1304 (11th Cir. 1991) ("The court has the power to impose coercive and compensatory sanctions"). Renfroe seeks the imposition of both forms of sanctions.

The court believes that whether it should impose civil

contempt sanctions that are compensatory in nature is a premature inquiry. Such sanctions, if the court imposed them, would stand only if the underlying preliminary injunction is valid. *See U.S. v. Koblitz*, 803 F.2d 1523, 1527 (11th Cir. 1986). As the parties are aware, the Rigsbys have appealed the preliminary injunction, and that appeal is still pending in the Eleventh Circuit. If the Eleventh Circuit vacates the preliminary injunction, compensatory sanctions would be unwarranted.

The court recognizes that Renfroe has made several efforts to obtain all of the purloined documents, and that Renfroe did not initiate contempt proceedings in an effort to enforce the injunction until after it learned that Scruggs had taken action to avoid it. Rather than to rule definitively on whether Renfroe was effectively forced to bring contempt proceedings and should be compensated for the time and resources it spent in enforcing the injunction, the court will pass these questions for the time being, and will not take them up until the Eleventh Circuit rules upon the validity of the preliminary injunction.

In order for the court to impose **coercive** civil contempt sanctions, Renfroe must show by clear and convincing evidence that the December 8, 2006 preliminary injunction **currently** is being violated. *See United States v. Money*, 744 F.2d 779, 780 (11th Cir. 1984); *see also Reynolds v. McInnes*, 338 F.3d 1201, 1211 (11th Cir. 2003) (explaining that "plaintiffs would have had the burden of

proving by clear and convincing evidence what they allege in their motion" for contempt); *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1296 (11th Cir. 2002) ("A finding of civil contempt . . . must be supported by clear and convincing evidence"). In order to meet its burden, Renfroe relies upon the number of pages of documents it received from Hood versus the number of documents defendants have said that they copied. This evidence does not meet the clear-and-convincing threshold necessary for imposition of coercive sanctions. The court is left to speculate about whether all documents have been returned.

Renfroe focuses on the fact that it received 6,319 unique data-dump pages from Hood, and it juxtaposes this fact with its contention that the Rigsbys have routinely admitted that they copied 15,000 documents during the data-dump weekend of June 3-4, 2006. The Rigsbys did not expressly admit to the 15,000-pages figure in their answer to Renfroe's amended complaint. Renfroe says that the Rigsbys told a reporter on *20/20* that they copied 15,000 documents, but the transcript of that television program reveals only that the Rigsbys "downloaded thousands of documents." Neither defendant was under oath when one or both of them evidently told reporter Michael Kunzelman that they had "printed out and copied roughly 15,000 pages of claims records."

Cori Rigsby acknowledged during the contempt hearing that she and Kerri Rigsby made approximately 15,000 copies during the data

dump. She explained, however, that this figure referred to all of the pages from each of the three identical sets of documents, so that each individual set actually consisted of approximately 5,000 documents. The court can understand how it might be reasonable to characterize 6,319 as "approximately" 5,000, or 18,957 (6,319 x 3) as "approximately" 15,000. If a person wanted to use round numbers, saying that 18,957 is "approximately 20,000" would be more accurate than saying "approximately 15,000," but the Rigsbys have never claimed to have known the exact number of pages they printed or copied on June 3 and 4, 2006. They just copied everything they could get their hands on.

Renfroe also points to the number of boxes of paper in which defendants stored the copied documents. Cori Rigsby testified that the 15,000-pages estimate was "based on the number of . . . boxes of paper that [she] purchased," an estimate she made after she had "quickly counted the boxes." March 19-20 Hr'g Tr., at 106:24 – 107:5. The parties agree that one unopened box of standard computer paper contains 5,000 sheets, so Cori Rigsby evidently saw three boxes when she "quickly counted" them. But then how did defendants make the remaining 3,957 (6,319 x 3 - 15,000) or 4,614 (6,538 x 3 - 15,000) copies? Maybe Cori Rigsby actually bought four boxes of paper but only saw three boxes when she counted. Maybe there was extra paper laying around at the copy center where defendants made the copies, and they used this extra paper in

addition to that which they had purchased. The court is puzzled at how one set of 6,319 or 6,538 data-dump documents could, as Cori Rigsby testified, fill two complete boxes and one partial box when each box originally contained 5,000 sheets of paper, but this court's puzzlement falls short of establishing by clear and convincing evidence that defendants are still harboring and secreting copies of documents.

