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' JOINT RESPONSE (DOC. 1262)
TO MOTIONS TO COMPEL (RE: DOCS. 1239, 1240, 1242)

The Scruggses' response is written as if this case were a blank slate with no past history and no prior rulings from this Court. Despite lip service to the contrary, the Scruggses revert back to their familiar but legally insufficient approach of making blanket and generalized assertions of privilege without ever demonstrating that each element of the asserted privilege is satisfied. Though this Court has "caution[ed] counsel that claims of privilege will be subjected to close scrutiny," Oct. 1 2007 Order (Doc. 563) at 3, the Scruggses have ignored both the letter and the spirit of this Court's prior rulings.

The Scruggses attempt to portray themselves as ordinary lawyers being "assaulted" by unbelievable questions involving improbable events. Yet, in reality, the Scruggses, alone or by enlisting the aid of others, engaged in an extraordinary scheme to spoliate evidence, to manufacture evidence, to influence and corrupt witnesses, and to use "every trick in the book" to prevail in cases brought against State Farm, including this case. The discovery process is designed to seek the truth. The Scruggses are engaging in legal gymnastics to prevent the truth from coming out and to prevent State Farm from marshalling a full defense of the claims in this matter. State Farm merely seeks discovery to which it is entitled and as to which the Scruggses have failed to establish the proper assertion of privilege.

The broad outline of the facts are by now familiar. Hurricane Katrina's unprecedented storm surge levels caused millions in damage to Mississippi residents, many of whom did not have flood insurance. Immediately after the storm, Scruggs, working in concert with Attorney General Hood, launched a challenge to the validity of the water damage exclusion in State Farm's and other insurers homeowners policies. Yet, that approach suffered from the fact that the policy language was previously upheld by the Mississippi courts and was subsequently upheld in Katrina litigation.[1]

Scruggs had other ideas. Reaching for his tobacco playbook, he helped to coordinate and launch a frontal assault on State Farm. Working through "insiders" who later became his paid litigation consultants, he obtained unauthorized access to State Farm's computer system. Documents were stolen. Some have since surfaced, including those downloaded to a "thumb drive" by the Rigsbys' lawyers in Scruggs' trailer.

When he deemed the time was right, Scruggs had his "insiders" appear on ABC's *20/20*. But that was just the beginning. Documents the Scruggses have now produced reveal their ceaseless efforts to exploit the national and local media. Allegations of document destruction were made. Investigations were started at the federal and state level. And, after the *20/20* story, Mr. McIntosh filed this suit, despite stating two months earlier that he was satisfied with the payment he received from State Farm.

Since the lawsuit was filed, State Farm has worked to bring the true facts to light. State Farm's efforts have been met with a continued effort to obstruct discovery. Documents that were requested in discovery, such as the Rigsbys' calendars that would establish when they met with the Scruggses, were mysteriously lost. Despite representations that it would be preserved and maintained, Cori Rigsby's computer suddenly "crashed" under equally mysterious circumstances. Evidence has now come to light

[1] Following Attorney General Hood's proclamation that policy "exclusions to the damage caused by a storm surge, which is the direct consequence of hurricane winds, is unconscionable and illegal, at least here in Mississippi," Jim Hood, *A Policy of Deceit*, N.Y. Times, Nov. 19, 2005, the Fifth Circuit reaffirmed that "Mississippi courts have upheld such exclusions before and after Hurricane Katrina." *Leonard v. Nationwide Mut. Ins. Co*., 499 F.3d 419, 437 (5th Cir. 2007).

that Scruggs employed hackers to try to access State Farm's systems. Additionally, evidence now establishes that the original and infamous "sticky note" on the original engineer report on Plaintiffs' home was taken from State Farm's files by the Rigsbys and was last in their possession.

This evidence raises serious questions that need to be answered. Yet, the obstruction continues. Blanket privileges are raised and overruled by the Court. Despite the rulings, the very same privileges are reasserted at depositions. The questions need to be answered and the truth needs to be laid bare.

For the following reasons, and those detailed in State Farm's prior papers and incorporated herein (Docs. 1239, 1240, 1242), the motions to compel should be granted in their entirety.

