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

HENRY KUEHN and JUNE P. KUEHN **PLAINTIFFS**

VERSUS **No. 1:08-cv-577-LTS-RHW**

STATE FARM FIRE & CASUALTY COMPANY, et al. **DEFENDANTS**

STATE FARM'S REPLY ON ITS MOTION TO QUASH/FOR PROTECTIVE ORDER (RE: SUBPOENAS OF ITS COUNSEL)

State Farm respectfully submits this reply to Plaintiffs' response [57] to its motion [54] and supporting memorandum [55] to quash/for protective order as to the notices of deposition, subpoenas *duces tecum*, and document subpoenas served by Plaintiffs on State Farm's counsel in this matter. *See* [45], [46], [48], [49], [50], [51], [52].

Plaintiffs freely state that John Minor has already thoroughly testified about his communications with State Farm's counsel, *see* [57] at 6, thus striking a fatal blow to their disfavored attempt to depose opposing counsel. Nor are Plaintiffs entitled to depose opposing counsel by relying on rhetoric and rank speculation. Hyperbole cannot substitute for fact, nor are Plaintiffs entitled to their own private set of facts. The fanciful notion that State Farm's counsel "attempted to introduce impropriety and ambiguity into the appraisal process as to the Kuehns' claim so that later State Farm could claim the appraisal was conducted inappropriately," *id.* at 2, *see also id.* at 5, does not make it so. As Mr. Minor testified, nothing State Farm's counsel did had any impact on the conduct or the outcome of the appraisal. [55-2] at 174:12-16, 175:4-9. Nor does fantasy trump reality. Plaintiffs' conclusory assertion that State Farm's counsel "put themselves in the place they now find themselves by actively attempting to influence the appraisal process … **regardless of how the appraisal was actually conducted**," [57] at 4 (emphasis in original), does not make it so. "How the appraisal was actually conducted" is ***the*** key issue in this dispute. Plaintiffs' attempts to conjure relevance for testimony from State Farm's counsel do not alter that fundamental fact. Nor do Plaintiffs' unsupported and irrelevant assertions satisfy their burden to show that State Farm's counsel are the only source of non-privileged, relevant, and crucial information.

Plaintiffs also appear to be confused about the objections to their document subpoenas. No privilege claims have been asserted over communications between State Farm's counsel and Mr. Minor. Indeed, all such documents have already been produced, as Mr. Minor confirmed. *See* [55-2] at 44:8-15; 115:23-116:25. With respect to the documents over which privilege has been asserted, Plaintiffs offer no basis for challenging even a single privilege designation, let alone any reason for this Court to conduct an *in camera* review of all of the documents listed in the privilege log. With respect to documents post-dating the filing of the present suit, which have been objected to as irrelevant, Plaintiffs have made no showing that they are relevant and discoverable, especially since discovery is currently limited to appraisal issues only. Thus, this Court should grant the motion to quash/for protective order.

I. THIS COURT SHOULD PRECLUDE THE DEPOSITIONS OF STATE FARM'S COUNSEL

Plaintiffs fail to recognize that "depositions of opposing counsel are disfavored generally and should be permitted only in limited circumstances" because taking them "disrupts the adversarial system" and "lowers the standards of the profession." *Nguyen v. Excel Corp.*, 197 F.3d 200, 209, 209 n.26 (5th Cir. 1999) (citing *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)); *accord Wilson, P.A. v. Scruggs, P.A.*, 2003 WL 23521358, at *1 (S.D. Miss. Apr. 10, 2003). Depositions of opposing counsel are not permitted unless the proponent satisfies ***all*** of the following three factors: "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of this case." *Nguyen*, 197 F.3d at 208 (citing *Shelton*, 805 F.2d at 1327); *see also Scruggs*, 2003 WL 23521358 at *1-2. State Farm's counsel is not the only source of any information Plaintiffs may seek. Moreover, any information they possess is not relevant or crucial to the central issues in this case, *i.e.*, the actual conduct and scope of the appraisal and the propriety of the award. Plaintiffs have no basis to depose State Farm's counsel and raised this issue only after State Farm discovered evidence that the appraisal process had been tainted. An order precluding those depositions is warranted.

