

**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

**NON-PARTIES RICHARD F. SCRUGGS AND ZACHARY SCRUGGS'S
OBJECTIONS TO MAGISTRATE'S ORDER**

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 72(a) and Local Rule 72.1(A)(1), non-party attorneys Richard F. Scruggs and Zachary Scruggs hereby object to United States Magistrate Judge Robert M. Walker's December 11, 2007 Order, Doc. 911, denying the motion to quash deposition notices and document requests and motion for a protective order filed on September 11, 2007, by plaintiffs Thomas C. and Pamela McIntosh.¹ Until December 5, 2007, the Scruggses served as counsel for the Plaintiffs, Thomas and Pamela McIntosh, who brought the above-captioned action against State Farm Fire and Casualty Company and E.A. Renfroe & Company for their roles in the fraudulent denial of the McIntoshes' claim for coverage of the damage that they sustained to their home following Hurricane Katrina. Since 2006, the Scruggses have also represented Cori and Kerri Rigsby, two whistleblowers who disclosed to the Scruggses evidence of State Farm and Renfroe's fraudulent conduct.

Judge Walker's Order compels the Scruggses to sit for deposition to be deposed on matters directly related to their representation of the McIntoshes and Rigsbys. The Scruggses respectfully request that this Court reverse the magistrate's December 11, 2007 order on grounds that it is clearly erroneous, misapprehends the relevant law, and is otherwise contrary to law.

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.

First, the magistrate's order erroneously concludes that the information that State Farm and Renfroe seek is not privileged or otherwise protected from discovery. Until December 5, 2007, the Scruggses represented the McIntoshes in this lawsuit. The Scruggses have also represented the Rigsbys since February 2006, including in connection with a *qui tam* action against State Farm and Renfroe, which is currently pending in the United States District Court for the Southern District of Mississippi. The information that the magistrate ordered the Scruggses to provide clearly falls within the scope of information protected by the attorney-client privilege of the Rigsbys. Furthermore, the Rigsbys provide consulting services to the Scruggses in connection with other Katrina-related cases. Any relevant information the Scruggses may have is clearly privileged and otherwise protected from State Farm's and Renfroe's discovery.

Second, the magistrate's order failed to find that State Farm and Renfroe had met the heightened burden necessary to compel the depositions of their opposing counsel. In addition to the *qui tam* case, the Scruggses have represented hundreds of Gulf Coast homeowners in cases against State Farm and Renfroe for their roles in the fraudulent and unlawful scheme that the Rigsbys uncovered. Without citing a single legal authority, the magistrate's order ignores well-accepted law that strongly disfavors depositions of opposing counsel, especially when the deposition is not crucial to the case of the party seeking the testimony. Depositions of opposing counsel, such as the ones ordered by Magistrate Walker, have been regularly criticized for disrupting the adversarial system and lowering the standards of the legal profession.

Third, the magistrate's order misapplies the undue burden test by evaluating only the benefit of the Scruggses' depositions to Defendants without any consideration of the burdens that these depositions will impose upon the Scruggses. When the burdens that these depositions will impose on the non-party Scruggses are considered, it is apparent that State Farm's subpoenas will subject the Scruggses to unreasonable and undue burden, in particular due to the extraordinary criminal contempt case pending in the Northern District of Alabama. At the heart of the criminal contempt case are the Scruggses' legal and professional relationships with the Rigsbys, as well as their conduct following the issuance of a preliminary injunction relating to State Farm documents. These are exactly the same matters on which the magistrate has now

permitted State Farm and Renfroe to examine the Scruggses. To permit these depositions to go forward would jeopardize Richard Scruggs's, Zachary Scruggs's, and the Scruggs Law Firm's rights and defenses in the criminal contempt case.

Fourth, the factual findings that the magistrate made with respect to Zachary Scruggs do not support an order compelling him to testify on topics for which the court did not find that he was likely to have relevant, non-privileged, crucial information that could not be obtained from other sources. The only factual finding that the magistrate made with respect to Zachary Scruggs is that he has represented the Rigsbys and the McIntoshes, which means that his attorney-client communications with them are privileged. This factual finding, without more, does not warrant requiring him to submit to depositions about topics beyond his attorney-client relationships with the Rigsbys and the McIntoshes, and it certainly does not warrant requiring him to testify about Richard Scruggs's receipt of documents from the Rigsbys.

Fifth, even if the motion to quash is denied, the Scruggses cannot be compelled to provide documents, because State Farm has not served a *subpoena duces tecum* on the Scruggses. Thus far, the only subpoenas that State Farm has served on the Scruggses have been for testimony only. Magistrate Walker's Order fails to address this procedural issue and similarly fails to consider the substantial and undue burden that State Farm's requests impose on the Scruggses.

In the event that the Court does not reverse the Magistrate's Order, the Scruggses respectfully request that the Court stay the enforcement of State Farm's subpoenas and document requests pending the resolution of the criminal contempt case. The criminal contempt case alleges that Richard Scruggs and the Scruggs Law Firm failed to comply with the preliminary injunction issued in *Renfroe v. Moran*, a related case pending in the Northern District of Alabama arising out of the Scruggses' investigation of State Farm. Because the issues in the criminal contempt case overlap almost entirely with the topics about which State Farm and Renfroe seek to depose the Scruggses, these depositions pose a real threat to defendants' constitutional rights in the criminal contempt case and should not be permitted to proceed while that case is pending.

