

**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

**OBJECTION OF NON-PARTIES RICHARD F. SCRUGGS AND
D. ZACHARY SCRUGGS TO MAGISTRATE JUDGE’S ORDER [Docket No. 1194],
REQUEST FOR STAY, AND REQUEST FOR EXPEDITED CONSIDERATION**

Pursuant to FED. R. CIV. P. 72(a), non-parties Richard F. Scruggs and D. Zachary Scruggs (“the Scruggses”) object to certain portions of the Magistrate Judge’s Order of May 15, 2008 (“the Order”). The Order is clearly erroneous and contrary to law. First, the documents that the Magistrate Judge ordered the Scruggses to produce all relate either to Cori and Kerri Rigsby or the conduct of Richard Scruggs and the Scruggs Law Firm. These documents are of no relevance now that the Scruggs Law Firm has withdrawn from this case, the Court has disqualified all the former members of the Scruggs Katrina Group, the Court has excluded the Rigsbys as witnesses, and the Court has excluded the documents they uncovered while working for Defendant E.A. Renfroe & Co. (“Renfroe”).

Second, the Magistrate Judge did not address the many critical objections raised and briefed in detail by the Scruggses, including the assertion of the their Fifth Amendment rights against self incrimination or their assertion of the attorney-client privilege and the work-product privilege. Third, the Magistrate Judge apparently based the Order on a letter brief submitted by Defendant State Farm Fire & Casualty Insurance Co. (“State Farm”) that was never served upon the Scruggses and

to which the Scruggses never had an opportunity to respond. For these reasons, the Court should sustain the Scruggses' objections and reverse the Order.

Because the Magistrate Judge has ordered the Scruggses to produce documents to State Farm by May 30, 2008, the same date as the deadline for filing this Objection, the Scruggses request this Court to stay the effect of the Order compelling production and to consider this Objection on an expedited basis. Without a stay, the Scruggses may be required to comply with the Order before this Court hears and resolves their Objection.

REQUEST FOR STAY

Due to the short time frame in which the Magistrate Judge has ordered the production of certain documents, the Scruggses request this Court to grant a stay of the fifteen-day period to comply with the Order. As the Scruggses are not parties to this litigation, Rule 45(c)(2)(B) does not require them to comply with the State Farm subpoenas until the Court addresses their objections. Because the Scruggses did not have the same opportunity to present updated argument to Magistrate as State Farm did, and because the Magistrate Judge did not address certain of the Scruggses' objections, the Scruggses are prejudiced and unduly burdened by having to complete an exhaustive document search while the Court considers this Motion.

The Scruggses will also be prejudiced if they are forced to produce any responsive documents while this Objection is being considered because their constitutional privileges may be waived *upon such production*. State Farm, on the other hand, will suffer no prejudice if the Scruggses are granted an additional fifteen days from the date of the Court's ruling on this Motion to produce documents, if such production is still required by the Court. The Scruggses have also this day requested a stay from the Magistrate Judge (attached as Exhibit "A").

BACKGROUND

The Scruggses began their representation of Cori and Kerry Rigsby in February 2006. The Scruggses represented the Rigsbys (former employees of Renfroe) with respect to the disclosure of information and documents regarding State Farm and/or Renfroe to law enforcement officials and in a *qui tam* action in this Court against State Farm and other defendants (Civil Action No. 1:06-cv-00433-LTS-RHW). In September 2006, Renfroe sued the Rigsbys in the Northern District of Alabama for damages and for the return of certain documents. In December 2006, Judge William Acker ordered the Rigsbys and their attorneys (including the Scruggses) to return all documents removed from the records or systems of Renfroe or State Farm. *See* Exhibit “B” (Preliminary Injunction). Since that time, the Scruggses have made repeated efforts to produce all such documents to Renfroe.

In August 2007, State Farm noticed the depositions of the Scruggses, including broad document requests [Docket Nos. 399, 400]. At that time, the Scruggses were Plaintiff’s attorneys. State Farm later served subpoenas upon the Scruggses to compel their testimony, but did not include document requests in the subpoenas. Plaintiffs moved to quash the subpoenas [Docket No. 453].

In November 2007, the Scruggses were indicted on criminal charges in the Northern District of Mississippi. The Scruggses and the Scruggs Law Firm sought and were granted leave to withdraw as attorneys in this matter on December 5, 2007 [Docket Nos. 890-891].

