

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

**THOMAS C. McINTOSH and
PAMELA McINTOSH**

PLAINTIFFS

VERSUS

CIVIL ACTION NO. 1:06cv1080-LTS-RHW

**STATE FARM FIRE AND CASUALTY
INSURANCE COMPANY, *et al.***

DEFENDANTS

ORDER

Before the Court are a number of motions regarding this Court's order [989] and subpoenas duces tecum served by Defendants State Farm and Renfroe on Richard and Zach Scruggs on January 14, 2008.¹ Plaintiffs have moved to quash the subpoenas [1051], as have non-parties Cori and Kerry Rigsby (the Rigsby sisters) [1072]; Richard and Zachary Scruggs filed [1078] notice of compliance with the subpoenas and with the Court's order [989]; State Farm has moved to strike the Scruggses' notice of compliance [1083], and to compel production of the documents commanded by the subpoenas [1075]; State Farm's motion [1110] seeks to have stricken the reply briefs filed by the Rigsby sisters and by Plaintiffs [1086 and 1094, respectively, as not contemplated by Order [989]; State Farm's motion [1111] seeks an order striking the Scruggses opposition [1107] to State Farm's motion to compel; and Renfroe has moved [1081] for clarification of order [989]. A brief background review is helpful in keeping these matters in context.

¹The State Farm notices of intent to serve subpoenas are documents [1024 and 1025], and proofs of service are [1028 and 1029]; the Renfroe notices of intent to serve subpoenas are documents [1033 and 1034], and the proofs of service are [1035 and 1036].

The McIntoshes are Biloxi homeowners whose property was damaged in Hurricane Katrina. They were paid policy limits on their flood insurance and some monies under their State Farm homeowner's policy. Forensic Analysis & Engineering Corp.² prepared two different engineering reports on the McIntosh property, dated October 12, 2005 and October 20, 2005, respectively. By February 2006, the Rigsby sisters gave Richard Scruggs the October 12, 2005 engineering report which, according to Scruggs' testimony in other proceedings in Alabama, had a sticky note attached bearing the handwritten notation, "put in wind file – do not pay bill do not discuss." An ABC television *20/20* broadcast which aired in late August 2006 discussed the dual engineering reports, and ABC contacted the McIntoshes. According to Mr. McIntosh's notes, ABC apparently got the reports from Scruggs. At some point after the *20/20* television program, the Scruggs Katrina Group came to represent the McIntoshes, filing this lawsuit against State Farm on October 23, 2006, adding Renfroe as a defendant by amended complaint on May 31, 2007.

Cori and Kerry Rigsby, former employees of Defendant Renfroe, were dispatched to Mississippi to work State Farm *Hurricane Katrina* claims soon after August 29, 2005. Kerry Rigsby actually inspected the McIntosh property, and approved the payment of flood insurance policy limits. By February 2006, unbeknownst to Renfroe or State Farm, and while the Rigsbys were still employed by Renfroe/State Farm, the Rigsbys were copying/taking State Farm documents and giving them to Richard Scruggs, including the October 12, 2005 engineering report on the McIntosh property. The McIntoshes' attorneys contend the Rigsbys are key

²On November 9, 2007, the parties notified the court that Plaintiffs have settled all their claims against Forensic [797], although no order dismissing Forensic has yet been entered, and Forensic still appears on the docket as a party defendant. The notice of settlement states "a dismissal will be filed after the settlement is finalized."

witnesses in the McIntosh case. The Rigsbys also became clients of Richard and Zach Scruggs who filed a *qui tam* action on their behalf on April 26, 2006 against State Farm, among others. That lawsuit was sealed until August 1, 2007. Meanwhile, the Rigsbys continued funneling thousands of State Farm documents to Scruggs until they left their employment with Renfro/State Farm in June or July of 2006. Soon thereafter, they were hired by the Scruggs Law Firm as consultants in *Katrina* litigation, at annual salaries of \$150,000.00 each.

On September 7, 2007, State Farm noticed the depositions of Richard and Zach Scruggs. [434 and 435]. Plaintiffs moved to quash the notices and/or for protective order [453], and on December 11, 2007, the Court entered [911] its order denying Plaintiffs' motion to quash/for protective order, holding that Defendants could depose Scruggses. The Plaintiffs and the Scruggses filed motions for review [947 and 956, respectively]. On January 9, 2008, the District Judge entered order [988] upholding the ruling allowing the depositions to go forward after resolution by the Magistrate Judge of issues related to requested documents. In what would ultimately prove to be a futile effort to maintain the February 2008 trial date,³ the Court entered order [989] on January 9, 2008, with respect to documents requested from the Scruggses, requiring that (1) the parties desiring to depose the non-party Scruggses⁴ issue subpoenas duces tecum for any documents sought from the Scruggses by January 14, 2008; (2) the recipients of the subpoenas must produce the requested documents or "serve fully briefed objections" within five calendar days of service; whereupon (3) the issuer of such subpoenas must, within three

³On January 16, 2008, the District Judge entered [1049] an order granting Plaintiff's motion to continue the trial date [1018]. On April 21, 2008, the Court reset the trial for October 6, 2008.