I. BLANKET ASSERTIONS OF THE FIFTH AMENDMENT ARE UNTENABLE

Time and again, this Court has ruled that blanket assertions of privilege will not be tolerated. *See, e.g.,* May 15, 2007 Order (Doc. 1194), *aff'd*, June 20, 2008 Opinion and Order (Docs. 1211, 1212); Dec. 11, 2007 Order (Doc. 911), *aff'd in part, vacated in part*, Jan. 9, 2008 Order (Doc. 988). Yet, prior to their Court ordered depositions, counsel for the Scruggses made it quite clear that the Scruggses would not answer ***any*** questions. This conduct alone demonstrates that they never intended to answer any questions and that what now purports to be "the Scruggses' question-by-question invocation of various privileges," Doc. 1262 at 2, is a mere fiction. It also demonstrates that what purport to be their reasons for their question-by-question assertions of privilege are after-the-fact excuses of convenience.

> As the Scruggses' criminal defense attorneys and I have told [State Farm's counsel] in a conversation this morning, the Scruggses do intend to invoke their Fifth Amendment right not to answer State Farm's questions at their upcoming depositions.

Doc. 1262-2 at ECF 2 (letter from Scruggses' counsel to the Court dated July 18, 2008).

> [E]arlier today the Scruggses' counsel conveyed to us their blanket determination that the Scruggses will be invoking the Fifth Amendment privilege in response to every substantive question (even though those questions have not even yet been asked).

Doc. 1262-2 at ECF 6 (letter from State Farm's counsel to the Court dated July 18, 2008). Thus, before a single question was even asked, the Scruggses pronounced their pre-determined position that they would not answer any questions no matter how far removed from any ostensible criminal liability.

One need look no further than the first pages of the Scruggses' appendixes to observe that they continue to make a mockery of the legal process. Their initial and continued assertions of the Fifth Amendment are made in bad faith. For example, the Scruggses frivolously assert that answers to even the following background questions will expose them to criminal prosecution.

2. Q. And what is your current address, please?

3. Q. Have you ever previously given a deposition?

4. Q. Have you ever taken a deposition?

6. Q. The oath that was administered to you was the same oath that you take in a court of law. Do you understand that the proceeding we're about to start is being conducted under penalty of perjury?

7. Q. Your father is Richard Scruggs?

8. Q. Isn't it true that you are a convicted felon?

9. Q. Isn't it true that you were sentenced to 14 months in federal prison for failure to report a conspiracy to corruptly influence a state court circuit judge?

Doc. 1262-14 at 1-2 (re: Zach Scruggs).

2. Please give me your home address.

4. Are you a graduate of the University of Mississippi Law School?

5. Have you, at some time in your life, been admitted to practice law in the State of Mississippi?

6. Have you previously given a deposition in a civil matter?

9. Mr. Scruggs, isn't it true that you are a convicted felon?

10. Isn't it true that you've pled guilty to conspiracy to corruptly influence a state circuit judge?

11. Isn't it true that you have been sentenced for five years in federal prison for conspiracy to corruptly influence a state circuit judge?

Doc. 1262-16 at 1-2 (re: Richard Scruggs). Beyond the fact that such questions do not implicate the Fifth Amendment, questions about their felony convictions for their roles in the bribery of a state judicial officer are permitted by Federal Rule of Evidence 609(a)(1), (2) ("Impeachment by Evidence of Conviction of Crime"), but their unsupported assertions then go on and on. *See* Docs. 1239-2 & 1240-2.

This Court has previously ruled in this case that the Scruggses' assertions of privilege, including the Fifth Amendment privilege against self-incrimination, "have not been made sufficiently specific nor supported by substantial evidence." Doc. 1211 at 2. Finding that the subjects of the requested discovery "do not appear to me to have any bearing on [the dismissed criminal contempt proceeding or] any other criminal proceeding now pending or known to be contemplated," this Court rejected the Scruggses' assertions of the Fifth Amendment privilege as to multiple document requests. *Id.*

Despite this Court's admonition that assertions of the Fifth Amendment privilege should be "sufficiently specific" and "supported by substantial evidence," Doc. 1211 at 2, the Scruggses persist in invoking the Fifth Amendment privilege in blanket fashion. Similarly, their response does not substantiate their assertions of this (or any other) privilege, let alone to the standard that the law demands. Accordingly, this Court should reject their blanket assertions of the Fifth Amendment.

This Court's prior Orders are in full accord with well-settled precedent from the Supreme Court and the Fifth Circuit. "It is well established that the [Fifth Amendment] privilege protects against real dangers, not remote and speculative possibilities." *Zicarelli v. N.J. State Comm'n of Investigation*, 406 U.S. 472, 478 (1972). In order to invoke the Fifth Amendment, the Scruggses "must be faced with ***substantial hazards of incrimination*** from the information sought." *Steinbrecher v. Comm'r*, 712 F.2d 195, 197 (5th Cir. 1983) (emphasis added). "Only as to genuinely threatening questions should his silence have been sustained." *United States v. Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976).