II. BACKGROUND FACTS

A. The Scruggs Law Firm's litigation Against State Farm And Renfroe.

Starting in 2006, attorneys Richard and Zachary Scruggs represented hundreds of plaintiffs in lawsuits against State Farm and Renfroe arising from their participation in the fraudulent denial of Hurricane Katrina damage claims. Among the many plaintiffs that the Scruggses have represented against State Farm and Renfroe are Thomas and Pamela McIntosh, who the Scruggses represented until December 5, 2007, when they withdrew as plaintiffs' counsel in this case. Additionally, in April 2006, sisters Cori and Kerri Rigsby, through the Scruggs Law Firm, P.A. and Missouri counsel, filed a *qui tam* action against, among others, State Farm and Renfroe which is currently pending in the United States District Court for the Southern District of Mississippi.² As relators on behalf of the United States, the Rigsbys allege that State Farm and Renfroe presented to the United States government false claims for payment under the National Flood Insurance Program.

In coordination with what was then known as the Scruggs Katrina Group ("SKG"), the Scruggs Law Firm also represented twenty-one Gulf Coast homeowners in a multi-million dollar Racketeer Influenced and Corrupt Organizations Act civil case against State Farm and Renfroe for their participation in an enterprise to procure corrupt property inspections and falsely-contrived inspection reports for the common purpose of denying Gulf Coast homeowners' Katrina damage claims.³

B. *E.A. Renfroe & Co., Inc. v. Cori Rigsby Moran And Kerri Rigsby*, N.D. Ala. Case No. 2:06-cv-1752-WMA.

The Scruggses, as non-parties, have also personally had to litigate against State Farm and Renfroe in various actions. In September 2006, Renfroe sued the Rigsbys in the United States District Court for the Northern District of Alabama. The suit, styled *Renfroe v. Moran*, was assigned to Judge William M. Acker, Jr. Renfroe alleged that the Rigsbys' procurement of State

² The case is styled *United States ex rel. Rigsby v. State Farm, et al.*, S.D. Miss. Case No. 1:06cv433-LTS-RHW.

³ The RICO case is styled *Shows, et al. v. State Farm Mut. Auto. Ins. Co., et al.*, Case No. 1:07-cv-00709-LTS-LRA. It is pending in the Southern District of Mississippi.

Farm's documents breached their employment contracts and violated Alabama's Trade Secrets Act. Ex. A. Renfroe sought damages and an injunction requiring the return of any Renfroe and State Farm documents that the Rigsbys had obtained during their employment with Renfroe. *Id.* Scruggs was not named in the case, nor has Scruggs or the Scruggs Law Firm entered an appearance in the case as counsel for the Rigsbys.

On December 8, 2006, Judge Acker issued the preliminary injunction requested by Renfroe. Ex. B. The first paragraph of Judge Acker's preliminary injunction required the Rigsbys and "their agents, servants, employees, attorneys, and other persons in active concert or participation with them" to deliver to Renfroe's counsel all Katrina-related State Farm documents that the Rigsbys had acquired while working for Renfroe. *Id.* at 13. This provision, however, contained an "express exception" for "law enforcement officials." *Id.* Similarly, the second paragraph of the preliminary injunction permitted the Rigsbys and "their agents, servants, employees, attorneys, and other persons in active concert or participation with them" to "disclose" such documents to "law enforcement officials at their request." *Id.* at 14.⁴

On December 12, 2006, Scruggs sent a set of State Farm documents that he had obtained from the Rigsbys to Mississippi Attorney General Jim Hood at his request. Notwithstanding the express law enforcement exemption contained in Judge Acker's preliminary injunction, Renfroe moved in January 2007 to hold the Rigsbys, Richard Scruggs, and the Scruggs Law Firm in contempt for their failure to turn over documents covered by the preliminary injunction. Ex. D at 3. In response, Richard Scruggs appeared specially before Judge Acker to seek dismissal of the contempt proceedings on the grounds that the court had no jurisdiction to enjoin him because he was a non-party and that he had not violated the preliminary injunction because his disclosure of the State Farm documents to the Mississippi Attorney General was covered by the preliminary injunction's law-enforcement exception. Ex. E.

⁴ The Rigsbys appealed Judge Acker's order granting the preliminary injunction. The United States Court of Appeals for the Eleventh Circuit affirmed the preliminary injunction. Ex. C. In doing so, the Eleventh Circuit stated three times that "the injunction specifically allows disclosure of the documents to 'law enforcement officials.'" *Id.* at 12.

On March 19, 2007, Judge Acker conducted a hearing on Renfroe's motion for contempt. Ex. F. Renfroe examined Cori Rigsby and Richard Scruggs under oath with respect to their legal and consulting relationships following Hurricane Katrina as well as the Rigsbys' distribution of State Farm and Renfroe documents in 2006.

On June 15, 2007, Judge Acker referred Richard Scruggs and the Scruggs Law Firm to the U.S. Attorney for prosecution for criminal contempt. Ex. G at 25-26. However, "[f]ollowing a serious and thorough review of the facts," the U.S. Attorney for the Northern District of Alabama declined to prosecute Richard Scruggs. Ex. H. Judge Acker then appointed three private attorneys to prosecute Richard Scruggs and his law firm. Ex. I. He directed the private attorneys to prepare a charging document "for his signature, as the charging party." Ex. J. On August 21, 2007, Judge Acker and his appointed private attorneys came to an agreement on a charging document, which Judge Acker signed and his three private attorneys filed to initiate the criminal contempt action. Ex. K.