⁴By this time the Richard and Zach Scruggs and their law firm were also no longer attorneys in the case, having withdrawn on December 5, 2007, following Richard and Zach's federal indictments on felony charges. Both Richard and Zach Scruggs have now pled guilty to felonies.

calendar days, file a “fully briefed motion for an order compelling production.” The Court plainly stated it intended to “rule upon any such motion based upon the “fully briefed objections” and “fully briefed motion to compel.”

On January 14, 2008, State Farm and Renfroe, issued and served subpoenas on the Scruggses. The State Farm subpoenas were issued by counsel of record H. Benjamin Mullen, and the proofs of service reflect that Mullen served the subpoenas on Travis LeBlanc & John Keker “via email per agreement of counsel” for the Scruggses and counsel for State Farm. The Renfroe subpoenas were issued by counsel of record H. Hunter Twiford, III, and the proofs of service reflect that they were served by attorney Stephen Schelver on Travis LeBlanc and John Keker, “via email per agreement between counsel” for the Scruggses and Renfroe. [1035 and 1036]. Mr. Schelver is not counsel of record in this case, but his stated address on the return is that of the law firm with which Mr. Twiford practices.

Plaintiffs’ motion to quash/for protective order [1051]

Plaintiffs’ assert the Defendants’ document requests are broad and “would undoubtedly cover many documents protected by attorney/client privilege and work product protections.” Plaintiffs further claim any documents relevant to the McIntosh claim are McIntosh documents, subject to the limitation of 30 documents requests by each party established by the case management order (CMO), and that the documents subpoenaed from the Scruggses therefore exceed the limitations of the CMO. Plaintiffs contend there is no reason to require the Scruggses to produce any documents which are not relevant to the McIntosh claim, and reiterate in their reply memorandum [1094], that “any documents held by the Scruggses and relevant to the McIntosh case, are ‘McIntosh documents.’”

State Farm responds [1073] to Plaintiffs' motion that none of its requests seek the *McIntoshes'* documents, hence the CMO is not violated. State Farm also challenges Plaintiffs' conclusory, and unsubstantiated, "blanket assertions of purported privilege," noting that Plaintiffs' have neither addressed any particular document request nor produced any privilege log with respect to any document claimed to be privileged. Renfroe's response [1128] makes essentially the same points made by State Farm, and asserts that Plaintiffs have failed to provide the Court sufficient information to evaluate their claims of privilege.

Plaintiffs provided no memorandum in support of their motion. The Court rejects Plaintiffs' claim that the subpoenas for documents from these non-parties violate the case management order. Unquestionably 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. While the Court agrees that Rule 45, Fed. R. Civ. P., does not require Plaintiffs to provide a privilege log for documents they do not possess and which are not sought from them, Plaintiffs' sweeping generalities and blanket assertions of privilege do, indeed, provide insufficient foundation for the relief they seek.

The Rigsbys' motion to quash [1072]

Kerri and Cori Rigsby seek to prevent disclosure of any documents protected by privileges belonging to them resulting from the fact that the Scruggses represented the Rigsbys "in their efforts to provide information to state and federal law enforcement officials" regarding

State Farm's claims handling, and in their *qui tam* action (1:06cv433-LTS-RHW).⁵ The Rigsbys appear to claim some protected interest in the State Farm documents they provided the Scruggses and law enforcement agencies. The Court has previously ruled that the Scruggses undertaking representation of the Rigsbys does not transform "everything [the Rigsbys] ... physically took from [Renfro/State Farm] into privileged information..." [563] Those documents are discoverable, and are not protected by attorney-client privilege or attorney work product. The Rigsbys attempt to be more specific in their objections to the subpoenas, but their opposition, like that of the McIntoshes, is essentially a broad claim that the subpoenas call for documents protected by privilege. As with the McIntoshes' motion, the Court has simply not been presented sufficient information to hold that any particular document request infringes on any legitimate privilege. The Court is not omniscient and cannot bar discovery based on speculation that a request might lead to disclosure of privileged information.