The Scruggses' suggestion that Judge Senter ceded complete control to them over what questions could be answered without any further judicial review – based on their assertion that "Judge Senter's

appreciation that '[w]hether substantive information is obtained [at the depositions] is largely up to the deponents, who are represented by their own counsel on different fronts,' should be respected," Doc. 1262 at 8 (alterations in original); *see also id.* at 2-3 (quoting same language) – is unsound. The Scruggses are ***not*** the final arbiters of whether their Fifth Amendment invocations are proper. "'The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself – his say-so does not of itself establish the hazard of incrimination.'" *Steinbrecher*, 712 F.2d at 197 (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)). Rather, that decision ultimately rests with the court and this Court can and should reject the Scruggses' blanket Fifth Amendment invocations. *See id.* at 196.

In evaluating a claim of Fifth Amendment privilege, a court is to determine "whether the summoned information is incriminating in nature, either on its face or in the context of circumstances that the information is requested." *United States v. Redhead*, 194 F. App'x 234, 236 (5th Cir. 2006). When a question posed does not call for a facially incriminating answer, "the burden of proving that the danger [of self-incrimination] exists lies on the claimant," who must "specify how he would be injured by any specific question or answer." *Steinbrecher*, 712 F.2d at 198 (internal quotation marks, brackets omitted). Indeed, through "clear," "specific," and "particularized" reasons, the witness "must establish more than speculative or generalized allegations of the potential for self-incrimination." *Redhead*, 194 F. App'x at 236-37 & n.1. The Scruggses have failed to do so. Their blanket assertions of the Fifth Amendment are wholly speculative and generalized and must be rejected.

A. <u>The Criminal Contempt Proceeding Is Over and Without Jurisdiction Over the Scruggses</u>

The Scruggses seek to excuse having to answer even a single question by arguing that "[n]early every one of State Farm's deposition questions ... directly implicated" the criminal contempt proceeding in the Northern District of Alabama arising out of the *Renfroe* matter. Doc. 1262 at 16. Even if that assertion were true, as Judge Senter has pointedly noted, the "criminal contempt proceeding … has been

dismissed ….” Doc. 1211 at 2. Nor is there any real risk of further proceedings. In addition to issues concerning the Fifth Amendment’s prohibition against double jeopardy, even before the appointment of the special prosecutors to press those charges, by letter dated July 25, 2007 (Ex. A), U.S. Attorney Alice H. Martin advised Judge Acker that after careful consideration she “decline[d] to prosecute Mr. Scruggs or his firm.” After Judge Acker appointed special prosecutors, Judge Roger Vinson, in what is now a final and binding order, held that the court lacked jurisdiction over the Scruggses for criminal matters. *See United States v. Scruggs*, No. 2:07-cr-325/RV (N.D. Ala. Feb. 29, 2008) (Ex. B). Thus, the Scruggses’ arguments that answers to questions relating to criminal contempt implicate their Fifth Amendment privilege ring hollow.

Nor, contrary to their arguments, was “the Scruggses’ receipt, use, ***and*** disposition of State Farm and Renfroe documents from the Rigsbys … directly related to the criminal contempt allegations leveled against the Scruggses.” Doc. 1262 at 17 (emphasis added). Their “receipt and use” of such documents ranging from as early as late 2005 at least through August 2006 (when the ABC News 20/20 story was broadcast) was ***not*** at issue in the criminal contempt proceedings. Rather, it was the “disposition” of those documents after the December 2006 issuance of Judge Acker’s injunction that was at issue. The Scruggses’ attempt to squeeze “[n]early every one of State Farm’s deposition questions” into the dismissed criminal contempt proceedings, *see* Doc. 1262 at 16, is wholly misplaced.

B. <u>The Scruggses’ Document Production Waives the Fifth Amendment</u>

The Scruggses also erroneously argue that “the Court’s ruling on the Scruggses’ Fifth Amendment objection to producing documents is not binding as to [their] objections to deposition testimony.” Doc. 1262 at 24. The Scruggses misconstrue this Court’s prior Order as well as the law.