The Allegations of Criminal Contempt ("Allegations") that Judge Acker's private attorneys filed allege that Richard Scruggs's December 12, 2006 disclosure of State Farm documents to Attorney General Hood was a willful violation of Judge Acker's preliminary injunction. *Id.* at 3-4. After the Allegations were filed, Judge Acker recused himself from the criminal contempt case. Ex. J. The other judges and magistrate judges of the Northern District of Alabama also recused themselves from the case. Ex. L. The chief judge of the United States Court of Appeals for the Eleventh Circuit subsequently reassigned the case to Senior District Judge C. Roger Vinson of the Northern District of Florida, before whom the case is now pending. Ex. M.

C. State Farm's Deposition Subpoenas And Notices Of Document Requests.

The Scruggses are not and have never been parties to this action. On August 28, 2007, State Farm served on the parties to this case notices of the video depositions of the Scruggses and notices of certain document requests made pursuant to Fed. R. Civ. P. 30(b)(5), which applies only to parties. Exs. N and O. Presumably recognizing that pursuant to Fed. R. Civ. P. 45, a notice is insufficient to compel a non-party to submit to a deposition and produce

documents, counsel for State Farm served subpoenas on the Scruggses on September 5, 2007. Exs. P and Q. As the faces of the subpoenas clearly indicate, they are for deposition testimony only. Those subpoenas did not command the Scruggses to produce and permit inspection and copying of any documents that should have been identified on the face of the subpoenas. *Id.* As of today, counsel for State Farm and Renfroe have not served a subpoena *duces tecum* on the Scruggses in this action.

On September 11, 2007, the McIntoshes moved to quash the noticed video depositions of the Scruggses and the document requests. Doc. 453. In support of their motion, the McIntoshes argued that the information and materials that State Farm seeks are protected from discovery by the attorney-client privilege and the work product doctrine. *Id.* at 4-7. They also argued that the depositions should not be permitted because State Farm was unable to meet its heightened burden under the test enunciated in *Shelton v. American Motors Corp.*, 805, F.2d 1323 (8th Cir. 1986), which requires State Farm to show that: “(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 the case.” *Id.* at 1327. *See also* Doc. 453 at 7-11. Finally, the McIntoshes requested that the Court enter a protective order on the ground that State Farm’s depositions are intended to harass and unduly burden the McIntoshes and the Scruggses. *Id.* at 11-12. The McIntoshes also argued that State Farm’s document requests, which were served without a subpoena, were procedurally improper and that the requests called for clearly privileged material and were overly broad and unduly burdensome. *See* Doc. 609 at 12-14.

State Farm responded to the motion to quash on September 28, 2007. Doc. 559. It argued that it should be permitted to depose Richard Scruggs as to the chain of custody of the October 12 report, *id.* at 5-10, and Zachary Scruggs as to internal State Farm communications regarding Katrina claims that he may have received from the Rigsbys, *id.* at 10-14. State Farm argued that this information cannot be obtained from other sources. *Id.* at 14-15. With respect to the document requests, State Farm argued that the attorney-client privilege and work product

doctrine do not apply to the documents that State Farm seeks. *Id.* at 15-29. Renfroe untimely joined in State Farm's response to the motion to quash on October 23, 2007. Doc. 707.⁵

On December 4, 2007, the McIntoshes filed a notice of supplemental authority in support of their motion to quash the Scruggses' depositions. Doc. 889. They attached a December 3, 2007 order of the Northern District of Mississippi granting a motion to quash deposition subpoenas that had been served on the Scruggses by Renfroe in connection with Renfroe's Alabama lawsuit against the Rigsbys. Magistrate Judge Alexander of the Northern District of Mississippi granted the Scruggses' motion to quash Renfroe's deposition subpoenas on the ground that the depositions would be unduly burdensome. Doc. 889 attach. 1. Of particular import, Magistrate Alexander found:

Although the specter of invoking a constitutional privilege usually does not alone justify ending a deposition altogether, the court fails to see how an individual facing criminal contempt charges could comment in a civil proceeding about topics that form the substance of the criminal charges without invoking a constitutional right in response to every question, except perfunctory, context-setting questions (*e.g.*, What is your name?). When a deposition serves no useful, productive purpose, it would waste precious judicial, and lawyerly resources to order its occurrence. In light of the many other pending lawsuits in which the Scruggs Law Firm and Renfroe are involved, it is very clear to the court that the response to nearly every question during these depositions would be invocation of one or more of the multiple privilege/work product protections noted above. And, more to the point, it would pose a substantial hardship on [the Scruggses] to submit to a civil deposition before the criminal proceeding is concluded.

Id. at 6-7.

III. MAGISTRATE'S FACTUAL AND LEGAL FINDINGS

On December 11, 2007, Magistrate Walker denied the McIntoshes' motions for a protective order and to quash the noticed video depositions of the Scruggses. Magistrate Walker made several factual findings. He found that Richard Scruggs did not represent the McIntoshes prior to August 2006. Doc. 911 at 3. He also found that the Scruggses had been the McIntoshes' attorneys in connection with this litigation. *Id.* at 1-2. As depicted in the order, the Scruggses and several other attorneys had associated in what was previously known as the "Scruggs Katrina

⁵ The McIntoshes moved to strike Renfroe's joinder on the ground that it was untimely. Doc. 715. That motion was denied by Magistrate Walker on December 11, 2007. Doc. 911 at 5.