The court agrees with Renfroe's tacitly stated sentiment that defendants' telling the media that they copied approximately 15,000 pages of allegedly fraud-evincing documents, when this estimated page count actually consisted of three identical sets of approximately 5,000 pages each, was, at best, misleading. It might very well be true that the "huge misunderstanding in the number of documents copied on that data dump weekend" is a misunderstanding that was created entirely by the Rigsbys's own actions and statements. That the Rigsbys may willingly have promoted sensationalistic journalism does not establish the propriety of imposing the coercive sanctions upon them. There is no point in imposing a coercive sanction on a party to make her do something she cannot do. The court is not satisfied that the Rigsbys are willfully violating the requirement to return all documents. Whether they violated a duty to their former employer by misleading the public will be a matter to be decided as part of the trial on the merits. It may be relevant to some aspects of Renfroe's claim,

but it is not relevant to the issue of coercive sanctions. The bottom line is that defendants and Scruggs testified that they no longer have any Renfroe or State Farm documents, and Renfroe has not presented evidence that clearly and convincingly refutes these assertions.

In addition to page-count discrepancies, Renfroe says that Scruggs must not be complying with the injunction because copies of data-dump documents continue to "dribble in" from various members of the Scruggs Katrina Group. Scruggs says that he has "made an effort" to get individuals with whom he shared the documents to return them. March 19-20, at 175:16 – 176:3. He does not provide any details behind this effort. "A party under court order to produce documents has a duty to make in good faith all reasonable efforts to comply." *U.S. v. Hayes*, 722 F.2d 723, 725 (11th Cir. 1984). If Scruggs has been lackadaisical in his attempts to retrieve copies of the documents that he shared with other individuals, that issue can be adequately addressed if and when Renfroe renews its request for compensatory sanctions. Renfroe's contention that documents have been "dribbling in" does not establish by clear and convincing evidence that there are still more documents "out on the street." The court therefore will not order the Rigsbys and Scruggs "to account for the numbers of copies, paper and electronic, that have been made from [the] unique documents" that defendants copied, as Renfroe requests. *See* Pla.'s

Br. in Supp. of Mot. for Civil Contempt (Doc. No. 128-1), at 9. The court instead will leave it to Renfroe to attempt to acquire such an accounting through the discovery process, to the extent it is relevant to the remaining issues.

Criminal Contempt

"The role of criminal contempt is to protect the institutions of our government and enforce their mandates. A federal court may impose criminal sanctions pursuant to 18 U.S.C. § 401 (1982),[1] to vindicate its authority and safeguard it own processes." *In re McDonald,* 819 F.2d 1020, 1023-24 (11th Cir. 1987) (citations omitted). The Eleventh Circuit went on to explain:

> The essential elements of criminal contempt are that the court entered a lawful order of reasonable specificity, it was violated, and the violation was willful. Whether the order is reasonably specific is a question of fact and must be evaluated in the context in which it is entered and the audience to which it is addressed. In criminal contempt, willfulness means a deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of an order. Each of these elements must be proven beyond a reasonable doubt in order to determine guilt and impose punishment.

[1] 18 U.S.C. § 401 states:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as-

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Id. at 1024 (citations omitted).