To begin with, when this Court overruled the Scruggses’ Fifth Amendment objections to six State Farm document requests, it explained that “the requested documents do not appear to me to have any bearing on [the dismissed criminal contempt proceeding or] any other criminal proceeding now

pending or known to be contemplated." Doc. 1211 at 2. While the Scruggses attempt to narrowly tie this ruling to the document requests, *see* Doc. 1262 at 24, the Court did no such thing. A fair reading of this Court's Order is that the subject matters of the requested documents pose no risk of self-incrimination. Thus, the Scruggses must answer questions on these subjects at their depositions.

The Scruggses' argument that this Court's prior rulings have no effect on their Fifth Amendment objections to deposition testimony rests on the proposition that document production is different from oral testimony. Doc. 1262 at 24. Despite the narrow treatment they attempt to give to the production of their documents, in a case that the Scruggses expressly rely on, *United States v. Hubbell*, 530 U.S. 27 (2000), *see* Doc. 1262 at 13, the Supreme Court held that the collection and production of documents called for by a subpoena was the functional equivalent of answering a series of questions at a deposition.

> Given the breadth of the description of the 11 categories of documents called for by the subpoena, the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions. ***The assembly of literally hundreds of pages of material in response to a request for*** "any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to" an individual or members of his family during a 3-year period, Appendix, *infra*, at 19, ***is the functional equivalent of the preparation of an answer to*** either a detailed written interrogatory or ***a series of oral questions at a discovery deposition.***

503 U.S. at 41-42 (emphasis added). Here, the Scruggses assembled and produced over 5,350 pages of documents, *see* Ex. C, in response to multiple categories of documents, which the Scruggses sought but failed to properly assert the Fifth Amendment. As Judge Senter held, the Scruggses' "blanket" "claims of privilege [including the privilege against self-incrimination] asserted as to the documents in question have not been made sufficiently specific nor supported by substantial evidence" and their blanket assertions of the Fifth Amendment privilege were overruled. Doc. 1211 at 1, 2.

By failing to properly assert (let alone support) the Fifth Amendment on a question-by-question basis when it was incumbent upon them to do so, and by producing thousands of pages of documents, the Scruggses have waived the Fifth Amendment privilege as to the subjects relating to those documents.

In *Hubbell*, the Court noted that, "Entirely apart from the contents of the 13,120 pages of materials that respondent produced in this case, it is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a 'lead to incriminating evidence,' or 'a link in the chain of evidence needed to prosecute.'" *Hubbell*, 503 U.S. at 42. Echoing that language, the Scruggses make clear that the Fifth Amendment privilege "not only extends to answers that would in themselves support a conviction under a federal criminal statute *but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime*." Doc. 1262 at 13 (emphasis in original) (quoting *Hoffman*, 341 U.S. at 486); *see also id.* at 16 (quoting *Hoffman*, 341 U.S. at 486).

Just as the law provides that the Fifth Amendment is waived for matters as to which the witness has testified, *see, e.g.*, *United States v. Benson*, 219 F. App'x 556, 560 (7th Cir. 2007) – the "functional equivalent" of which has already occurred here, *see Hubbell*, 503 U.S. at 41-42 – the law similarly provides that "[d]isclosure of a fact waives the privilege as to details." *United States v. Rogers*, 340 U.S. 367, 373 (1951). Stated somewhat differently, even a "partial" waiver is the equivalent of a "full" waiver and, once released, the genie cannot be put back into its bottle. Thus, the Scruggses' attempt to resurrect the Fifth Amendment privilege as to certain details after it has already been waived as to such matters must fail.

For example, in *United States v. Gwinn*, 2003 WL 23357667 (M.D. Fla. Aug. 15, 2003), a defendant – like the Scruggses – was ordered by the court to respond to certain discovery requests. *Id.* at *1-2. After reviewing the record, the defendant's discovery responses, and submissions to the court, the court held that the defendant had waived the Fifth Amendment privilege as to ten specific subject areas and compelled answers to questions on those topics at a second deposition. *See id.* at *6-8. Similarly, here, the Scruggses produced thousands of pages of materials responsive to State Farm's document requests. *See* Ex. C. Accordingly, the Scruggses have waived any Fifth Amendment

privilege they might have had as to the subject matters of these document requests, which, as State Farm has previously noted, constituted the lion's share of the questions asked. *See* Doc. 1242 at 4. These waivers cover virtually all of the "justifications" that the Scruggses assert for their Fifth Amendment objections, including criminal contempt and the Computer Fraud and Abuse Act, *see* Doc. 1262 at 14-15, n.1,[2] thus permitting answers to all the questions.[3] Indeed, as but one example of the production of documents that squarely implicate the Computer Fraud and Abuse Act as well as Judge Acker's injunction – and, thus, effect a waiver – are a series of emails all bearing the initials or moniker of "ald" or "aldewitt" downloaded in or about April 2006 by Anthony L. DeWitt from the Rigsby's State Farm computer in a meeting held in Scruggs' trailer. *See* Ex. C at SMPH1-000976 to 991.

