IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	:	

STATE FARM'S REPLY TO THE SCRUGGSES' AND PLAINTIFFS' RESPONSES TO MOTIONS TO COMPEL (RE: DOCS. 1239 & 1240)

The Scruggses, through their counsel's letter response dated July 30, 2008, attached hereto as Ex. 1, "inform the Court that [they] vigorously oppose the relief requested" by State Farm in its motions to compel (Docs. 1239 & 1240). Plaintiffs, through their counsel's letter response dated July 30, 2008, attached hereto as Ex. 2, echo some of the Scruggses' arguments and assert others that patently ignore both the prior motion practice leading up to the Scruggses' depositions and this Court's prior Orders related thereto. The Scruggses' and Plaintiffs' assertions are without foundation and misguided on multiple levels. State Farm will address them in the order they appear in their responses.

State Farm's Requests for Expedited Briefing and Relief

The Scruggses erroneously assert that there is "no support" for State Farm's request for expedited relief and that "State Farm has not requested an expedited briefing schedule …." Ex. 1 at 1.

First, State Farm explained the reasons for its request for expedited relief – *i.e.*, those associated with the impending incarceration of the Scruggses, *see* Doc. 1239 at 6, ¶¶ 8-9; Doc. 1240 at 6, ¶¶ 8-9 – as this Court recognized when it noted that "State Farm is attempting to conclude the depositions with dispatch since both Richard and Zachary Scruggs are scheduled to soon report to federal correctional

institutions to begin serving their sentences for the crimes to which each has pled guilty," July 29 Order (Doc. 1238) at 1, and that "State Farm advised it filed the pleadings as emergency motions as it desires to conclude the depositions before the deponents report to federal correctional institutions to begin serving their sentence." July 24, 2008 Order (Doc. 1231) at 1. The Scruggses' assertion, which Plaintiffs join, that there is "no factual support for this claim," Ex. 1 at 2, because Fed. R. Civ. P. 30(a)(2)(B) "allow[s] depositions to be taken in prison," *id.*, *see* Ex. 2 at 1, completely misses the point. This issue is not whether it is possible to take depositions in prison, but whether the ability to do so will be delayed. It will. Unfortunately, delay stacked upon more delay seems to be the Scruggses' objective.

Second, State Farm requested an expedited briefing schedule, as expressly set forth in Mr. Mullen's affidavit, *see* Doc. 1239-3 at 2, ¶¶ 5-6; Doc. 1240-3 at 2, ¶¶ 5-6, which the Scruggses have read. *See* Ex. 1 at 2 (addressing "Mr. Mullen's current affidavit").

The Scruggses' Complaints of Delay, Lack of Specificity, and Lack of Case Law Are Misplaced

Incredibly, the Scruggses have the temerity to suggest that "State Farm's motion represent its first communication of any detail to the Scruggses of its complaints regarding the depositions, despite having a week to do so in the case of Zach Scruggs, and nearly as long for Richard Scruggs." *Id.* at 1. On July 22, 2008 – ***one day after*** Zach Scruggs' deposition and ***the day of*** Richard Scruggs' deposition – State Farm sought emergent relief to file its motions to compel the Scruggses under a temporary interim seal, pending the Scruggses' yet-to-be-filed motion to seal their depositions and the Court's ruling thereon. *See* Docs. 1228 & 1229. State Farm could not simply file its motions to compel due to the agreement that the Scruggses sought and which was given to them as a courtesy. They should not now be heard to complain.