The court finds that there exists sufficient evidence to meet the burden of proving that Scruggs willfully violated the court's December 8, 2006 preliminary injunction, and that referral to a prosecutor is the appropriate course to take to vindicate the court's authority. There is no dispute that Scruggs became aware of the preliminary injunction the day it was issued. That injunction required him, as an attorney or agent of defendants, to deliver forthwith to Renfroe's counsel "all documents . . . that either of the defendants . . . downloaded, copied took or transferred from the premises, files, records or systems of Renfroe or of any of its clients . . . which refer or relate to any insurance claims involving damages caused or alleged to have been caused by Hurricane Katrina in the State of Mississippi." It is undisputed that Scruggs had in his possession the exact documents that fell within the scope of the injunction and that were and are the whole subject of the controversy. Instead of complying, Scruggs promptly sent the documents to Hood for the calculated purpose of ensuring noncompliance with or avoidance of the injunction's clear first paragraph. Scruggs's motive seems clear from the undisputed facts. Even after Hood "voluntarily" sent the documents to counsel for Renfroe at Scruggs's request, Scruggs wrote to Hood requesting another copy of the same documents for himself and ostensibly for the Scruggs Katrina Group. Scruggs is

an experienced attorney and an officer of the court. His brazen disregard of the court's preliminary injunction is precisely the type of conduct that criminal contempt sanctions were designed to address.

Scruggs argues that he did not violate the injunction because the injunction, as he interprets it, contains an express carve-out for law enforcement. To read the preliminary injunction to permit Scruggs to deliver the documents to Hood rather than to counsel for Renfroe is such a strained construction and so contrary to the injunction's clear terms as to lack any credibility whatsoever. It unduly blurs the distinction between the injunction's first and second paragraphs. It deems the words "disclose," "use," and "misappropriate" in the second paragraph to be synonymous with the word "deliver," even though "deliver" is the word that the court carefully chose for the first paragraph. Moreover, Schloemer's December 12, 2006 letter, which Scruggs says was a followup to his December 8, 2006 conversation with Hood, states that Hood's office was "not comfortable that the protective measures put in place by the Court will be effective in keeping these documents out of the grasp of State Farm." If Hood and Scruggs really thought that the injunction permitted Scruggs to do what he did, why did Hood believe that the protective measures in the injunction were insufficient? If that truly was Hood's and Scruggs's interpretation, why did Hood not instead send a letter to Scruggs

requesting delivery of the documents "as expressly permitted by the protective measures built into the injunction"? The substance of the December 12, 2006 followup letter from Hood's office is fundamentally at odds with Scruggs's testimony.

In the alternative, Scruggs argues that he was performing a public service by sending the documents to Hood instead of to counsel for Renfroe because he "had no doubt" that Renfroe's counsel would make the documents available to Renfroe or to State Farm, which in turn would interfere with Hood's criminal investigation of State Farm. March 19-20 Hr'g Tr., at 198:3-11. Taking Scruggs's word for it, he was arrogating to himself the right to substitute his judgment for the court's judgment. That spells "defiance." The court has two other reactions to Scruggs's argument, neither of which is particularly relevant to whether Scruggs violated the injunction, but reactions nevertheless. First, the court very deliberately included a protective order in the preliminary injunction to ensure that the documents would be delivered to Renfroe's counsel only, not to Renfroe or to State Farm, rendering Scruggs's illusory concern unfounded. Second, even if the court had not issued a protective order with the preliminary injunction, and even if Renfroe's counsel had promptly disclosed the documents to State Farm, the court does not understand how this would have jeopardized a criminal investigation of State Farm. Unless, as Renfroe has hinted at, Scruggs and Hood had teamed up to

bully State Farm into civil and criminal settlements by telling State Farm that they had 15,000 inculpatory documents but not allowing State Farm to see them, the court does not see why it was worth it to Scruggs to risk contempt. The database from which the documents were printed was still in the possession of Renfroe and/or State Farm.

Scruggs next argues, based on the following November 14, 2006 colloquy between the court and Renfroe's counsel, that Renfroe consented to his delivery of the documents to Hood:

> The Court: So you are willing to stipulate that the defendants' sharing of private information to a criminal investigation is not a violation of any obligation that they owe to the plaintiff?
>
> Ms. Stanley: Renfroe stipulates that the giving of information and documents to a government investigator conducting any kind of investigation is not a violation of their contract.
>
> The Court: All right. And would not be either a contractual violation or a tort?
>
> Ms. Stanley: Agreed.
>
> The Court: Or a violation of any fiduciary obligation arising out of the relationship?
>
> Ms. Stanley: Agreed.