A. State Farm's Counsel Are Not the Only Source of Information

First, as to the requirement that "no other means exist to obtain the information than to depose opposing counsel," *Nguyen*, 197 F.3d at 208 (citing *Shelton*, 805 F.2d at 1327), Plaintiffs cannot satisfy it. In their response, Plaintiffs freely admit that "counsel for State Farm had done a ***thorough*** direct examination [of Mr. Minor] regarding the issues," [57] at 6 (emphasis added), and – eliding over their knowing waiver not to pursue all such communications, *see* [55-2] at 147:14-16 – Plaintiffs contend that their counsel then "***thoroughly exhausted*** John Minor's recollection of the communications with Tucker and Spragins." [57] at 6 (emphasis added). In support of these propositions, Plaintiffs cite thirty-eight pages of their examination of Mr. Minor, *id.*, which amply demonstrates that these communications have been robustly addressed and – fatally to the *Shelton/Nguyen* test – that State Farm's counsel are not the only sources of this information. Further, Mr. Minor testified that all written communications between him and State Farm's counsel have already been produced in discovery, [55-2] at 44:8-15; 115:23-116:25, notwithstanding Plaintiffs' halfhearted attempt to discount this fact in their response. *See* [57] at 6. This Court need not go any further to preclude the depositions of State Farm's counsel.

2. Communications With State Farm's Appraiser Are Immaterial and Irrelevant

Second, as to the requirement that "the information sought is relevant and non-privileged," *Nguyen*, 197 F.3d at 208 (citing *Shelton*, 805 F.2d at 1327), Plaintiffs do not come to grips with Mr. Minor's unequivocal testimony that he simply did ***not*** understand Mr. Tucker and did ***not*** change the appraisal in any way on the basis of anything State Farm's counsel said. Thus, whatever communications State Farm's counsel had with Mr. Minor are not relevant (let alone crucial) to this case, regardless of the legal theory that Plaintiffs plead. *See* [57] at 3.

Mr. Minor repeatedly testified that "I never understood a single thing Lucky said from the day he hired me," [55-2] at 151:20-21, "[a]ll of the direction that I received verbally from Lucky was – I didn't have any idea," *id.* at 44:18-21, "I didn't understand what he was talking about," *id.* at 45:12-13, he

"never made any sense to me," *id.* at 101:11-12, and he "talks in circles." *Id.* at 104:21-22; 105:12. Mr. Minor further testified that his communications with State Farm's counsel had no affect on the conduct or the outcome of the appraisal.

> Q. Did any question that Mr. Tucker ask you in his e-mails or on the telephone change the job that you did?
>
> A. ***No***.
>
> …
>
> Q. I guess the bottom line, is there anything that happened in any of this correspondence, verbal, e-mail, letter, whatever that changed the way you did the appraisal in this case on the Kuehn file?
>
> A. ***No***, I did it – I did it – ***no***. And it never will. I'll never change.

Id. at 174:12-16, 175:4-9. In the absence of any comprehension of those discussions and in the absence of any impact on the appraisal, none of the communications with State Farm's counsel has any relevance to this case because it did not affect the appraisal process. Moreover, not only is such information not relevant to the issues in this case, but it is also not crucial to its preparation.

While Plaintiffs rely on overheated rhetoric that State Farm's counsel made "representations" and "omissions" to Mr. Minor in an attempt "to 'set up' the Kuehns … in such a way as to further interfere with the appraisal process as outlined by the policy language, delay the payment of the Kuehns' claim, and pursue their own anti-appraisal agenda on behalf of State Farm," [57] at 2-3, they offer no evidence to contradict Mr. Minor's testimony that ***no*** such influence occurred. Mere rhetoric cannot make the communications between State Farm's counsel and Mr. Minor relevant and crucial.

Nor do Plaintiffs' other efforts to manufacture some possible relevance of this disfavored discovery withstand scrutiny. Plaintiffs' advertence to their claims for "**bad faith, fraud, and breach of contract**," [57] at 3 (emphasis in original), is vacuous and a classic red-herring. Those claims have nothing to do with the appraisal issues and are beyond the scope of currently permissible discovery. Pursuant to this Court's Orders bifurcating discovery, "the interpretation and effect of the appraisal

clause contained in the insurance contract and the question of whether the existing appraisal award is valid should be … addressed first," and discovery is limited to the validity of the appraisal award. *See* [15] at 2. This Court reconfirmed that limitation when it extended the discovery deadline "[a]s to the appraisal issue" in a text only Order on February 13, 2009. Plaintiffs' claims for "bad faith, fraud, and breach of contract," [57] at 3 (emphasis omitted), are all pleaded in the alternative to their claims as to the validity of the appraisal, *see* [1] at ¶ 45, and are beyond the reach of current discovery in this matter.