The Magistrate Judge denied Plaintiff’s Motion to Quash [Docket No. 911], and State Farm re-noticed the Scruggses’ depositions, including another set of document requests. Plaintiffs [Docket No. 947] and the Scruggses [Docket No. 956] objected to the Magistrate Judge’s Order. This Court

allowed the deposition subpoenas to stand, but referred the document requests to the Magistrate Judge [Docket No. 988].

After the Magistrate Judge found that State Farm's document requests were ineffective [Docket No. 989], State Farm issued subpoenas *duces tecum* to compel the production of documents on January 14, 2008. Pursuant to FED. R. CIV. P. 45(c)(2)(B) and the terms of the Magistrate Judge's Order [989], the Scruggses served timely objections to the subpoenas. State Farm filed a Motion to Compel the Scruggses' response [Docket No. 1075], which the Scruggses opposed [Docket No. 1107] (a copy of the Scruggses' Opposition, which includes its original objections to the subpoenas, is attached as Exhibit "C"). Notably, State Farm moved to strike the Scruggses' opposition to its Motion to Compel, arguing that the Court should not consider any papers filed after State Farm's Motion to Compel [Docket No. 1111].

In March 2008, after all the briefing related to State Farm's Motion to Compel was completed, the Scruggses entered guilty pleas in the Northern District of Mississippi. The Scruggs Law Firm is no longer open for business.

On April 4, 2008, this Court disqualified the Rigsbys as witnesses, and disqualified all attorneys within the Scruggs Katrina Group and the Katrina Litigation Group, as well as any other attorneys associated by SKG and/or KLG attorneys [Docket No. 1172]. Notably, the Court also excluded "any documents supplied by the Risgby sisters to the SKG or the KLG or its associates". Order, at 3 (April 4, 2008).

On May 15, 2008, the Magistrate Judge ordered the Scruggses to produce documents responsive to certain requests contained in the subpoenas within fifteen (15) days [Docket No. 1194]. In the Order, the Magistrate Judge noted that "counsel for the Defendants" had conferred with the

Court about outstanding motions and that State Farm had informed the Court as to the remaining discovery it seeks to obtain from the Scruggses. Order, at 8-9. The Magistrate Judge, apparently at an April 21 status conference in which only the parties were permitted to participate, requested information about discovery that remained necessary in light of the recent developments described above.

State Farm responded with a letter to the Court dated May 9, 2008 (attached as Exhibit “D”), a copy of which counsel for the Scruggses has obtained only on May 27. It appears that the Scruggses’ new counsel, who entered appearances in late March, were inadvertently omitted from a distribution list in the office of State Farm’s counsel. (*See* e-mail exchange between Mullen, Watkins, attached as Exhibit “E”). Because they were not aware of the communications between counsel for State Farm and the Court, the Scruggses were not aware that the Court would consider any further briefing or argument as to the relevance of the document requests.

In any event, the Scruggses, who are not parties to this litigation, were not privy to this exchange prior to the Magistrate Judge’s ruling and were never given a corresponding opportunity to update their position in light of changed circumstances. Because the Order does not reflect that any of the pertinent changed circumstances were considered by the Magistrate Judge in reaching his decision, the Scruggses request that the Court set aside that portion of the Order compelling the production of documents.

ARGUMENT

The Magistrate Judge’s Order should be set aside as clearly erroneous and contrary to law. As noted above, the Scruggses should have been given an opportunity to respond to the Magistrate Judge’s request for additional information. However, the Magistrate Judge was at least aware of the

changed circumstances in this case, which are specifically referenced in footnote 7 of the Order. Indeed, State Farm's May 9 letter to the Magistrate Judge (referenced at pp. 8-9 of the Order), in which it essentially abandons sixteen of its original twenty-five requests, indicates that State Farm understands that recent events have drastically impacted the necessity for its document requests. At the very least, State Farm should have copied counsel for the Scruggses so the Scruggses would have had the same opportunity as State Farm to advise the Court on the current status of the subpoena requests.

Furthermore, the Magistrate Judge did not address many of the Scruggses' initial objections to State Farm's requests, including their assertion of their Fifth Amendment privileges. Because of these objections, and because of the changed circumstances discussed above, this Court should set aside the portions of the Order compelling the Scruggses to produce documents.

Relevance

This Court's April 4 Order, which disqualified the Rigsbys as witnesses and any attorneys associated with the Scruggses as the McIntoshes' attorneys and excluded all documents supplied by the Rigsbys from evidence, leaves no doubt that requests for the documents ordered to be produced are not relevant. The Magistrate Judge erred in failing to properly weigh the effect of the April 4 Order.