This colloquy took place shortly before the court issued the preliminary injunction. It does not establish that Renfroe consented to Scruggs's delivery of the documents to Hood one month later, after the injunction was issued. And even if it did prove consent, Renfroe is not in a position to consent to noncompliance

with this court's orders.

Scruggs consistently emphasizes that he reserves his contention that he is not subject to the preliminary injunction and/or to the jurisdiction of this court. On this subject the court maintains the position it expressed in its memorandum opinion of January 19, 2007. Scruggs testified that he became defendants' attorney in February 2006, and the later-entered preliminary injunction expressly applied to defendants' agents and attorneys. Application of the injunction to Scruggs as an attorney of defendants is entirely consistent with the scope of injunctions as described in Rule 65(d), Fed. R. Civ. P. The case *Doctor's Associates, Inc. v. Reinert & Duree, P.C.*, 191 F.3d 297, (2d Cir. 1999), to which Scruggs repeatedly refers to argue that he is not subject to the preliminary injunction (and which is not binding on this court) is clearly distinguishable for this reason in addition to the reasons expressed in the court's January 19, 2007 memorandum opinion.

With respect to the Rigsbys themselves, the court does not believe that there is evidence to prove that either of them engaged in conduct that constitutes a basis for punitive or criminal sanctions. They could be in criminal contempt only if held vicariously liable as agents or confederates of Scruggs. They certainly were not the brains of the injunction-avoidance schemes. After they gave the documents to Scruggs they were, in effect,

controlled by him. Perhaps the Rigsbys ought to have been more proactive and taken more immediate action when the injunction was issued. Perhaps they should have done more than to make one or two phone calls to Scruggs. Perhaps their present counsel should have affirmatively demanded that Scruggs promptly return the documents when he spoke to Scruggs between December 8, 2006 and December 12, 2006. All of these considerations may be relevant if and when the court evaluates whether defendants' efforts were reasonable for purposes of considering compensatory civil contempt sanctions. *See United States v. Roberts*, 858 F.2d 698 (11th Cir. 1988). But the fact remains that the Rigsbys themselves did not have possession of the documents on or after December 8, 2006, and this should preclude a jury finding that they knowingly or willfully violated the terms of the preliminary injunction.

Renfroe argues that Scruggs Katrina Group member Don Barrett's offer to provide additional documents to Renfroe, and the Scruggs Katrina Group television advertisement featuring Kerri Rigsby, constitute further evidence of contumacious conduct that calls for punitive sanctions. The court disagrees. There is no evidence that the documents Barrett offered "refer or relate to any insurance claims involving damages caused or alleged to have been caused by Hurricane Katrina in the State of Mississippi" and therefore fall within the scope of the injunction. The television advertisement, in which Kerri Rigsby says that she "know[s]

firsthand how far [insurance companies] will go to avoid paying your claim," does not constitute disclosure, use, or misappropriation of any documents covered by the injunction. Moreover, the television ad does not appear to compromise or even implicate Renfroe or State Farm trade-secret information, which is, of course, the centerpiece of this lawsuit.

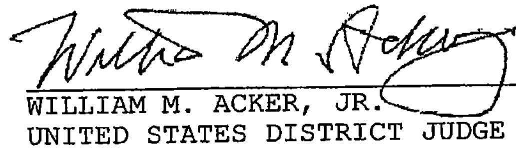
Conclusion

The court will not at this time impose civil contempt sanctions against defendants or against Scruggs. It will permit Renfroe to renew its request for compensatory sanctions after the Eleventh Circuit determines the validity of the December 8, 2006 preliminary injunction. Because the court will not now impose civil sanctions, the Rigsbys's and Scruggs's motions to strike certain evidentiary submissions filed by Renfroe will be deemed moot, except to the extent that they are directed at evidence in connection with the referral of Scruggs for criminal contempt proceedings, as to which defendants' motion to strike will be denied. The court will not refer Cori Rigsby or Kerri Rigsby for prosecution for criminal contempt.