State Farm's motions to strike reply briefs [1086 and 1110]

State Farm urges the Court to strike the Rigsbys' and the Plaintiffs' reply memoranda filed in support of their motions to quash because the Court's order [989] did not contemplate the filing of any such brief. It is true that the Court did not envision a regular briefing schedule with respect to issues arising from the service of subpoenas duces tecum on the Scruggses when it entered order [989]. However, the Court does not find it necessary to strike the reply memoranda filed by the Rigsbys and Plaintiffs.

⁵Richard Scruggs pled guilty to conspiracy to bribe a state court judge on March 14, 2008, and the following week, Zach Scruggs pled guilty to misprision of a felony in connection with the conspiracy to bribe the state court judge. On March 17, 2008, the Scruggs Law Firm and all partners and employee attorneys who had appeared in the *qui tam* action, moved to withdraw [62] from representation of the Rigsbys. The Court granted the motion and terminated the Scruggses representation in that case by text order entered 3/20/2008.

Renfroe's motion for clarification of the Court's order [1081]

On January 22, 2008, Renfroe moved the Court to modify order [989] to give all parties additional time to fully brief issues regarding the subpoenas duces tecum. The issues surrounding the document requests have existed for months, at least since Defendants originally sought to depose the Scruggses. State Farm issued deposition subpoenas to Richard and Zach Scruggs August 28, 2007, and the subpoenas were served September 5, 2007. The Scruggses moved for a protective order prohibiting the depositions [453] on September 11, 2007, and on October 23, 2007, Renfroe joined [707] in State Farm's response to that motion. Discovery ended in this case on November 1, 2007. The Court has, since that time granted leave for the parties to conduct depositions after the close of discovery.⁶ The Court denied the Scruggses motion for protective order by order [911] entered December 11, 2007. The District Court affirmed that ruling on January 9, 2008 [988], but stayed the depositions of the Scruggses pending resolution of the documents issues, which prompted the immediate entry of order [989], also on January 9, 2008. The Court notes that Defendants waited until the last possible day to issue their subpoenas duces tecum, which they served by email. Finding no reason to further delay the disposition of these issues so that the depositions of Richard and Zach Scruggs can proceed, the Court denies the motion for clarification/extension of deadlines set out in [989].

State Farm's motion to strike the Scruggses' notice of compliance [1083]

On January 23, 2008, State Farm moved to strike [1078] the Scruggses notice of compliance with the subpoenas and order [989]. State Farm objects to the fact that counsel for

⁶See, e.g., order [876] granting State Farm's motion [760], joined by Renfroe, for leave to conduct several depositions outside the discovery period.

the Scruggses served unsigned, unfiled objections to the subpoenas via email to “but one of State Farm’s various counsel of record;” and that the email service was made at 11:01 p.m. on Friday, January 18, 2008. State Farm contends the Scruggses failed to comply with order [989] because they did not *file* their objections. It bears repeating that the Scruggses are not parties in this litigation. In accordance with Rule 45(c)(2)(B), the Court’s order [989] required the Scruggses to *serve* their objections to the subpoenas. While the Court obviously contemplated that it would be *privity* to the Scruggses objections, neither the order nor the Rule require that such objections be *filed*. Since the proofs of service show the subpoenas were “served” via email, the Court does not find it unreasonable that the Scruggses “served” their objections in the same manner by email to the attorneys who served the subpoenas. The fact that a party may be represented by many attorneys does not require that each of the attorneys be separately served with a document. However, in light of the timing of service of the emailed objections, which hopefully resulted from the time constraints imposed by the Court rather than an intentional effort to disadvantage Defendants, the Court allowed the defense some leeway in the time for filing the motion to compel. State Farm’s concerns regarding a motion to quash and for sanctions served on State Farm by the Scruggses are of no moment, as no such motions have been filed with the Court.

**State Farm’s motion to compel [1075] and motion to strike the Scruggses’
Memorandum in opposition thereto [1111]**

Due to the passage of time and events which have occurred since these motions were filed,⁷ at the request of the Court, counsel for the Defendants reviewed the outstanding motions

⁷For example, the trial was continued from the February 2008 calendar, and has not yet been reset. Richard and Zach Scruggs have each pled guilty to felony charges, for which they await sentencing, and have withdrawn as counsel. On April 4, 2008, the District Judge disqualified Plaintiffs’ remaining counsel, disqualified the Rigsbys as witnesses and excluded any documents supplied by the Rigsbys to the Scruggses and associates. [1173] On April 7-8, 2008 new counsel entered appearances on behalf of Plaintiffs. [1174 and 1175] On April 21, 2008, the District

and have advised the Court as to those remaining discovery matters they consider essential to protect their clients' interests. State Farm requests that the Court rule upon nine of its original 25 document requests from the Scruggses.