II. DOCUMENT REQUESTS DO NOT LIMIT THE SCOPE OF DEPOSITIONS

A recurring theme running throughout the Scruggses' papers is the erroneous assertion that the scope of their depositions was somehow limited by State Farm's document requests. *See, e.g.*, Doc. 1262 at 3-6, 27. They could not be more wrong. It is a fundamental fact of civil practice that depositions are often taken on all manner of subjects ***without*** a single document request listed in the deposition notice. Yet, under the Scruggses' view, without any document requests, no questions could ever be asked. While Rule 30(b)(2) allows documents to be requested from non-parties and from parties for production at their depositions, the rule is entirely permissive. Thus, that rule, which addresses the "Notice of the Deposition" and is sub-titled "Producing Documents," provides:

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[2] As revealed by the Scruggses' Exhibit H (Doc. 1262-10), the "other potential criminal prosecutions" that they allude to, *see* Doc. 1262 at 14-15, n.1, are not the subject of any of State Farm's questions. Rather, the "other potential criminal prosecutions" concern questions revolving around reported attempts to corruptly influence a state court judge, in a wholly unrelated matter, arising out of a fee dispute from asbestos litigation. *See* Doc. 1262-10.

[3] The Scruggses argue that in a few instances they asserted the Fifth Amendment out of a concern for potential waiver. *See* Doc. 1262 at 14-15, n.1 (citing *United States v. Yurasovich*, 580 F.2d 1212, 1221 (3d Cir. 1978)). Yet, on its facts, *Yurasovich* is inapposite. There the defendant who disobeyed an order to testify, was held in contempt, and never took the witness stand. *See* 580 F.2d at 1215, 1220. In contrast, here the Scruggses have "taken the stand" and have asserted the Fifth Amendment in response to hundreds of questions. Further, their "accidental waiver" theory would eviscerate the rule that the Fifth Amendment privilege applies only where the witness faces "substantial hazards of incrimination from the information sought." *Steinbrecher*, 712 F.2d at 197.

> ***If*** a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent ***may*** be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

Fed. R. Civ. P. 30(b)(2) (emphasis added).

As State Farm's May 9, 2008 letter to the Court withdrawing certain document requests demonstrates, State Farm narrowed the ***document requests***. Doc. 1201-4. Nowhere did State Farm forfeit its fundamental right to ask questions about subjects for which it was no longer seeking corresponding documents. *See id.* Nowhere – as the Scruggses erroneously assert – has "State Farm ***admitted*** that none of the information sought through its abandoned requests was necessary in its defense of the McIntoshes' claims." Doc. 1262 at 27 (emphasis in original). That statement is just false. So, too, as State Farm previously explained, *see* Doc. 1242 at 7, a far different calculus of undue burden or expense goes into the evaluation of making, quashing, or modifying a document request under Rules 45(c)(1) and 45(3)(A)(iv) than the one that goes into giving an answer to a question at a deposition.

III. THE SCRUGGSES' EXAMPLES OF "HYPOCRITICAL" QUESTIONS ARE WHOLLY MISPLACED

On the first page of their response, as their isolated lead-off cherry-picked example, the Scruggses attempt to shock, distract, and prejudice this Court with unfounded assertions that State Farm merely seeks to harass them with questions about the possibility of an affair with Kerri Rigsby. *See* Doc. 1262 at 1. What the Scruggses fail to mention is that Kerri Rigsby has admitted having affairs with married men involved in handling Katrina claims and that there has been talk of an affair involving one of the Scruggses. *See, e.g.*, K. Rigsby Dep., Vol. II, at 458:16-459:8, 512:9-19 (Ex. D). If the answer was "no," then that was all that need be said.

It is axiomatic that evidence of such an affair is admissible for purposes of demonstrating motive and bias. It is difficult to imagine more relevant evidence of bias than informing a jury that the testimony about another person is being provided by a witness with whom she had an affair. Evidence as to "a witness' motivation for testifying, as well as any other potential incentives for falsification, are

always relevant lines of inquiry." *United States v. Hall*, 653 F.2d 1002, 1008 (5th Cir. 1981). "[P]roof of bias, that is, any evidence of a relationship, circumstance or motivation which might lead a witness to slant, unconsciously or otherwise, his testimony is almost always relevant." *Koch v. Koch Indus., Inc.*, 2 F. Supp. 2d 1385, 1389 (D. Kan. 1998) (quotations omitted).