Group,” and they jointly represented the McIntoshes as litigation counsel in this case until December 5, 2007, when the Scruggses withdrew as counsel. *Id.*

Magistrate Walker also found that the Rigsbys, who are non-party witnesses in the case, are also the Scruggses’ clients. *Id.* at 2. The magistrate did not make any finding as to when the attorney-client relationship between the Rigsbys and the Scruggses was formulated. He did, however, find that the Scruggses have represented the Rigsbys in a *qui tam* case that is currently pending before this Court and that the Rigsbys were in contact with Richard Scruggs in early 2006. *Id.* At that time, the Rigsbys were Renfroe employees assigned to work on State Farm *Katrina* claims in Mississippi. *Id.* By February 2006, the Rigsbys had begun providing State Farm documents to Richard Scruggs. *Id.* Magistrate Walker found that on April 26, 2006, Richard Scruggs filed under seal the Rigsbys’ *qui tam* action against State Farm. *Id.* The Rigsbys continued to work for Renfroe and to provide documents to Richard Scruggs at least until June 2006. *Id.* The Rigsbys left the employ of Renfroe on or about June 2006 and were hired by “the Scruggs Firm” as consultants in *Katrina* litigation. *Id.* Although the magistrate’s order recognizes that the Scruggses relationships with the Rigsbys are “complicate[d],” the order is clear that the Rigsbys are both litigation consultants and “clients of the Scruggses.” *Id.*

Magistrate Walker also made factual findings about the existence of two engineering reports prepared in October 2005 that concern the McIntoshes’ property. *Id.* at 3. One of the engineering reports contained a sticky note. *Id.* On the basis of testimony that Richard Scruggs provided in March 2007 at a contempt hearing in Renfroe’s Alabama action before Judge Acker, Magistrate Walker concluded that the Rigsbys had provided the October 12, 2005 engineering report with the sticky note to Scruggs in February 2006. *Id.* at 3. At the time that Richard Scruggs received the engineering report, Magistrate Walker found that Scruggs did not represent the McIntoshes. *Id.* As indicated in the order, the McIntoshes learned about the engineering report with the sticky note when an ABC news producer contacted Mr. McIntosh on August 21, 2006 and told him that there were two engineering reports on his property, one of which bore the sticky note. *Id.* at 4. From this and one line in a deposition that the ABC producer had previously worked with Richard Scruggs, Magistrate Walker “reasonably inferr[ed]” that

Richard Scruggs was “the source” of the information to the ABC producer regarding the McIntosh claim. *Id.* Other than finding that Zachary Scruggs has represented the McIntoshes and the Rigsbys, Magistrate Walker did not make any other factual findings with respect to him.

On the basis of the aforementioned facts and without citing any legal authority, Magistrate Walker concluded that State Farm and Renfroe are entitled to depose both of the Scruggses. While Magistrate Walker’s order limits the topics on which Defendants may question the Scruggses, it appears to go beyond what State Farm requested. *Id.* at 4-5. State Farm sought to depose the Scruggses regarding just two topics: the chain of custody of the so-called sticky note document, and email Zachary Scruggs’ may have received from the Rigsbys. Magistrate Walker expanded the topics to include other State Farm documents the Rigsbys may have provided to the Scruggses and the Scruggses’ employment relationship with the Rigsbys. *Id.* at 4-5.

Magistrate Walker declined to evaluate the claims of privilege with respect to Defendants’ document requests. *Id.* at 5. Similarly, he did not address the McIntoshes’ argument that the document requests served on the Scruggses, without a subpoena, were procedurally improper. He did not order the Scruggses to produce any documents, nor did he expand the scope of permissible document discovery beyond the three topics on which he found that Defendants could depose the Scruggses.

IV. ARGUMENT

The Scruggses respectfully request that the Court reverse Magistrate Walker’s December 11, 2007 order, Doc. 911, on grounds that it is clearly erroneous, misapprehends the relevant law, and is otherwise contrary to law.

A. Standard Of Review.

Under Federal Rule of Civil Procedure Rule 72(a), a party may serve and file objections to a magistrate judge’s orders regarding nondispositive pretrial matters if the objections are filed within ten days after service of the order.⁶ The court reviews a magistrate’s ruling under Fed. R.

⁶ The Scruggses are not parties to the *McIntosh* case and they withdrew from the case as counsel on December 5, 2007. Doc. 911 at 1. The magistrate’s order therefore was not served on them

Civ. P. 72(a), which provides that the court shall “modify or set aside any portion of the magistrate judge’s order found to be clearly erroneous or contrary to law.” *Id.*; 28 U.S.C. § 636(b)(1)(A); Uniform L.R. 72-1; *see also United States v. Wilson*, 864 F.2d 1219 (5th Cir. 1989). “The ‘clearly erroneous’ standard applies to the factual components of the magistrate judge’s decision.” *Lahr v. Fulbright & Jaworski, L.L.P.*, 164 F.R.D. 204, 208 (N.D. Tex. 1996). On the other hand, the magistrate judge’s legal conclusions are freely reviewable. *Id.* The district judge applies a *de novo* standard and reverses if the magistrate judge errs in some respect in his legal conclusions. *Id.*

B. The Magistrate’s Order Should Be Revised Because State Farm’s Deposition Subpoenas Seek Discovery Of Information That Is Privileged and Protected, State Farm Cannot Meet The *Shelton* Test, And The Subpoenas Subject The Scruggses To Unreasonable And Undue Burden.