Despite the Scruggses' feigned protestations of the lack of "specifics," Ex. 1 at 2, or the lack of discussion of "every single question addressed to them," *id.*, or the claim that State Farm has "insufficiently identified its objections to the Scruggses' invocation of objections and privileges," *id.*,

the reasons for those motions are patently obvious and ineluctably clear from State Farm's papers. Beyond stating their names, the Scruggses refused to answer ***any*** questions based on the indiscriminate assertions of putative privileges, as shown in question after question on the attached transcripts that were expressly incorporated into the motions. *See, e.g.*, Doc. 1239 at 1, 3-6, ¶¶ 1, 4-8; Doc. 1240 at 1, 3-6, ¶¶ 1, 4-8. Long before the depositions began, this Court "caution[ed] counsel that claims of privilege will be subjected to close scrutiny." Oct. 1, 2007 Order (Doc. 563) at 3. Neither the Scruggses nor Plaintiffs have met their burden of satisfying the elements of each privilege they asserted, many of which ran squarely counter to the prior rulings of this Court. *See, e.g.*, Doc. 1239 at 1, 3-6, ¶¶ 1, 4-7; Doc. 1240 at 1, 3-6, ¶¶ 1, 4-7. Their current complaints appear to be nothing more than make-weight arguments interposed for purposes of unnecessary delay, harassment, and needless expense.

So, too, State Farm's request for a certification concerning the completeness of the Scruggses' Court ordered document production is motivated by the Scruggses' misplaced attempt to claw back documents as "inadvertently" produced, even though this Court ordered their production. It is also supported by the certification-by-signing requirement of Fed. R. Civ. P. 26(g)(1)(A), under which signing "certifies that to the best of the person's knowledge, information, and belief formed after reasonably inquiry" the disclosure is "complete and correct as of the time it is made," and it is also supported by this Court's inherent authority to enforce its orders. For the further convenience of the Court in connection with these motions, attached hereto as Group Exhibit 3 are the exhibits marked at the deposition of Zach Scruggs other than its Exhibit 14 and attached hereto as Group Exhibit 4 are the exhibits marked at the deposition of Richard Scruggs other than its Exhibit 18.

The Scruggses' complaint that "State Farm cites little case law," Ex. 1 at 2 – while they cite none – glosses over State Farm's invocation of specific Federal Rules and diminishes or overlooks the repeated citations of this Court's prior Opinions and Orders, which are not only case law, but are also

the law of this case. Further, the Scruggses' naked assertion that "State Farm misrepresents the Court's prior rulings as to the scope of the document production," *id.*, is false.

The Scope of the Depositions

While the Scruggses ironically and vaguely allude to "the supposed scope of the depositions," Ex. 1 at 2 – the "supposed scope" concerning their imagined limitation – Plaintiffs expressly but erroneously assert that "the court properly restricted the topics for the deposition to the Scruggses' relationships with the media, third party witnesses, and the allegedly improper acquisition of certain documents," Ex. 2 at 1, and that "the topics of the deposition had been severely limited by the Court …." *Id.* at 2. Those citation-free assertions are wrong and are fashioned out of whole cloth. ***Nothing*** in any of this Court's prior Orders placed any restrictions on the scope of the depositions. *See* Dec. 11, 2007 Order (Doc. 911), *aff'd in relevant part, vacated in part*, Jan. 9, 2008 Order (Doc. 988); May 13, 2008 Order (Doc. 1194), *aff'd*, June 20, 2008 Opinion and Order (Docs. 1211, 1212). Nor did the questions put to the Scruggses veer significantly from the scope of documents produced. The questions were almost completely connected to those subjects and normal follow through, had answers been given. But, as explained more fully below, even that is beside the point.

First, Plaintiffs' motion for a protective order/motion to quash the Scruggses' deposition was "***denied***" by this Court's December 11, 2007 Order, *see* Doc. 911 at 6 (emphasis added), which – following objections filed by Plaintiffs and the Scruggses – Judge Senter "**AFFIRMED** as to the allowance of the Scruggses' depositions" by the Court's January 9, 2008 Order, *see* Doc. 988 at 2 (emphasis in original). Not one word in those Orders restricted the topics for the depositions of the Scruggses, nor was any such relief sought in the underlying motions for protective order/to quash.