"Courts generally are 'liberal' in admitting evidence of bias because a jury 'must be sufficiently informed of the underlying relationships, circumstances, and influences operating on the witness to determine whether a modification of the testimony reasonably could be expected as a probable human reaction.'" *Id.* (quoting 4 Jack Weinstein & Margaret Berger, Weinstein's Federal Evidence § 607.04[1] (2d ed. 1997)). That is because "[a] successful showing of bias on the part of a witness would have a tendency to make the facts to which he testifies less probable in the eyes of the jury than it would be without such testimony." *United States v. Abel*, 469 U.S. 45, 51 (1984). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Chislum v. Dep't of Corr.*, 2005 WL 1827950, at *3 (D.N.J. Aug. 2, 2005) (quoting *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974)). The Scruggses cannot seriously dispute that questions designed to discover information about possible bias or motivation are not relevant.

Nor does their second example of Senator Lott withstand scrutiny. *See* Doc. 1262 at 1. Both the Rigsbys and Brian Ford, the author of the original October 12, 2005 engineer report on the McIntosh property, have testified to having been contacted by Senator Lott. *See, e.g.*, K. Rigsby Dep., Vol. II, at 456:21-458:2 (Ex. D); C. Rigsby Dep., Vol. II, at 365:2-367:13 (Ex. E); B. Ford Dep., Vol. II, at 369:10-375:4, 482:18-486:15 (Ex. F). It is no secret that Senator Lott is Dickie Scruggs' brother-in-law and, as Mr. Ford testified, he viewed the call from Senator Lott as having been arranged by Mr. Scruggs to encourage him to try to "help the team" just before Mr. Ford was set to testify before a grand jury. *See* B. Ford Dep., Vol. II, at 370:5-24, 485:16-486:15 (Ex. F).

The third example concerning contacts with the media, *see* Doc. 1262 at 1, is based on extensive documentation produced by the Scruggses, which are replete with emails between Zach Scruggs and multiple members of the media, in which Mr. Scruggs was spinning deposition testimony and other matter. *See* Ex. C at SMPH1-000017 to 723; SMPH1-001340 to 1901; SMPH1-002492 to 2665; SMPD1-000824 to 2367.

The fourth and final example – that of the Scruggses' overall strategy, *see* Doc. 1262 at 1 – is based not only on the Scruggses' infamous tobacco playbook, but also on a statement that Dickie Scruggs made in open court, boasting that they "used every trick in the book, political, public opinion and legal" in their handling of the Katrina litigation. *See* 2/28/07 Hr'g Tr., *Woullard v. State Farm Fire & Casualty Co.*, No. 1:06cv1057-LTS-RHW (S.D. Miss.) at 10:18-20 (Ex. G.)

In short, there was nothing improper about any of these questions. Nor was State Farm's task made any easier by the Scruggses' refusal to answer any question beyond their name, which left the questioner with no capacity or ability to set normal predicates for follow-up inquiry. As a result, the only rational way to proceed was often with the bottom-line conclusions to be accepted or denied. The reason for that lays squarely at the feet of the Scruggses.

IV. THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES HAVE NOT BEEN ESTABLISHED AND THE CONSTANT RE-VISITING OF THIS COURT'S RULINGS SHOULD END

In another case of "deja vu all over again," the Scruggses regurgitate a slew of attorney-client and work product privilege arguments already considered and rejected by this Court. *See* Doc. 1262 at 26-35. Ignoring the prior briefing and rulings in this matter, the Scruggses rekindle their *Shelton/Nguyen* argument that they cannot testify as to the ***facts*** of this case because they are "opposing attorneys" and once represented Plaintiffs as well as the Rigsbys. *See id.* at 26-27. As State Farm previously demonstrated, the reasons for any application of *Shelton* evaporated with the Scruggses' withdrawal. *See* Doc. 898 at ECF 3; Doc. 981 at ECF 4, 7-8. The Court subsequently ordered their depositions, *see* Doc. 911 (denying motion for protective order/to quash), and overruled their objections

to being deposed. *See* Doc. 988. Since their withdrawals, the Scruggses have been disbarred. *See* Mississippi Supreme Court Orders disbarring Richard Scruggs and Zach Scruggs (Exs. H & I).