Federal Rule of Civil Procedure 45 provides that the court which issues a subpoena shall quash or modify the subpoena if it requires disclosure of privileged or other protected matter, or otherwise subjects a person to undue burden. *See* Fed. R. Civ. P. 45(c)(3)(A). The magistrate’s legal conclusion that the Scruggses have “non-privileged relevant information unavailable by other means” is clearly erroneous, contrary to law, and should be reconsidered and reversed. Doc. 911 at 5.

1. **The Magistrate’s Order Erroneously Concludes That The Information That State Farm Seeks Is Not Privileged And Otherwise Protected From Discovery.**
 - a. **The Information That The Magistrate Ordered The Scruggses To Provide Is Protected By The Attorney-Client Privilege Of The Rigsbys.**

The magistrate failed to consider that the topics about which he ordered the Scruggses to testify are protected by the attorney-client privilege that the *Rigsbys* have with the Scruggses. Where an attorney is consulted for the purpose of obtaining advice on legal questions or matters, that activity gives rise to an attorney-client relationship. *See In re LTV Secs. Litig.*, 89 F.R.D. 595, 602 (N.D. Tex. 1981). On the basis of the magistrate’s factual findings, the Scruggses had

by the Court. On December 20, 2007, counsel for State Farm served a copy of the order on the Scruggses, through their counsel. Ex. R.

an attorney-client relationship with the Rigsbys as early as February 2006 and certainly at all times relevant to the *McIntosh* case. See Doc. 911 at 1-3. The Rigsbys approached Richard Scruggs in February 2006 with concerns about State Farm's and Renfroe's fraudulent conduct and with questions regarding their own legal rights given their employment at that time with Renfroe. Indeed, Magistrate Walker found that the Rigsbys began providing documents to Richard Scruggs as late as February 2006, the receipt of which culminated in Scruggs filing a *qui tam* action on behalf of the Rigsbys two months later in April 2006. Doc. 911 at 2.

An attorney is not permitted and cannot be compelled to testify to communications made in confidence to the attorney by his or her client unless the client consents. Where the communications are of a confidential nature, are made between a client and her attorney, and are made for the purpose of seeking or giving legal advice, such communications are absolutely protected from disclosure by the attorney-client privilege. See *Upjohn Co. v. United States*, 449 U.S. 383, 389-95 (1981). All of the Rigsbys' communications with the Scruggses for which State Farm and Renfroe seek discovery were of a confidential nature and made for the purpose of seeking or giving legal advice. Indeed, counsel for the Rigsbys expressly directed the Scruggses to assert the privilege in the noticed depositions. See Doc. 505. Magistrate Walker made no finding to the contrary.

Although all the facts establish that the Rigsbys approached Richard Scruggs for the sole purpose of obtaining legal advice and representation in early 2006, Magistrate Walker found that the Scruggses have nonprivileged information about the circumstances surrounding their receipt and the chain of custody of State Farm documents that the Rigsbys provided in early 2006. Doc. 911 at 4-5. Magistrate Walker concluded that information concerning the engineering report and its chain of custody were not privileged because "Scruggs did not represent the *McIntoshes* when he received the engineering report." *Id.* at 3 (emphasis added).

This appears to miss the point. Although Scruggs may not have represented the *McIntoshes* in early 2006, he did represent the *Rigsbys* at that time. Any communications that the Scruggses had with the Rigsbys occurred solely for the purposes of obtaining and providing legal advice. Accordingly, any communications that the Rigsbys had with the Scruggses relating

to the documents that they provided to him in 2006 and the Scruggses' subsequent use of those documents in their litigation against State Farm and Renfroe are privileged. State Farm's subpoenas should be quashed on attorney-client privilege grounds.⁷

b. The information That The Magistrate Ordered The Scruggses To Provide Is Protected By The Work-Product Doctrine.

State Farm's subpoenas should also be quashed on the ground that they seek the discovery of information that is protected by the work-product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The magistrate's order errs because it does not discuss the applicability of the work-product doctrine to the topics on which it requires the Scruggses to testify. Specifically, the magistrate's order fails to discuss the work-product issues that are raised by requiring the Scruggses to testify to the litigation consulting work that the Rigsbys have performed for them, nor does the order discuss how the Rigsbys' consulting work is even relevant to the claims and defenses in the *McIntosh* case. Magistrate Walker found that Rigsbys worked for the Scruggses as litigation consultants, but he never stated any basis for ruling that the work-product doctrine did not apply to the work performed by the Rigsbys in the course of their employment as litigation consultants. Doc. 911 at 2.

The work-product doctrine provides qualified protection of "a lawyer's research, analysis of legal theories, mental impressions, notes, and memoranda of witnesses' statements." *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991) (citing *Upjohn*, 449 U.S. at 400; *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982)). In *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), the court held that the work-product doctrine barred the taking of an attorney's deposition where the testimony sought would have reflected the mental impressions and opinions of the attorney. *See id.* at 1328; *see also Buford v. Holladay*, 133 F.R.D. at 492-93. This strong presumption in favor of protecting attorney work product can be

⁷ Magistrate Walker relies upon testimony that Richard Scruggs provided in the Alabama case for his conclusion that Richard Scruggs, like any opposing counsel, has information that could be relevant to his client's adversary. Any such information clearly falls within the scope of the attorney-client privilege. Moreover, Renfroe's counsel stipulated in the hearing before Judge Acker and at a deposition that it would not seek a waiver of the Rigsbys' attorney-client privilege in its communications with Scruggs Law Firm. Ex. S at 32:23-33:24; 137:3-138:7.

overcome only by showing a compelling need for the information and an inability to discover the substantial equivalent by other means. *See Conkling v. Turner*, 883 F.2d 431, 434-35 (5th Cir. 1989); *In re Int'l Sys. & Controls Corp. Secs. Litig.*, 693 F.2d 1235, 1240-41 (5th Cir. 1982); Fed. R. Civ. P. 26(b)(3); Miss. R. Civ. P. 26(b)(3) (“[T]he court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”).

