

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

THOMAS C. and PAMELA McINTOSH

PLAINTIFFS

vs.

CIVIL ACTION NO.: 1:06-CV-1080-LTS-RHW

**STATE FARM FIRE & CASUALTY COMPANY,
FORENSIC ANALYSIS & ENGINEERING CORPORATION,
and E.A. RENFROE & COMPANY, INC.**

DEFENDANTS

**NOTICE OF MOTION AND MOTION OF NON-PARTIES RICHARD F.
SCRUGGS AND ZACHARY SCRUGGS FOR STAY OF MAGISTRATE'S
ORDER PENDING OBJECTIONS**

Non-party attorneys Richard F. Scruggs and Zachary Scruggs hereby move for an order from United States Magistrate Judge Robert H. Walker staying his December 11, 2007 Order denying the motion to quash deposition notices and document requests and the motion for protective order filed by plaintiffs Thomas C. and Pamela McIntosh on September 11, 2007.¹ Doc. 911. The Scruggses bring this motion for a stay in order to preserve their right to have a District Judge review the order under Federal Rule of Civil Procedure 72(a) and Local Rule 72.1(A). Specifically, the Scruggses request a stay of Magistrate Walker's December 11, 2007 order pending the resolution of their objections to the order filed on this date and the resolution of objections filed on December 21, 2007 by the McIntoshes and objections filed today by non-parties Kerri and Cori Rigsby.²

¹ Filed herewith is a Motion to Intervene for the limited purpose of filing these objections and requesting a stay of the December 11, 2007 order.

² Magistrate Walker's December 11, 2007 order does not appear on its face to require any immediate action on the part of the Scruggses. Specifically, the order does not require the immediate production of any documents. Moreover, as the Scruggses argue in their objections, neither State Farm nor Renfrore has served a proper document subpoena on either of the Scruggses. Nonetheless, the Scruggses bring this stay motion out of an abundance of caution.

A stay is warranted here for two reasons. *First*, the objections filed by the Scruggses, the McIntoshes, and the Rigsbys “present a substantial case on the merits [involving] a serious legal question.” *Ruiz v. Estelle*, 650 F.2d 555, 565-66 (5th Cir. Unit A June 1981) (per curiam).

As detailed in the Scruggses’ objections, Magistrate Walker’s order would require the Scruggses to reveal privileged communications between themselves and their clients the Rigsbys to defendants State Farm and Renfroe. Furthermore, at all relevant times, the Scruggses were opposing counsel to State Farm and Renfroe in this, and other, actions. Yet the order failed to find that State Farm and Renfroe have met the stringent requirements of the *Shelton* test, which governs when a party can take the deposition of opposing counsel. Indeed, the order does not even discuss the *Shelton* test. The order also fails to conduct the required balancing of the benefits and burdens of the depositions State Farm and Renfroe demand. Rather, the order assesses only the benefits to State Farm and Renfroe without weighing the burden to the Scruggses, who are not parties to this case and are now no longer counsel. In addition, the order fails to address blatant procedural defects in defendants’ document requests and similarly fails to address the fact that State Farm’s document demands, even if they were procedurally proper, are wildly overbroad and burdensome. Finally, the topics on which State Farm seeks to depose the Scruggses overlap with the issues in a criminal contempt case currently pending against Richard Scruggs and the Scruggs Law Firm in the United States District Court for the Northern District of Alabama. The Scruggs have therefore requested that, in the event that the District Judge does not reverse the December 11, 2007 order in its entirety, any deposition or document production be stayed pending the outcome of the contempt case.

Second, “the balance of equities weighs heavily in favor of granting the stay.” *Ruiz*, 650 at 565-66. Absent a stay, the Scruggses are likely to be irreparably injured. They may be required to disclose communications and documents covered by the attorney-client privilege, the work-product doctrine, and the joint-prosecution privilege applicable to *qui tam* actions. Once these communications or documents are disclosed, there will be no recourse for the Scruggses, the McIntoshes, the Rigsbys, or any other holder of the privileges that are threatened by the December 11, 2007 order. Furthermore, the Scruggses may be required to testify on topics

directly related to the pending criminal contempt proceeding, which testimony threatens their constitutional rights in the criminal case. Once required to testify on these topics, the Scruggses will have no recourse in the event that the District Judge reverses the December 11, 2007 order. In addition, while the December 11, 2007 order does not require the production of any documents, and a proper *subpoena duces tecum* has never been served on either of the Scruggses, the Scruggses will be irreparably injured if they are required to comply with the massively overbroad and unduly burdensome document requests served by State Farm.

On the other hand, compared to the significant privilege issues and constitutional rights at stake, the harm to State Farm and Renfroe of a stay is insubstantial. The topics on which State Farm and Renfroe sought to examine the Scruggses are peripheral, and neither State Farm nor Renfroe ever demonstrated that the Scruggses are the only sources of the information State Farm and Renfroe purport to seek. Indeed, State Farm and Renfroe acknowledged that, for the almost all of the information they seek from the Scruggses, the same information is available from Cori and Kerri Rigsby, whom State Farm and Renfroe have each deposed on multiple occasions. The fact that neither State Farm nor Renfroe has gotten around to serving a proper document subpoena demonstrates the insignificance of the information State Farm and Renfroe claim to need. Furthermore, any stay is likely to be short; the District Judge may well resolve the objections to the December 11, 2007 order before January 15, 2008, the date on which State Farm unilaterally noticed the Scruggses depositions.

For the foregoing reasons, non-parties Richard F. Scruggs and Zachary Scruggs respectfully request that United States Magistrate Judge Robert H. Walker stay his December 11, 2007 order pending the resolution by the District Judge of the objections thereto filed by plaintiffs, the Scruggses, and non-parties Cori and Kerri Rigsby.

Dated: December 27, 2007

/s/ John W. Keker

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CERTIFICATE OF SERVICE

I hereby certify that on ___th day of December, 2007, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following counsel of record:

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