Since the *Shelton* factors do not apply to former counsel, they certainly do not apply to ex-attorneys. Upon withdrawal, the Scruggses became former counsel and, upon disbarment, they became ex-attorneys. Thus, the reasons for even considering the *Shelton* factors are absent, yet the Scruggses (and Plaintiffs, *see* Doc. 1261 at 1-3, 5-6) continue to assert them, notwithstanding the prior Orders of the Court and notwithstanding their current status. Rather, as previously established, the relevant standard that governs this discovery is that provided under Rule 26(a)(1), which permits discovery of "any nonprivileged matter that is relevant to any party's claim or defense." *See, e.g.*, Doc. 981 at ECF 4.

Nor do their latest assertions of attorney-client or attorney work product withstand scrutiny. It is black letter law that the burden falls squarely on the person asserting a privilege to demonstrate that each and every element of the privilege is satisfied. *See, e.g., In re Grand Jury Proceedings*, 517 F.2d 666, 670 (5th Cir. 1975); *Scott v. Litton Avondale Indus.*, 2003 WL 1913976, at *3 (E.D. La. Apr. 17, 2003).

As a threshold matter, all of ***Plaintiffs'*** myriad assertions at the Scruggses' depositions of attorney-client privilege or attorney work product must be overruled inasmuch as Plaintiffs have failed to respond to this motion. Consequently, they have not established (let alone tried to establish) that each of the elements of the privileges they asserted has been met.

Nor do the Scruggses' conclusory assertions fare any better. Their "burden cannot be met by [an attorney's] 'mere conclusory or *ipse dixit* assertions.'" *OneBeacon Ins. Co. v. Forman Int'l, Ltd.*, 2006 WL 3771010, at *4 (S.D.N.Y. Dec. 15, 2006) (citations and internal quotation marks omitted). Yet, they offer nothing more to satisfy any of the elements (let alone each of them), either in response to the examples cited by State Farm or in response to any of the other instances, all of which were expressly incorporated into the motions. *See, e.g.*, Doc. 1239 at ¶ 7; Doc. 1240 at ¶ 7. So, too, their half hearted assertions that the questions "are ***likely to intrude***" or "***potentially intruded*** upon work product and

attorney-client privileges," Doc. 1262 at 34-35 (emphasis added), fall woefully short of what is required to establish and uphold such privileges.

Illustrating the lengths to which the Scruggses will go to avoid testifying, the Scruggses further assert that "there has been no showing that any of the information sought at the depositions was available only from the Scruggses." Doc. 1262 at 27. In advancing that argument, the Scruggses ignore the fact that Judge Senter overruled this argument when they previously made it, holding that "there is no requirement that any litigant exhaust alternative sources for information in the possession of someone the litigant wishes to depose." June 20, 2008 Opinion (Doc. 1211) at 2.

So, too, despite acknowledging this Court's ruling that the presence of third-parties, such as the Rigsbys' mother or step-father, waives any privilege that might have attached at such meetings with the Rigsbys and their now-former lawyers, *see* May 23, 2008 Order (Doc. 1196) at 1 – the fact of such presence being established by the sworn testimony of the Scruggses' former clients – the Scruggses assert that they are not relying upon such "factual assumptions" in making their objections. Doc. 1262 at 32-33. But they are not "factual assumptions"; they are facts of record in this matter given by their former clients.

So, too, the Scruggses' (and Plaintiffs', *see* Docs. 1242-3 at 2, 1261 at 3) groundless assertion that State Farm is limited "to depos[ing] them regarding topics State Farm and this Court deemed necessary to the defense of the McIntoshes' claims," Doc. 1262 at 1, is wrong. As State Farm recently explained, *see* Doc. 1242 at 4-6, ***nothing*** in any of the Court's prior Orders placed any restrictions on the scope of the depositions. Their motions for protective orders were ***denied***, those rulings were ***affirmed***, and nothing in them limited the scope of the depositions. *See id.* Indeed, the Scruggses' prior attempt to place such restrictions on the scope of the deposition was ***overruled***. *See id.* at 5.

These constant attempts at re-litigating settled rulings in this case – whether by the Scruggses or by Plaintiffs, whether as to the inapplicability of *Shelton/Nguyen*, the inapplicability of the attorney-

client privilege or the work product doctrine, the scope of the depositions, or otherwise – must come to an end.

