

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

THOMAS C. and PAMELA McINTOSH

PLAINTIFFS

V.

NO. 1:06cv1080-LTS-RHW

STATE FARM FIRE & CASUALTY COMPANY,
FORENSIC ANALYSIS & ENGINEERING CORPORATION,
and E. A. RENFROE & COMPANY, INC. and
DOES 1 THROUGH 10

DEFENDANTS

**REPLY IN SUPPORT OF OBJECTION OF NON-PARTIES RICHARD F. SCRUGGS
AND D. ZACHARY SCRUGGS TO MAGISTRATE JUDGE’S ORDER [Docket No. 1194]**

Non-parties Richard F. Scruggs and D. Zachary Scruggs (the “Scruggses”) submit the following Reply to the Response of Defendant State Farm Fire & Casualty Insurance Co. (“State Farm”) to the Scruggses’ Objection [Docket No. 1201] to the Magistrate Judge’s Order of May 15, 2008 [Docket No. 1194].¹ In support of their Objection, the Scruggses state as follows:

1. The Magistrate Judge erred as a matter of law in failing to recognize the Scruggses’ invocation of their constitutional privilege against self-incrimination. State Farm’s arguments as to the Scruggses’ pending sentencing in the Northern District of Mississippi (i.e., that a guilty plea removes any further risk of self-incrimination) is legally incorrect, and ignores the fact that the Scruggses’ Fifth Amendment rights remain intact through sentencing. *See* Scruggses’ Objection, at 9. The production of documents in this forum could also expose the Scruggses to possible further criminal contempt proceedings in Judge Acker’s courtroom.

Indeed, Richard Scruggs has already been the subject of one such prosecution, and, as non-

¹In their initial Objection at page 12, the undersigned stated that Scruggs Law Firm had already noted that no documents that would be responsive to Request Number 9 were in its custody. In fact, the Scruggs Law Firm may possess some documents responsive to Request Number 9. The statement in the Objection indicating to the contrary was incorrect.

parties, the Scruggses should not be put to risk of further prosecution, especially as to those documents that are available from other sources. This is precisely the sort of undue burden to which the Scruggses initially objected, and which the Magistrate Judge's prior order did not properly address.

2. Turning specifically to Request Number 17, the Order of the Magistrate Judge appears to call for production of documents that may be subject to Judge Acker's injunction. The Scruggses continue to object to any order that could put them in violation of Judge Acker's December 8, 2006 preliminary injunction order. Judge Acker's preliminary injunction specifically required the Scruggses to return the relevant documents to Defendant Renfroe and "not to further disclose" any documents "downloaded, copied took or transferred from the premises, files, record or systems of Renfroe or any of its clients, including, but not limited to State Farm Insurance Company" *See* Exhibit "B" to Scruggses' Objection, at 14. Judge Acker entered a protective order describing the persons who may view the documents, requiring his consent for further copying of the documents, and providing that "[n]one of the Documents . . . may be used except in connection with this case . . .". *See* Consent Order, attached hereto as Exhibit "F". The Scruggses should not be placed in the untenable position of responding to a document request that they reasonably believe seeks documents that, if produced, could subject them to further contempt proceedings.

3. Moreover, the Magistrate's Order with respect to Request Number 17 (as the Scruggses argued in their initial Objection) creates an unnecessary burden on the Scruggses to re-produce documents that have already been produced to Renfroe in the Alabama action. Pursuant to Judge Acker's Injunction, Richard Scruggs and the Scruggs Law Firm have turned over to Renfroe all hard copy documents obtained from State Farm's offices or computers.

Moreover, Richard Scruggs and the Scruggs Law Firm turned over in December 2007 paper printouts of all electronic versions of these documents that remain on the Scruggs Law Firm's systems. Thus, all documents subject to Request Number 17 are in the hands of Renfroe, a defendant in this action, and the only documents responsive to Request Number 17 in the possession of the Scruggses are the electronic versions of the documents produced in December 2007.²

4. Rather than require the Scruggses to re-review and re-produce documents, State Farm should get the documents it wants from Renfroe, or State Farm should avail itself of the procedure established by Judge Acker to obtain copies of the documents. This is not a procedure without precedence, as the Mississippi Department of Insurance has already been granted access to the documents upon application to Judge Acker. *See* Order Granting Access, attached hereto as Exhibit "G". State Farm has made no attempt to request these documents from Judge Acker, and such a request would not prejudice it at all. If, as State Farm claims, it is "crucial" that the documents sought through its subpoenas are produced for use in defending against the McIntoshes' claims – and not necessarily produced *from the Scruggses* – the undue burden of production should not be placed upon the Scruggses.