In accordance with Rule 42(a), Fed. R. Crim. P., the court will formally request that an attorney for the government prosecute Scruggs's contempt. If the government declines this request, the court will appoint another attorney to prosecute the contempt. Because in the context of criminal contempt proceedings the

undersigned has acted as the functional equivalent of a grand jury for finding probable cause, he will have the criminal contempt proceedings against Scruggs reassigned to another judge.

DONE this 15th day of June, 2007.



WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

cc: Alice Martin
United States Attorney's Office
Northern District of Alabama

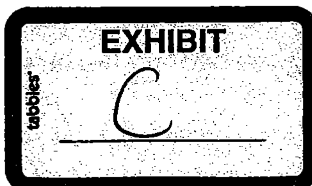
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THOMAS C. and PAMELA McINTOSH,	:	
Plaintiffs,	:	CIVIL ACTION NO. 1:06-CV-1080-LTS-RHW
- against -	:	
STATE FARM FIRE & CASUALTY CO. and FORENSIC ANALYSIS & ENGINEERING CO., et al.,	:	
Defendants.	:	

DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S MOTION TO DISQUALIFY ATTORNEY RICHARD F. SCRUGGS, THE SCRUGGS LAW FIRM, P.A., AND THE SCRUGGS KATRINA GROUP

Comes now Defendant State Farm Fire and Casualty Company ("State Farm"), and hereby moves this Honorable Court for an order to disqualify Plaintiffs Thomas C. and Pamela McIntoshes' attorney, Mr. Richard F. Scruggs, his law firm, the Scruggs Law Firm, P.A., and the Scruggs Katrina Group. As grounds for this motion, State Farm states as follows:

1. The unvarnished facts of this case make plain that, in conjunction with his representation of the McIntoshes, attorney Richard F. Scruggs ("Scruggs") committed clear violations of several state and national ethical rules and should, at a minimum, be disqualified from this case. In particular, Scruggs's own testimony establishes conclusively that: (i) since at least February 2006, Scruggs has had regular, unauthorized *ex parte* contact with two State Farm "insiders," Cori and Kerri Rigsby (the "Rigsby Sisters" or "Sisters"); (ii) the Rigsby Sisters stole thousands of State Farm's confidential documents and gave them to Scruggs for use in his litigation against the company; and (iii) the Rigsby Sisters are now being generously



compensated by Scruggs to serve as "trial consultants" in his litigation against State Farm and other insurance companies. This conduct violates Rules 4.2, 4.4, and 8.4 of the Mississippi Rules of Professional Conduct.

2. Cori and Kerri Rigsby are former employees of E.A. Renfroe and Co., Inc. ("Renfroe"), a firm that provides insurance adjusters to insurance companies following a catastrophic event. The Rigsby Sisters were both employed by Renfroe to adjust and mediate claims by State Farm's policyholders in the aftermath of Hurricane Katrina, and had virtually plenary access to State Farm confidential policyholder information and claim files. Kerri Rigsby was the Renfroe manager who accompanied and supervised the Renfroe adjuster who inspected and adjusted the McIntoshes' claim that is the subject of this lawsuit.

3. By their own account, the Sisters surreptitiously began copying State Farm's confidential documents and funneling them to Scruggs for use in his civil litigations against State Farm as early as February 2006. In fact, one of the first documents they gave to Scruggs was an original engineering report prepared in conjunction with the McIntoshes' claim. The Rigsby Sisters' clandestine activities went on for several months, culminating in what they have referred to as a "data dump" – a weekend event in which the Sisters enlisted the help of several friends and printed out or copied a total of some 15,000 pages of State Farm documents and claim files, which they then handed over to Scruggs. Scruggs, in turn, rewarded the Sisters for their cooperation by paying them an annual salary of $150,000 each to serve as "litigation consultants" for him and his associates at the Scruggs Katrina Group (the "SKG").

4. Notably, in a separate lawsuit brought against the Sisters by Renfroe, captioned *E.A. Renfroe & Co., Inc. v. Moran*, No. 2:06-cv-01752-WMA, 2006 WL 4458009 (N.D. Ala.