Likewise, the Scruggses' audacious request that "if the Court determines that the Scruggses' invocation of the Fifth Amendment was not well-taken with respect to particular questions, the Court should specify those questions that they are required to answer rather than order that they respond to questions about particular subject areas or topics," Doc. 1262 at 25, is nothing more than an invitation to further stonewall and delay, and will lead to an endless cycle of motion practice. To this end, the Scruggses advance the disingenuous argument that "[a]n order that specifies the particular questions that the Scruggses are to answer … will in no way prejudice State Farm," *id.* at 26, and they thus seek to receive this Court's imprimatur to refuse to answer a single follow-up question to any or all of those that this Court should order them to answer. Their attempt to inject indeterminate delay into the resolution of this discovery, and ultimately of this case, should be denied.

This case is set for trial on October 6, 2008. It is time for these depositions to be reconvened and long past time for answers to be given. There is no legitimate reason not to have these depositions proceed in the normal manner. Questions are asked, answers are given, and are then followed-up.

From day one, the Scruggses interjected themselves into the ***facts*** of this case in an effort to manufacture fraud where none existed. On numerous occasions, this Court has ordered the Scruggses to provide discovery as to these non-privileged matters, but to no avail. The Scruggses' baseless privilege assertions, stonewalling, and delay should finally end here.

V. STATE FARM HAS STANDING TO COMPEL RESPONSES AND CONFERRED IN GOOD FAITH

In keeping with their litigation strategy, the Scruggses offer several arguments in an attempt to muddy the waters. They claim that State Farm lacks standing to compel responses to questions asked by Renfroe, *see* Doc. 1262 at 9-10, and that State Farm failed to confer in good faith to resolve this dispute. *Id.* These arguments are meritless.

The Scruggses' reliance on *Payne v. Exxon Corp.*, 121 F.3d 503, 510 (9th Cir. 1997), for the proposition that State Farm cannot compel answers to questions asked by Renfroe is misplaced. *See* Doc. 1262 at 9-10. That case based its holding on an outdated version of Federal Rule 37 that allowed only "the discovering party" to move to compel a discovery response. By contrast, as Federal Rule 37(a)(3)(B) reads today, "a party seeking discovery may move for an order compelling" a discovery response. This language is consistent with the Rule's liberal approach to discovery and, specifically, with Federal Rule 26(b)(1), which allows parties to "obtain discovery regarding any nonprivileged matter that is relevant to ***any*** party's claim or defense." (Emphasis added.) Their argument also ignores the fact that State Farm noticed the deposition, was present at the deposition, heard the questions, and heard the refusals to answer. Yet, the Scruggses apparently insist that State Farm must go through the empty and time-wasting exercise of asking the same questions again before it can seek answers to such questions. Such a position stands the objective of the Federal Rules of Civil Procedure – which "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding," Fed. R. Civ. P. 1 – on its head. In any event, Renfroe has fully joined in State Farm's motions to compel. *See* Doc. 1263. But at their peril the Scruggses made a conscious strategic litigation decision not to address any of those questions. Their claims of privilege have been waived and their call for yet more briefing is a tactic designed to gloss over their waiver, to waste the resources of the Court and of the defendants, and to create more delay.

Similarly, the Scruggses' argument that State Farm failed to confer in good faith prior to filing the instant motions is designed only to distract and delay. One need only recall their pre-deposition proclamation that they would not answer a single question, or peruse their deposition transcripts, to appreciate their obstructive behavior. As this Court previously recognized in connection with a motion to compel filed by Plaintiffs where (unlike here) "***no*** good faith certificate accompanied" the motion, denying the motion on such grounds would be "virtually certain" to lead to the re-filing of the motion

"and this litigation would be unnecessarily prolonged." Oct. 17, 2007 Order (Doc. 652) at 2 (emphasis added). Here, a good faith certificate ***was*** filed, but the Scruggses simply quibble with its terms and, in so doing, ignore most of the discussions that proceeded it. *See* Doc. 1262 at 10-11. Nor, as evidenced by the positions the Scruggses continue to take in their response, would any further discussion create a break in the Scruggs tactics. The Scruggses' feigned complaints about the prior efforts should not forestall this Court from reaching the merits of the motions to compel and avoiding unnecessary delay.

For all the foregoing reasons, and the reasons set forth in State Farm's motions to compel and related briefing, the motions should be granted in their entirety. In addition, State Farm respectfully requests that it be awarded its reasonable attorneys fees and costs incurred as a result of the Scruggses' relentless obstructive behavior, which is designed to delay and avoid reaching the truth.

Dated: August 22, 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 22d day of August, 2008.

/s/ John A. Banahan
JOHN A. BANAHAN

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