Plaintiffs also refer to "nonsense" that Mr. Minor "**was not *allowed* to resign**," [57] at 2 (emphasis in original), while eliding over Mr. Minor's testimony that he told Mr. Tucker to "***fire me, fire me***, let me quit, do whatever ***you've*** got to do," [55-2] at 107:8-10, a request that many people would naturally recoil from. Moreover, Plaintiffs fail to explain how a good faith effort to encourage an appraiser to complete his task, and to avert the undue delay that would arise from having to replace an appraiser anew, is remotely relevant to the actual scope and conduct of the appraisal. It is not.

Nor do Plaintiffs demonstrate the relevance of any information State Farm's counsel may possess by referring to communications that took place ***after*** the appraisal had been completed. [57] at 3. Plaintiffs' gratuitous recitation of the scurrilous testimony from Mr. Minor – which State Farm moved to strike – that he felt he was being "blackball[ed]" with "dirty pool" through certain statements made in a June 13, 2008 email ***after*** Mr. Minor signed the appraisal award for a second time on June 10, 2008, *see id.*; [57-7] at 2-3; [57-2] at 154:12-14, 157:23-24, 158:22-160:2, has no bearing on "the question of whether the existing appraisal award is valid." [15] at 2. Thus, Plaintiffs have not shown a legitimate reason why any testimony by State Farm's counsel is relevant (let alone crucial), and they fail on this *Shelton/Nguyen* factor as well.

3. State Farm's Counsel Possess No Information Crucial To This Case

Third, as to the requirement that "the information is crucial to the preparation of this case," *Nguyen*, 197 F.3d at 208 (citing *Shelton*, 805 F.2d at 1327), the communications that State Farm's

counsel had with Mr. Minor do not meet this exceedingly high standard. As noted above, Mr. Minor repeatedly testified that he did not understand his conversations with State Farm's counsel and that nothing State Farm's counsel said affected, in any way whatsoever, the manner in which the appraisal was conducted. What is crucial to this case is the manner in which the appraisal was actually conducted and the scope of the appraisal panel's award. As set forth in State Farm's moving papers, the testimony and related discovery demonstrates that the appraisal process was fundamentally inconsistent with the policy's language and with governing law, and that the appraisers independently determined the cause and coverage of Plaintiffs' damages, regardless of any information State Farm's counsel might have.

In short, Plaintiffs cannot carry their burden to show any of the *Shelton*/*Nguyen* prongs permit the depositions of State Farm's counsel. For all of the foregoing reasons, and those set forth in State Farm's moving papers, this Court should preclude the depositions of State Farm's counsel.

II. THE COURT SHOULD PRECLUDE THE REQUESTED DOCUMENT DISCOVERY

Plaintiffs misconstrue the objections to their document subpoenas. First, State Farm has already provided through discovery all responsive and non-privileged documents, and Plaintiffs cite no authority that requires State Farm's counsel to go through the unusual step of citing Bates numbers to prove so. With respect to documents that have been objected to as irrelevant, Plaintiffs have not demonstrated that any documents from the files of State Farm's counsel post-dating the filing of this suit are relevant or discoverable. With respect to documents objected to as privileged, Plaintiffs have offered no reason to look beyond State Farm's privilege log, which on its face establishes that those documents are subject to attorney-client and work product protection. Thus, this Court should quash or enter a protective order as to Plaintiffs' subpoenas for documents served on Messrs. Spragins and Tucker and their firm.

A. State Farm Has Already Produced Responsive Documents

Plaintiffs ***already*** have many of the documents covered by their subpoenas – and all of the properly discoverable ones. State Farm has represented, pursuant to Rule 11, and Mr. Minor confirmed

at his deposition, that all written communications between him and State Farm's counsel have already been produced through discovery. Plaintiffs cite no authority for their demand that State Farm or its counsel be put to the undue and unusual burden to "identify such items by Bates number and state that they have already been produced." [57] at 6; *see* Fed R. Civ. P. 26(b)(2)(C)(i); 45(c)(3)(A)(iv).

B. The Document Requests Are Not Time-Limited and Seek Undiscoverable Materials

Plaintiffs also fail to show that any documents that post-date the filing of the present action are relevant or discoverable. The conclusory assertion that "[a]nything not already produced which is responsive to Plaintiffs' subpoena duces tecum simply must be produced," [57] at 6, does not suffice.