To the extent that the magistrate ordered discovery of the Scruggses’ interactions with the Rigsbys that occurred within the scope of the Rigsbys’ employment as consultants for the Scruggs Law Firm and SKG, those interactions also are protected by the work-product doctrine. The work-product doctrine protects not only materials prepared by a party, but also materials prepared by a representative of a party, including consultants. *See United States v. Nobles*, 422 U.S. 225, 228 (1975); *see also* Fed. R. Civ. P. 26(b)(3) (including “consultant[s]” within the scope of the work-product doctrine). In *United States v. Nobles*, the Supreme Court explained “that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.” 422 U.S. at 238-39. Here, the Rigsbys were hired by SKG as consultants for SKG’s cases against State Farm and other insurers that fraudulently denied Katrina damage claims. The content of the work that they did; the opinions that they provided; the mental impressions that they arrived at in the scope of their employment; and the conclusions that they reached are *all* protected by the work-product doctrine.

State Farm and Renfroe have not made a showing of a *compelling* need that would entitle them to access the mental impressions, conclusions and legal theories of the Scruggses or their consultants. There is no reason to believe that State Farm and Renfroe cannot without undue hardship obtain the information they seek here from other sources such as their own employees and agents, who after all created the engineering reports at issue. The mere possibility that an attorney’s deposition might yield admissible evidence cannot overcome the strong presumption against inquiries into attorney work product.

As is evident from Magistrate Walker's factual findings, the only interactions that Scruggses have had with the Rigsbys that are arguably relevant to the *McIntosh* case concern the *qui tam* case and other Hurricane Katrina cases which the Scruggses have anticipated bringing or actually litigated. Thus, the deposition testimony State Farm and Renfroe seek from the Scruggses will necessarily implicate either the attorney-client privilege or the legal theories, opinions, and mental impressions that were developed by the Scruggses and other SKG attorneys in anticipation and furtherance of litigation against State Farm, Renfroe, and other insurance companies. The work-product doctrine protects the Scruggses from having to disclose this information to State Farm and Renfroe. The magistrate's December 11th order clearly errs by ordering the Scruggses to testify to protected information without discussing the applicability of the work-product doctrine.

c. The Information That The Magistrate Ordered The Scruggses To Provide Is Protected By The Joint-Prosecution Privilege.

The Scruggses' communications with the United States government regarding State Farm's and Renfroe's fraudulent conduct after Hurricane Katrina are also protected from discovery by a joint-prosecution privilege, which the Rigsbys, as relators, and the Scruggses, as their attorneys, share with the United States. Several courts have recognized that there is a joint-prosecution privilege in communications made by a relator or relator's counsel to the United States government as well as a privilege in the attorney work product that is shared with the United States government. *See, e.g., United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 26-27 (D.D.C. 2002) (recognizing joint-prosecution privilege); *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 686 (S.D. Cal. 1996) (ruling that the relator and the government "are essentially the same party" and can assert a "joint prosecution privilege"). The magistrate's order that the Scruggses testify about their receipt and use of State Farm documents provided to them by their clients, Zachary Scruggs's receipt of confidential emails from his clients, and the Rigsbys consulting work for the Scruggses directly implicates the Scruggses' *qui-tam*-related communications with the United States government. All of these communications were made in the course of a joint-prosecution effort and were designed to further that effort. The joint-

prosecution privilege protects the Scruggs attorneys from having to disclose the content of these communications as well as any work product shared by the Scruggses with the United States government.

d. The Information That The Magistrate Ordered The Scruggses To Provide Is Protected By The Common-Interest Privilege.

To the extent that Magistrate Walker ordered discovery of the Scruggses' communications with the United States government, Mississippi Attorney General Jim Hood, and other Katrina-related litigants or counsel, those communications are protected from discovery by a common-interest privilege. The common-interest privilege is an extension of the attorney-client privilege and of the work-product doctrine and "extends the attorney-client privilege to communications made in the course of joint defense activities." *In re LTV Secs. Litig.*, 89 F.R.D. at 604; *see also Power Mosfet Techs. v. Siemens AG*, 206 F.R.D. 422, 424 (E.D. Tex. 2000) (stating the common-interest privilege applies to work product). The common-interest privilege thus protects communications between two parties or attorneys that share a common legal interest. *See Hodges Grant & Kaufmann v. IRS*, 768 F.2d 719, 721 (5th Cir. 1985); *Aiken v. Texas Farm Bureau Mut. Ins. Co.*, 151 F.R.D. 621, 623 (E.D. Tex. 1993).