Plaintiffs' and the Scruggses' subsequent motions to quash were prompted by document requests in the subpoenas *duces tecum* served on the Scruggses. *See, e.g.*, May 15, 2008 Order (Doc. 1194) at 1. While this Court made clear that "the Defendants can certainly question the Scruggses" about certain

areas as to which this Court quashed the document requests, *see id.* at 9, nothing in that Order limited the scope of the depositions. So, too, while Judge Senter, in affirming this Court's ruling in the wake of the Scruggses' objections, *see* June 20, 2008 Opinion and Order (Docs. 1211, 1212), noted that privilege assertions would not "insulate the Scruggses from giving testimony" on certain topics, Doc. 1211 at 1, "[n]or does the Scruggses' withdrawal as counsel for the plaintiffs make them immune from giving testimony about these documents," *id.* at 2, nothing in that Opinion or its corresponding Order limited the scope of the depositions.

Second, and importantly, in the objections that the Scruggses filed to the May 15, 2008 Order, they explicitly argued that "[a]t 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." Doc. 1205 at 4 (emphasis added). Despite having made the precise argument, without avail, that Plaintiffs and the Scruggses now seek to resurrect, the Court declined to accept it, and held that "[t]he Scruggses' objections will be overruled, and the order of the magistrate judge will, in all respects, be affirmed." June 20, 2008 Opinion (Doc. 1211) at 4.

Despite all of the prior motions for a protective order/to quash filed by Plaintiffs, the Scruggses, and the Rigsbys, and the serial Orders from this Court concerning the depositions of the Scruggses, Plaintiffs now proceed as if they are writing on a clean slate and assert that they "intend to file a Motion for a Protective Order that … limit[s] the scope of the deposition." Ex. 2 at 2. Plaintiffs not only take multiple bites of the apple, they also seem intent on churning it into sauce. Plaintiffs, as well as the Scruggses, have already filed multiple motions for a protective order and have already had a full, fair, and complete opportunity to be heard. Not only did they have the opportunity to raise these same arguments, but these same arguments have also been raised and overruled. They are not entitled to a

"do-over." The prior rulings are the law of this case, made after the expenditure of considerable time and resources by all interested persons and by this Court.

While Plaintiffs assert their private view as to the scope of permissible discovery, the rules provide a broad standard: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense" and "Relevant information need not be admissible at the time of trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Though Plaintiffs disagree with the subject of some questions, State Farm proceeded in good faith and well in conformity with the rules. Nor was its task made any easier by the erection of the Scruggses' stonewall, joined in from time to time by Plaintiffs, which forced State Farm to ask multiple lines of questions without receiving a single substantive answer over the course of two days of depositions, which did violence to the prior Orders of this Court and made a mockery of the deposition process.

The solution to dealing with divergent views over the subject of the questions is a simple and familiar one. These depositions should be taken and completed in accordance with the same rules that govern all depositions: "An objection at the time of the examination – whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition – must be noted on the record, ***but the deposition still proceeds***; ***the testimony is taken*** subject to any objection." Fed. R. Civ. P. 30(c)(2) (emphasis added). Alternatively, while a departure from standard practice, a follow-up deposition can be conducted before a judicial officer. It is beyond serious dispute that the rules are designed to minimize delay and cost and "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Yet, Plaintiffs and the Scruggses seek to stonewall, delay, disregard the rules, ignore and flout the prior Orders of this Court, and again raise the same objections that have already been briefed, considered, and overruled. Their attempts to do so should swiftly be brought to an end.

Third, it is axiomatic that the list of documents one seeks from a witness does not limit the scope of the questioning at a deposition. It is similarly axiomatic that there are different considerations of undue burden or expense that go into the evaluation of making, quashing, or modifying a document request under Fed. R. Civ. P. 45(c)(1) and 45(3)(A)(iv) than those that go into giving an answer to a question at a deposition. The attempt to suggest some sort of discovery equivalence is a false one.

For all the foregoing reasons, and the reasons set forth in State Farm's motions to compel, the motions should be granted in their entirety.

Dated: July 31, 2008

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 on this date electronically filed the foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

DATED, this the 31st day of July, 2008.

/s/ John A. Banahan
JOHN A. BANAHAN

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