Many of the documents the Magistrate Judge has ordered the Scruggses to produce had no relevance to this action even before the April 4 Order. For example, Requests No. 5 and 11 seek documents related to contacts with the media. However, upon State Farm's motion, this Court has already excluded a wide range of media reports from evidence [Docket No. 1180]. In light of that

ruling, documents related to the Scruggses' media contacts are not reasonably calculated to lead to the discovery of admissible evidence, and State Farm has admitted as much.

The Magistrate Judge also erred in ordering the Scruggses to produce documents that were allegedly "stolen" from State Farm and/or Renfroe and any documents that relate to the Rigsbys or their relationship with the Scruggses. In their Opposition to State Farm's Motion to Compel, the Scruggses noted that, with the exception of an engineering report and a sticky note which the Scruggses do not have, none of the requests for such documents were relevant to the McIntoshes' claims or Defendants' defenses. Opposition, at 13-14 [Docket No. 1107].

The Magistrate Judge found that "the Scruggses were receiving State Farm documents from the Rigsby sisters long before they became counsel for the McIntoshes, and Defendants are entitled to see the documents which were so provided, and to question the Scruggses about the documents as well as their relationship with the Rigsbys." Order, at 5. However, as the Scruggses, the Rigsbys, and the documents have all been disqualified from this litigation, both the documents themselves, as well as any information about the Scruggses' relationship with the Rigsbys, is irrelevant.

The Court has already issued sanctions for the transfer of documents from the Rigsbys to the Scruggses, obviating any interest State Farm has in viewing these documents. Prior to the issuance of the April 4 Order, the Magistrate Judge stated that the Rigsbys were subject to certain State Farm discovery because State Farm was "entitled to know the basis for the Rigsbys' charges of wrongdoing". Order, at 5 (October 1, 2007) [Docket No. 563]. That reasoning no longer applies, and the Magistrate Judge erred in requiring production.

To the extent that the requests at issue seek production of information relative to the State Farm documents, the Rigsbys, or their relationship with the Scruggses, the Magistrate Judge erred in compelling production. The Order should be set aside to avoid an unnecessary collision between compelled production, and the Scruggses' rights against self-incrimination.

Fifth Amendment

The Magistrate Judge did not address the Scruggses' objection that State Farm's document subpoena implicates their Fifth Amendment Rights and subjects them to an undue burden. These objections are even more compelling now in light of the Scruggses' guilty pleas in the criminal matter pending in the Northern District, for which they still await sentencing. The Court should overrule the Magistrate Judge's Order because the production of the requested documents may incriminate the Scruggses in connection with the action pending in Birmingham, Alabama or subject them to more severe sentence in the Oxford criminal matter.

“Although the contents of a document may not be privileged [under the Fifth Amendment], the act of producing the document may be.” *U.S. v. Doe*, 465 U.S. 605, 612 (1984); *Fisher v. United States*, 425 U.S. 391, 410 (1976). The privilege extends not only to document productions that would independently support a prosecution, but “likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.” *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951).

“[T]he act of producing documents in response to a subpoena may have a compelled testimonial aspect [and] may implicitly communicate ‘statements of fact.’” *U.S. v. Hubbell*, 530 U.S. 27, 36 (2000). “[W]hen the custodian of documents responds to a subpoena, he may be compelled to take the witness stand and answer questions designed to determine whether he has produced

everything demanded by the subpoena. The answers to those questions, as well as the act of production itself, may certainly communicate information about the existence, custody, and authenticity of the documents.” *Id.* at 37. Furthermore, the “collection and production of the materials demanded [is] tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions.” *Id.* at 40.

The production of the requested documents would compel testimony from the Scruggses that could furnish evidence to prosecute them in connection with the Alabama action. The *Renfroe* matter is still pending in Alabama, and Judge Acker has already referred Richard Scruggs and the Scruggs Law Firm for prosecution once based on an alleged failure to produce documents. To require that the Scruggses now search their files and produce documents related to the *Renfroe* matter could require them to provide evidence against themselves for a further such prosecution. In particular, request no. 17 calls for all documents taken from State Farm’s computers; if such documents existed, the Scruggses cannot be required to produce them because such a production could serve as the basis for further prosecution by Judge Acker for an alleged failure to comply with his December 2006 injunction. Thus, the Court must reverse the Magistrate’s Order.