Requests No. 1 and No. 2 seek production, respectively, of the "original October 12, 2005 engineer report purported to be prepared by forensic Analysis & Engineering company regarding the McIntosh property..." and the original sticky note on the October 12, 2005 report. In their objections to the subpoenas, the Scruggses stated these documents are not in their possession, custody or control.⁸ While the Defendants can certainly question the Scruggses about whether, and when, they might have had possession and/or control of these documents and any chain of custody with respect to them, the Court sees no point in ordering Richard and Zach Scruggs to produce that which they claim is not within their possession, custody or control.

Request No. 5 seeks documents concerning the American Broadcast Company pertaining to State Farm and Hurricane Katrina. The objections to this request are that it is overbroad, that it seeks documents which are irrelevant, not reasonably calculated to lead to discovery of admissible evidence, are subject to work-product protection, and are available elsewhere. As State Farm points out, the Court has previously ordered Scruggs' employees/clients the Rigsby sisters, to produce documents evidencing their communications with the media [Order 563], and the Court finds no reason why the Scruggses should be treated differently. Although it appears the McIntoshes' were not even clients of the Scruggs group at the time, the Scruggses clearly

Judge granted Defendant Renfroe summary judgment as to against Plaintiffs' claims of "aiding and abetting" State Farm in committing fraud, and as to the claim for breach of "a duty of undivided loyalty," and granted State Farm summary judgment as to Plaintiff s' claim of fraud. [1186]

⁸The Scruggses' objections to the subpoena requests are appended to their response [1107] opposing the motion to compel.

used State Farm documents, including the McIntosh claim engineering reports, for purposes of the ABC *20/20* broadcast in August 2006. The Court will limit the request to documents evidencing communications with the media leading up to, including, or in any way related to the *20/20* broadcast, and all documents which the Scruggses provided to the media in connection with that investigation/broadcast. With that limitation, Richard and Zach Scruggs are ordered to produce the documents requested in Request No. 5.

Request No. 9 seeks all documents concerning communications between the Scruggses and Brian Ford, including any proposed or actual employment, reimbursement, indemnity and/or compensation. Brian Ford is the engineer who prepared the October 5, 2005 engineering report on the McIntosh property. The Court orders Richard and Zach Scruggs to produce the documents requested in Request No. 9.

Request No. 10 seeks all documents concerning communications between the Scruggses and “any State Farm employee who worked on any Hurricane Katrina claim.” The Court will limit this request to documents concerning communications in any way related to the Rigsbys or the McIntosh claim, and as limited, the Court orders Richard and Zach Scruggs to produce the documents requested.

Request No. 11 seeks all documents concerning communications between the Scruggses 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 [the Scruggses].” As with Request No. 10, the Court will require production only of documents concerning such communications in any way related to the Rigsbys or the McIntosh claim.

Request No. 17 seeks all documents represented to the Scruggses 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.” With the exception of documents produced by State Farm in discovery in this case, the Court orders Richard and Zach Scruggs to produce the documents requested in Request No. 17.

Request No. 23 seeks 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.” The Scruggses’ objection to this request is that it is “not reasonably calculated to lead to discoverable evidence” in the McIntosh case and that the documents are privileged “to the extent that they were provided by individuals who are clients or former clients of Messrs. Scruggs.” The Court has been provided nothing upon which to base a finding of privilege, and orders Richard Scruggs to produce the requested documents.

Request No. 25 seeks all documents concerning any financial interest the Scruggses have in this or any other State Farm-related Hurricane Katrina matter following their withdrawal as counsel of record. The Scruggses object that the request is not reasonably calculated to lead to discoverable information in this case. The Court finds that the information sought might have bearing on the Scruggses’ bias or credibility, and will require the Scruggses to produce the requested documents.

The Court will deny State Farm’s [1111] motion to strike the Scruggses memorandum in opposition to the motion to compel. It is therefore,

ORDERED:

1. That motions [1051], [1072], [1081], [1083], [1086], [1110] and [1111] are denied.

2. That [1075], State Farm's motion to compel, is granted in part and denied in part.
3. That all documents ordered produced herein shall be produced within 15 days of the date of this order.

SO ORDERED, this the 15th day of May, 2008.

/s/ Robert H. Walker

ROBERT H. WALKER
UNITED STATES MAGISTRATE JUDGE