Sept. 1, 2006), a federal court in Alabama has already found this conduct improper. *See id.* at *1. There, Judge William M. Acker Jr. found that "[t]here can be no doubt that Moran[1] and Rigsby violated important and critical terms of their contracts with Renfroe when they copied State Farm's records and turned them over to Scruggs." Mem. Opinion and Preliminary Injunction, dated Dec. 8, 2006 ("12/8/06 *Renfroe* Order," attached as Exhibit 2 to Mem.), at 10 (footnote added). The court issued a preliminary injunction, which required Scruggs and the Sisters "to deliver forthwith" to Renfroe's counsel all of the pilfered documents and to stop using them. *Id.* at 13-14. Judge Acker further found that the Rigsbys acted "upon advice of counsel [presumably Scruggs]," *id.* at 8 (alterations in the original), and that "it is apparent that they are all three now engaged in a cooperative effort," *id.* at 9.

5. On June 15, 2007, Judge Acker found that there was ample evidence that Scruggs willfully violated the court's preliminary injunction and formally requested that the United States Attorney for the Northern District of Alabama prosecute Scruggs and his law firm for criminal contempt. *See* Mem. Opinion dated June 15, 2007 ("6/15/07 *Renfroe* Order," attached as Exhibit 3 to Mem.) at 1-2, 25-26. The court explained that "[Scruggs's] brazen disregard of the court's preliminary injunction is precisely the type of conduct that criminal contempt sanctions were designed to address." *Id.* at 20.[2]

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[1] Cori Rigsby was formerly known by her married name, Cori Rigsby Moran. She is now divorced and goes by her maiden name. *See* Deposition of Cori Rigsby ("C. Rigsby Dep.") at 12:21-25. All pertinent portions of C. Rigsby Dep. are attached as Exhibit 1 to State Farm's Memorandum of Law in Support of Defendant's Motion to Disqualify Mr. Richard F. Scruggs, the Scruggs Law Firm, P.A., and the Scruggs Katrina Group ("Memorandum" or "Mem.").

[2] *See also* June 15, 2007 Order issued in *Renfroe*, attached hereto as Exhibit 4; January 19, 2007 Order issued in *Renfroe* (finding sufficient evidence "to suggest that Scruggs, as defendants' agent or attorney, knowingly violated and/or permitted or helped defendants to violate this court's [injunction]"), attached to Memorandum as Exhibit 5.

6. Scruggs's conduct violated several local and national ethical rules and standards. First, Mississippi Rule of Professional Conduct 4.2 prohibits attorneys from *ex parte* communications with represented parties. As managers and adjusters for Renfroe working exclusively on State Farm matters, the Rigsby Sisters had the authority to speak for State Farm in their claims handling and mediation/litigation duties, and thus clearly fall under the definition of "represented parties." Scruggs admits that he had many unauthorized *ex parte* conversations with them over the course of several months.

7. Second, Scruggs's conduct violates Mississippi Rule of Professional Conduct 4.4, which prohibits a lawyer from using methods of obtaining evidence that violate the legal rights of a third party, and Mississippi Rule of Professional Conduct 8.4, which prohibits an attorney from engaging in conduct involving dishonesty or deceit or that is prejudicial to the administration of justice. The *Renfroe* court has already found that Scruggs and the Sisters clearly violated the legal rights of a third party – Renfroe – by "engag[ing] in a cooperative effort" to misuse confidential information. *See* 12/8/06 *Renfroe* Order at 9. And Scruggs's blatant use of stolen State Farm documents in lawsuits where he represents plaintiffs against State Farm – including this one – has grossly violated State Farm's legal rights as well.

8. Third, hiring the Rigsby Sisters – whom Scruggs has repeatedly described as material witnesses whose testimony he intends to offer against State Farm – as "litigation consultants" violates Rules 4.2, 4.4, and 8.4, and most assuredly creates the appearance of impropriety in derogation of Canon 9 of the Model Code of Professional Responsibility.

9. Fourth, Scruggs's concurrent representation of the Rigsby Sisters and the Plaintiffs violates Mississippi Rule of Professional Conduct 1.7, which prohibits lawyers from

representing clients when doing so would be adverse to, or would materially limit, their representation of another client.