Furthermore, the production of the requested documents could expose the Scruggses to increased penalties in the criminal case pending in Oxford. *See Mitchell v. U.S.*, 526 U.S. 314, 325-26 (1999) (right against self-incrimination extends through sentencing). Because the pending criminal matter in the Northern District arose out of Hurricane Katrina litigation, that Court could view the Scruggses’ conduct in this matter as relevant to their sentencing. Therefore, the Scruggses

may not be compelled to respond to the subpoenas when any such response could be used against them in a criminal sentencing.

Necessity and Availability from Other Sources

The Magistrate Judge's Order overlooks the fact that the Scruggses are not parties to this litigation. The Fifth Circuit requires courts to balance the benefits of a challenged subpoena with the burden to the responding party. *See Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 377 (5th Cir. 2004). In particular, the Court must consider whether subpoenaed documents are "necessary and unavailable from any other source." *Id.* (quoting 9A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2463 (2d ed. 1995)). Here, these questions are particularly pertinent in light of the objections set forth above.

State Farm has not shown that the documents sought through its subpoenas were either necessary or unavailable from another source. As noted in the Scruggses' Objection to the subpoenas, documents responsive to Requests 5, 9, 10, 11, and 17 are all available from other sources (sources which, to the Scruggses' knowledge, will not face a similar undue burden or risk of criminal sanction in responding).

In its May 9 letter to the Magistrate Judge (which the Scruggses' counsel did not receive until May 27), State Farm states without further explanation that these documents are "crucial to State Farm's defense of Plaintiff's bad faith claims." State Farm's only support for this statement is the Magistrate Judge's order of December 11, 2007, which was issued *before* the Court's disqualification of the Rigsbys and all Scruggs-associated attorneys and the exclusion of certain documents. State Farm has not presented any substantive argument to support a finding that the documents sought from the Scruggses are necessary to its defenses.

SPECIFIC OBJECTIONS

Request No. 5

Please produce all documents concerning the American Broadcast Company, including without limitation ABC news, 20/20, and Joe Rhee, pertaining to State Farm and Hurricane Katrina.

The Scruggses specifically object to the Magistrate Judge's Order to produce documents responsive to this request on the grounds that any responsive documents are irrelevant and not reasonably calculated to the discovery of admissible evidence. Any responsive documents have nothing to do with the merits of the underlying matter. After the withdrawal of the Scruggses as counsel for Plaintiffs, the subsequent disqualification of associated attorneys and the Rigsbys, and the exclusion of media reports, this request has no relevance. Even as limited by the Magistrate Judge to information about the 20/20 broadcast, the request is not relevant.

State Farm has made no showing that it has sought the documents from other sources, including ABC News or Joe Rhee, upon whom production of responsive documents would not work a substantial undue hardship. Also, the fact that State Farm apparently has not sought documents from any such sources belies any claim that such documents are necessary.

The Scruggses also assert their Fifth Amendment privileges with respect to this request.

Request No. 9

Please produce all documents concerning any communications between "you" and Brian Ford, including without limitation any proposed or actual employment, reimbursement, indemnity and/or compensation.

The Scruggses specifically object to the Magistrate Judge's Order to produce documents responsive to this request on the grounds that any responsive documents pertaining to communications by the Scruggses are irrelevant after their withdrawal and the disqualification of

associated attorneys. Any responsive documents were available from Ford himself, who will not face a similar undue burden upon production. The Scruggs Law Firm has already noted that no such documents were in its custody [Docket No. 842]. The Scruggses also assert their Fifth Amendment privileges with respect to this request. These defenses, all asserted by non-parties to the litigation, heavily outweigh the vague assertions of need and relevance by State Farm.

Request No. 10

Please produce all documents concerning communications with “you” and any State Farm Employee who worked on any Hurricane Katrina claim.

The Scruggses specifically object to the Magistrate Judge’s Order to produce documents responsive to this request on the grounds that any documents concerning communications by or to the Scruggses or the Risgbys after the Scruggses’ withdrawal and the disqualification of the Rigsbys and associated attorneys are irrelevant and unduly burdensome upon the Scruggses. Any responsive documents are available from other sources, such as State Farm employees, who might not face similar undue burdens. The Scruggses also assert their Fifth Amendment privileges with respect to this request.

Request No. 11

Please produce all documents concerning any communications between “you” and any person affiliated with or employed by any media outlet pertaining to or arising out of Hurricane Katrina, including without limitation any documents provided by you.