The Scruggses share a common legal interest with private parties, governmental entities, and attorneys that are litigating State Farm's and Renfroe's fraudulent conduct relating to Hurricane Katrina damage claims. The common-interest privilege protects the Scruggses from having to disclose any communications that were made between attorneys, governmental entities, and private parties who are litigating against or anticipate litigating against State Farm and Renfroe for their fraudulent conduct with respect to Hurricane Katrina damage claims.⁸

⁸ Although State Farm and Renfroe did not make the requisite showings to warrant enforcing the subpoenas, the Scruggses respectfully request that, if the Court does find that Defendants have demonstrated that they are entitled to certain information from the Scruggses, the Court modify the subpoenas accordingly or enter a limiting protective order pursuant to Fed. R. Civ. P. 26(c). Rule 26(c)(2) permits the Court "for good cause shown" to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." As the Fifth Circuit has written, "a request to depose opposing counsel generally would provide a district court with good cause to issue a protective order." *Nguyen*, 197 F.3d at 209. Such modification or protective order should further limit the topics on which Defendants may depose the Scruggses to the two topics about which State Farm specifically requested the right to question the Scruggses: (1) the chain of custody of the October 12, 2005

2. The Magistrate's Order Did Not Require State Farm And Renfroe To Meet The Heightened Burden Necessary To Warrant Deposing Opposing Counsel.

The magistrate's order misapprehends the law applicable to requests to depose opposing counsel. The Scruggses were Defendants' opposing counsel in the *McIntosh* case as well as several other related pending cases at all relevant times. The Scruggses have also represented hundreds of other Gulf Coast residents who are currently suing State Farm and Renfroe, and the Scruggses have represented the Rigsbys in the *qui tam* case. Like the *McIntosh* case, these cases all concern the Rigsbys' disclosure of State Farm's and Renfroe's fraudulent conduct in the wake of Hurricane Katrina.

The Fifth Circuit strongly disfavors depositions of opposing counsel. *See Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 (5th Cir. 1999). As a rule, a party should not be permitted to take the deposition of a party's attorney "except in the rarest of circumstances." *Id.* at 490-91. (citing *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826 (5th Cir. 1986)). Such tactics should be "discouraged, as they disrupt the adversarial process and lower the standards of the profession." *Swangain v. AON Corp.*, 2006 U.S. Dist. LEXIS 63964 at *5 (S.D. Miss. Sept. 6, 2006) (citing cases); *see also Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary.").

Following the Eighth Circuit in *Shelton*, 805 F.2d 1323, the Fifth Circuit has adopted a three-part test ("the *Shelton* test") to analyze the propriety of an attorney deposition and thereby limit the narrow circumstances in which a deposition of opposing counsel will be permitted. *See Swangain*, 2006 U.S. Dist. LEXIS 63964 at *6 (citing *Nguyen v. Excel Corp.*, 197 F.3d 200, 208 (5th Cir. 1999)). Under the *Shelton* test, the circumstances in which a deposition of an attorney will be permitted are "limited to where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Shelton*, 805 F.2d at 1327 (citation omitted).

engineering report and (2) Zachary Scruggs's receipt of State Farm emails.

The magistrate clearly erred when he ordered the depositions of the Scruggses to proceed without finding that Defendants had met all prongs of the rigorous *Shelton* test. *First*, State Farm and Renfroe have not made any showing that no other means exist to obtain the information that they seek to obtain from the Scruggses. For instance, if State Farm and Renfroe want to know what internal emails were forwarded by the Rigsbys to Zachary Scruggs, or anyone else for that matter, they can search their computer servers for that information or they can question the Rigsbys about it. In fact, State Farm and Renfroe have deposed both Rigsbys on multiple occasions and Renfroe has already questioned Richard Scruggs on the topics it seeks to question him on again. Any additional questions that they have for the Scruggses could only involve inquiring into their communications with their clients, their thoughts, and their mental impressions, areas which are well protected by several privileges and doctrines.

Second, all the information to which the magistrate required the Scruggses to testify is privileged or otherwise protected, as explained above. Thus, State Farm and Renfroe cannot as a matter of law meet the second prong of the *Shelton* test.

Third, the magistrate also failed to conclude that the information that State Farm seeks is *crucial* to the *McIntosh* case. The American Heritage Dictionary defines “crucial” as “[e]xtremely significant or important” and “[v]ital to the resolution of a crisis; decisive.” Am. Heritage Dictionary of the Eng. Lang (4th ed. 2000), *available at* <http://www.bartleby.com/61/35/C0773500.html>. The McIntoshes filed this lawsuit against State Farm and Renfroe, complaining of State Farm’s gross negligence, breach of contract, bad faith breach of contract, and fraud, and Renfroe’s aiding and abetting of State Farm’s fraudulent conduct. *See* Doc. 194. There is no reasonable basis expressed in the magistrate’s order for concluding that Zachary Scruggs’s testimony about his receipt of emails from his clients, who are not parties to this action, is somehow extremely significant or *vital* to the resolution of the *McIntosh* case. The same is true of the magistrate’s order that the Scruggses testify about their employment of the Rigsbys. It is not evident from the magistrate’s order that such information is vital to the resolution of the *McIntosh* case. In sum, State Farm and Renfroe simply have not made any showing that the information that they seek to obtain from Scruggses is relevant, non-

privileged, and *crucial* to the *McIntosh* case, nor did Magistrate Walker conclude that Defendants had met all three requirements. Accordingly, State Farm's deposition subpoenas to the Scruggses should be quashed because they have not, and cannot, meet all three prongs of the *Shelton* test.

3. The Magistrate's Order Fails To Evaluate The Undue Burden That These Depositions Will Impose On The Scruggses.

Magistrate Walker's order goes to great lengths to outline the potential benefits that the depositions of the Scruggses will have for the Defendants, but it fails entirely to consider the undue and unreasonable burden that these depositions will impose upon the Scruggses, who are non-parties to the *McIntosh* case. Such a one-sided calculus—weighing only the benefits to the Defendants of these depositions, and not considering the burden on the Scruggses—is clear error and should be reversed.