5. The Magistrate Judge clearly erred in failing to recognize the undue burden of production upon the Scruggses, especially in light of the fact that State Farm may seek the exact same documents from Renfroe or apply to Judge Acker for a copy of the documents pursuant to

² As counsel for Richard Scruggs and the Scruggs Law Firm explained to Renfroe at the time of the December 2007 production, because of then-pending indictments in the Northern District of Mississippi, Scruggs and the Scruggs Law Firm did not delete electronic versions of documents subject to the injunction that existed on its computer system. Thus, paper copies were produced to Renfroe, but the electronic copies remained -- and remain -- on the Scruggs Law Firm's computers. These electronic documents are the only documents responsive to Request Number 17 of which the Scruggses are aware.

the provisions of the protective order entered in the *Renfro* matter. To be clear, the Scruggses would not oppose either of these methods of discovering the information. State Farm's desire for the Scruggses to produce documents does not overcome the burden on the Scruggses of re-producing these documents or override their Fifth Amendment rights. The Scruggses' assertion of their Fifth Amendment rights in response to State Farm's subpoenas is based on a genuine concern about the use of the Scruggses' production of responsive documents as a basis for increased criminal sanctions or additional criminal contempt prosecutions.

6. Although the Magistrate Judge was aware of the changed circumstances brought about by this Court's April 4 Order, the Order from which the Scruggses appeal does not take into account those changed circumstances. In its April 4 Order, this Court disqualified the Rigsbys as witnesses and excluded from evidence any documents obtained by the Rigsbys. Therefore, the categories of documents regarding the Rigsbys that the Magistrate Judge ordered produced are no longer relevant.

7. The only concrete basis articulated by State Farm in support of the discoverability and possible relevance of the documents it now seeks from the Scruggses is on this very narrow point: these documents, State Farm argues, will lead to discovery of evidence "concerning chain of custody". Response, at 8. This tenuous claim does not outweigh the burden to the Scruggses arising from, among other things, the risk of self-incrimination and a burdensome review of documents that it has already produced and that are available from other parties. At the very least, if the Court affirms any part of the Magistrate Judge's Order, it should limit the scope of production, and of any depositions that may be taken of the producing witnesses, to the chain-of-custody question only – the sole basis for which State Farm now argues that these non-parties should be forced to produce the requested documents.

8. Aside from its chain-of-custody argument, State Farm states that it “wonder[s]” what documents are in the possession of Scruggses. Response, at 1. State Farm may not obtain documents from the Scruggses merely to satisfy its curiosity. The Magistrate Judge specifically excluded many of the categories of documents in the prior subpoena requests, and this Court has clearly changed the scope of relevant documents by its April 4 Order. State Farm has failed to show that production of these documents is reasonably calculated to lead to the discovery any new, *admissible* evidence. State Farm’s repeated reminders that it eliminated most of its original document requests do not validate the remainder of the requests. If anything, its recognition that substantially all of its document requests were rendered moot by the Court’s Order of April 4 lends credence to the Scruggses’ Objection.

9. State Farm tries to avoid this issue, but its May 9 letter not only reiterated its current position that it needed the Court to rule in its favor on production of several (but not all) documents that it sought previously by subpoena; it argued why its now-reduced requests remained valid. *See Ex. “D” to Scruggses’ Objection*, at 1-2 [Docket No. 1201-4]. Because State Farm failed to copy the Scruggses’ attorneys (former or present), the Scruggses had no opportunity to respond to State Farm’s arguments. Furthermore, State Farm’s letter included citations to the Magistrate Judge’s Order of December 11, 2007, and to this Court’s Order of January 9, 2007. Both of those Orders were issued before this Court’s April 4 Order, which disqualified attorneys and witnesses and excluded evidence, and which surely had an impact on the document request. State Farm did not reference this Court’s April 4 Order, and, because the Scruggses did not receive State Farm’s letter, the Scruggses did not have an opportunity to argue the effect of this Court’s April 4 Order.

FOR THESE REASONS, and the reasons contained in the Scruggses’ Objection to the

Magistrate Judge's Order, Non-Parties Richard F. Scruggs and D. Zachary Scruggs respectfully request this Court to set aside the Magistrate Judge's Order of May 15, 2008, to the extent that Order requires production of documents by the Scruggses.

THIS, the 7th day of June, 2008.

Respectfully submitted,

RICHARD F. SCRUGGS AND ZACHARY SCRUGGS

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CERTIFICATE OF SERVICE

I, Paul B. Watkins, Jr., one of the attorneys for non-parties Richard F. Scruggs and D. Zachary Scruggs, hereby certify that I have this date electronically filed the foregoing document with the Clerk of the Court using the ECF system, which sent notification of such filing to all counsel of record.

THIS, the 7th day of June, 2008.

Paul B. Watkins, Jr.
PAUL B. WATKINS, JR.