The Scruggses specifically object to the Magistrate Judge’s Order to produce documents responsive to this request on the grounds that any responsive documents are irrelevant and not reasonably calculated to the discovery of admissible evidence. Any responsive documents have nothing to do with the merits of the underlying matter. After the withdrawal of the Scruggses as

counsel for Plaintiffs, the subsequent disqualification of associated attorneys and the Rigsbys, and the exclusion of media reports, this request has no relevance. Even as limited by the Magistrate Judge, the request is not relevant.

Any responsive documents are available from other sources who would not face the same undue burden in responding as the Scruggses. State Farm has presented no reasonable argument as to the necessity of any responsive documents. The Scruggses also assert their Fifth Amendment privileges with respect to this request.

Request No. 17

Please produce all documents that were presented to “you” to have been taken from, removed from, copied from, forwarded from, or downloaded from, directly or indirectly, any State Farm office or State Farm computer system, including without limitation emails, pertaining to or arising out of Hurricane Katrina.

The Scruggses specifically object to the Magistrate Judge’s Order to produce documents responsive to this request on the grounds that any responsive documents are irrelevant and not reasonably calculated to the discovery of admissible evidence. Any responsive documents have nothing to do with the merits of the underlying matter. After the withdrawal of the Scruggses as counsel for Plaintiffs, the subsequent disqualification of associated attorneys and the Rigsbys, this request has no relevance. Most importantly, though, the Court has specifically excluded any responsive documents from evidence, and the portion of the Order compelling production of such documents is clearly erroneous.

Furthermore, any responsive documents were available from State Farm itself, or through a request for production directed toward Renfroe, a co-Defendant. Production of any responsive

documents is not necessary, as any such documents would be available to State Farm from other sources. The Scruggses also assert their Fifth Amendment privileges with respect to this request.

Request No. 23

All documents picked up or otherwise retrieved by Richard Scruggs from a highly placed source at State Farm on a trip to Bloomington, Illinois, which Richard Scruggs referenced in a March 30, 2006, interview.

Any responsive documents are irrelevant as to the merits of this matter. The Scruggses also assert their Fifth Amendment privileges with respect to this request.

Request No. 25

All documents concerning any financial interest that “you” have in this matter or any other State Farm-related Hurricane Katrina matter following your withdrawal as counsel of record.

The Scruggses specifically object to the Magistrate Judge’s Order to produce documents responsive to this request on the grounds that any responsive documents are irrelevant and not reasonably calculated to the discovery of admissible evidence. Any responsive documents have nothing to do with the merits of the underlying matter. After the withdrawal of the Scruggses as counsel for Plaintiffs, the subsequent disqualification of associated attorneys and the Rigsbys, this request has no relevance. The Scruggses also assert their Fifth Amendment privileges with respect to this request. Furthermore, to the extent that any such documents reveal work assignments or litigation strategy, they constitute work product and are privileged.

CONCLUSION

The Magistrate Judge’s Order, informed most recently only by correspondence from State Farm’s attorney, did not adequately take into account the prior objections by the Scruggses, and the changed circumstances noted by both State Farm and this Court. State Farm tacitly admitted in its

one-way communication with the Magistrate Judge that many of its prior document requests were no longer relevant in view of the current posture of this case. The Magistrate Judge clearly erred in failing to exclude the remaining document requests based on the arguments contained in the Scruggses' prior objections and the arguments contained in this Motion.

Finally, this Court should immediately stay the effect of the Magistrate Judge's Order so that the matter can be given full consideration and the non-party Scruggses have an adequate opportunity to compile the required documents, if so ordered.

WHEREFORE, PREMISES CONSIDERED, non-parties Richard F. Scruggs and D. Zachary Scruggs respectfully request this Court to set aside the May 15 Order of the Magistrate Judge to the extent that it compels the production of certain documents by the Scruggses. The Scruggses also request a stay of the period in which the Magistrate Judge order production of documents. The Scruggses request expedited consideration of these matters. The Scruggses seek such other relief as the Court deems appropriate.

THIS, the 28th day of May, 2008.

Respectfully submitted,

RICHARD F. SCRUGGS AND ZACHARY SCRUGGS

Paul B. Watkins, Jr.

J. CAL MAYO, JR. (MB NO. 8492)
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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 28th day of May, 2008.

Paul B. Watkins, Jr.

PAUL B. WATKINS, JR.