These items were objected to because they are irrelevant, and Plaintiffs cannot manufacture relevance by misciting a post-litigation duty to continue to evaluate an underlying homeowners claim. [57] at 7. The subpoenas do not seek such claim evaluation documents, nor can they by virtue of this Court's Orders limiting discovery to appraisal only. Rather, Plaintiffs seek to access the files of State Farm's counsel that post-date the filing of this suit concerning the appraisal.

Both of the cases that Plaintiffs cite, *Gregory v. Continental Insurance Co.*, 575 So.2d 534 (Miss. 1990), and *Remel v. State Farm Fire & Casualty Co.*, 2009 WL 587742 (S.D. Miss. Mar. 4, 2009), *see* [57] at 7, address underlying claims handling issues, not materials found in counsel's files due to their handling of subsequent litigation, let alone litigation about appraisal. Thus, those cases are inapposite. Further, having failed to refute the objection to producing State Farm's counsel's post-filing documents because they are irrelevant, the obligation to produce a privilege log with respect to such documents has not yet been triggered. If the Court determines that a privilege log as to such post-filing documents is necessary, one will be furnished. Until such a prospect occurs, State Farm stands on its objections.

C. Plaintiffs Have Not Demonstrated Any Need For This Court's *In Camera* Review

Plaintiffs' subpoenas to State Farm's counsel patently seek materials protected by the attorney-client privilege and attorney work-product doctrine. The privilege log previously submitted, and State

Farm's moving papers, demonstrate that those documents are protected by privilege. *See* [55-7], [55] at 14-19. Plaintiffs offer no argument otherwise. Instead, Plaintiffs make the bare and legally unfounded assertion that State Farm should be required to submit all of those documents for *in camera* review by this Court. *See* [57] at 6-7. The Federal Rules indicate that the purpose of a privilege log is to provide enough information to "enable other parties to assess the applicability of the privilege or protection." Fed. R. Civ. P. 26(b)(5)(A); *see also* Fed. R. Civ. P. 45(d)(2)(A) (substantively identical). Indeed, as this Court has previously observed, "[t]he very function of a privilege log [is] to allow the parties to ascertain the validity of a claimed privilege." *McIntosh v. State Farm Fire & Cas. Co.*, 06-cv-1080-LTS-RHW, Order [531] at 2 (S.D. Miss. Sept. 27, 2007) (Walker, J.). Plaintiffs have not articulated any legally cognizable reason to challenge or to test the validity of any claimed privilege. Plaintiffs' perfunctory, unspecified, and generalized request for a global *in camera* review does not suffice.

Plaintiffs' generic request is also legally untenable. The law provides that "an *in camera* inspection, even of one document, should not be undertaken to satisfy the whim of a party that a searching inquiry is required if only to provide peace of mind. … In other words, *in camera* review should not be used routinely on the theory 'it can't hurt.'" *Xerox Corp. v. United States*, 12 Cl. Ct. 93, 95 n.3 (Cl. Ct. 1987). Indeed, the privilege log requirement was specifically intended to "reduce the need for in camera examination of the documents," Fed. R. Civ. P. 26 (advisory committee note to 1993 amendments), and not – as Plaintiffs would have it – to increase the need for the expenditure of precious judicial resources. In order to challenge the applicability of an asserted privilege, a party must articulate a reason for doing so. A party is not entitled to make a blanket request that the Court spend its time and resources to perform an *in camera* review of every document listed in a log for no other reason than to satisfy that party's unspecified curiosity. Plaintiffs offer no reason why *in camera* review is warranted.

As previously demonstrated, the requested documents include communications between State Farm and its counsel, as well as documents containing State Farm's counsel's thoughts, mental

impressions, strategies, and analysis with respect to State Farm's putative legal exposure in this matter. Plaintiffs are not entitled to privileged "full and frank communication between attorneys and their clients." *Nester v. Jernigan*, 908 So. 2d 145, 148-49 (Miss. 2005). Nor are Plaintiffs entitled to State Farm's counsel's work product. "Discovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary." *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring). Plaintiffs' document subpoenas should be quashed.

CONCLUSION

For the foregoing reasons, this Court should grant the instant motion in its entirety.

Dated: March 26, 2009

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, March 26, 2009

/s/ John A. Banahan
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