10. Fifth, Scruggs must be disqualified under Mississippi Rule of Professional Conduct 3.7, which prevents a lawyer from representing a party in a proceeding in which the lawyer is likely to be a necessary witness. Here, Scruggs has unique firsthand knowledge regarding crucial, potentially exculpatory facts that bear directly on the McIntoshes' claims against State Farm.

11. Finally, it is important to underscore that this motion is *not* about preventing Plaintiffs from "obtain[ing] discovery regarding any matter, not privileged, that is relevant to the[ir] claims." Fed. R. Civ. P. 26(b)(1). The Federal Rules of Civil Procedure provide Scruggs with ample tools to obtain relevant documents and question witnesses regarding Plaintiffs' claims. Scruggs chose to ignore the Federal Rules, opting instead to chart a path that is clearly proscribed by the Mississippi Rules of Professional Conduct. As one court observed granting disqualification under analogous facts, "[t]he integrity of the justice system is at risk unless a stand is taken against conduct of the sort that occurred here."[3]

12. This is also not a motion that State Farm makes lightly. However, in the course of this litigation, deposition testimony, public statements, and other evidence make it abundantly clear that Scruggs has committed serious and repeated ethical violations and traduced the Federal

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[3] *Camden v. Maryland*, 910 F. Supp. 1115, 1123 (D. Md. 1996).

Rules. Given these flagrant violations, State Farm's counsel is duty-bound to bring these issues to the attention of the Court.[4]

13. To assist the Court in evaluating Scruggs's conduct in this matter, State Farm has retained Professor Charles W. Wolfram, who is a nationally-recognized expert in the field of professional responsibility and ethics. Among his many other writings in the field, Professor Wolfram is the author of the treatise MODERN LEGAL ETHICS. He also served as Chief Reporter for the American Law Institute's RESTATEMENT OF THE LAW GOVERNING LAWYERS. After reviewing the record evidence, Professor Wolfram concluded:

> In summary, it is my considered expert opinion that Mr. Scruggs blatantly, seriously, and repeatedly departed from the standard of conduct that would be followed by a lawyer of ordinary care and prudence in dealing with clearly confidential and privileged information possessed by the Rigsby Sisters as former confidential agents of State Farm. Mr. Scruggs' course of conduct warrants his disqualification from further participation in this matter. Moreover, Mr. Scruggs' extensive sharing of State Farm confidential documents and other information obtained from the Rigsby Sisters with all other members of the SKG requires that those other lawyers and their law firms also be disqualified.

Decl. of Charles W. Wolfram ¶ 3.

14. In short, Scruggs admits that he: (i) engaged in unauthorized *ex parte* communications with the Rigsby Sisters; (ii) hired the Rigsby Sisters as "litigation consultants"; (iii) received stolen confidential documents from them; (iv) continues to represent claimants against State Farm and the Sisters simultaneously; and (v) has firsthand knowledge regarding material facts in this case. Based on these admissions, disqualification of Scruggs, his law firm, and the SKG is more than warranted in this case.

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[4] *See* Mississippi Rule of Professional Conduct 8.3 (1987) ("A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

WHEREFORE, for these reasons and the reasons set forth in State Farm's Memorandum, State Farm respectfully moves this Honorable Court to enter an order to disqualify Mr. Richard F. Scruggs; his law firm, the Scruggs Law Firm, P.A.; and the Scruggs Katrina Group, and to prohibit Plaintiffs from using any information or documents obtained through the *ex parte* communication with the Rigsby Sisters.

Dated: June 19, 2007

Respectfully submitted,

/s/ John A. Banahan

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CERTIFICATE OF SERVICE

I, **JOHN A. BANAHAN**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that I have this date electronically filed the foregoing Motion to Disqualify Attorney Richard F. Scruggs, The Scruggs Law Firm, P.A. and the Scruggs Katrina Group with the Clerk of Court using the ECF system which sent notification of such filing to the following and further that I this day mailed, postage prepaid, a true and correct copy of the foregoing to:

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THIS the 19th day of June, 2007.

s/John A. Banahan
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