Federal Rule of Civil Procedure 45 provides that a court shall quash (or modify) a subpoena if it “subjects a person to undue burden.” Fed. R. Civ. P. 45(c)(3)(A)(iv). “Whether a subpoena subjects a witness to undue burden generally raises a question of the subpoena's reasonableness, which ‘**requires a court to balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it.**’” *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 377 (5th Cir. 2004) (quoting 9A Charles Alan Wright & Arthur Miller, Fed. Prac. & Proc. § 2463 (2d ed. 1995)) (emphasis added). In balancing a subpoena's benefits *and* burdens, the court must also “‘consider whether the information is necessary and unavailable from any other source.’” *Id.*

The magistrate erroneously failed to evaluate the burden that the ordered depositions will impose upon the Scruggses. There are four reasons why State Farm's subpoenas should be quashed for imposing unreasonable and undue burden on the Scruggses. *First*, an extraordinary criminal contempt case is pending against Richard Scruggs and the Scruggs Law Firm, and Defendants seek to depose the Scruggses on matters directly related to the criminal contempt case. The Scruggses' legal and professional relationships with the Rigsbys are at the heart of the criminal contempt case. Indeed, Magistrate Walker's reliance upon testimony that Richard

Scruggs gave at a contempt hearing highlights the fact that the matters on which Defendants' seek the Scruggses' testimony are at issue in the criminal contempt case. The Scruggses therefore bear the risk that any deposition testimony that they provide will either jeopardize their privilege against self-incrimination, lead to additional criminal contempt charges, or be used against them and their firm in the criminal contempt case. The Court should quash State Farm's subpoenas to prevent the Scruggses from having to bear this unreasonable burden.

Second, State Farm's subpoenas subject the Scruggses to unreasonable and undue burden by seeking to elicit testimony from State Farm's and Renfroe's opposing counsel in many substantially-related cases.

Third, the information that State Farm and Renfroe seek from the Scruggses can be obtained from other sources. State Farm and Renfroe have several discovery tools such as interrogatories, requests for admission, and document requests that are available to them in that case as well as the *qui tam* case, *Renfroe v. Moran*, and the other Katrina cases. They can use those discovery tools to uncover the factual information that they might seek to elicit from the Scruggses. State Farm and Renfroe do not need the Scruggses' testimony to develop that factual information, nor is there any reason to believe that the Scruggses have any more information to offer Defendants than do the Rigsbys. Moreover, Renfroe, in particular, has already had an opportunity to examine Richard Scruggs in *Renfroe v. Moran* on the same matters that it again seeks his testimony. As the magistrate's order discusses, at the March 19, 2007 contempt hearing, Renfroe examined Scruggs about his legal and working relationships with the Rigsbys following Hurricane Katrina. What Renfroe now seeks is a second opportunity to question Scruggs again about the same matters. Neither Renfroe nor State Farm has demonstrated any compelling need to reexamine Scruggs, nor is any reason apparent.

Fourth, the Scruggses are not parties in the *McIntosh* case. That they are third parties to that dispute is a factor that weighs against burdening them with depositions for which State Farm and Renfroe have no compelling necessity.⁹ See *Katz v. Batavia Marine & Sporting Supplies*,

⁹ As Magistrate Walker noted in his order, the Scruggses have recently been named as defendants in a criminal action pending in the Northern District of Mississippi. See *United*

Inc., 984 F.2d 422, 424 (Fed. Cir. 1993) (collecting cases); *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364, 371-72 (9th Cir. 1982).

Considering enforcement of subpoenas by Renfroe in the Alabama action for substantially the same testimony that the Defendants seek here, a magistrate in the Northern District of Mississippi properly conducted the undue burden analysis and concluded there that Renfroe's subpoenas should be quashed. *See* Ex.U. That court's reasoning is instructive in this case as well. There, the court granted the motion to quash because burdens to the Scruggses of testifying, including the risks posed to their defense of the pending criminal contempt case, substantially outweighed the benefit of their testimony to Renfroe. The Scruggses' burdens were not considered by Magistrate Walker. As such, his order clearly errs by failing to properly conduct the undue burden analysis. State Farm's subpoenas should be quashed.

C. The Factual Findings That The Magistrate Made With Respect To Zachary Scruggs Are Not Reasonably Related To The Court's Order That He Submit To A Deposition.

Magistrate Walker ordered that Zachary Scruggs testify on three topics: (i) the circumstances surrounding Richard Scruggs's receipt of State Farm documents from the Rigsbys; (ii) his employment relationship with the Rigsbys; and (iii) his receipt of emails sent to him by the Rigsbys when they were employed by Renfroe/State Farm. *See* Doc. 911. With respect to Zachary Scruggs, the magistrate's order should be reversed on two additional grounds.

First, in their response to the McIntoshes' motion to quash, State Farm did not request that Zachary Scruggs testify on all three topics on which the magistrate's order requires him to provide testimony. State Farm argued that they needed to depose Zachary Scruggs about internal State Farm communications regarding Katrina claims that he may have received from the Rigsbys while they were employed by Renfroe/State Farm. *See* Doc. 559 at 10-14. The

States v. Scruggs, N.D. Miss. Case No. 3:07-CR-192-NBB-SAA. That case is on a short schedule and set for trial on February 25, 2008. Ex. T. Rather than submitting to unnecessary depositions in State Farm's and Renfroe's various cases, the Scruggses need to devote their attention to their defenses in that case as well as the criminal contempt case. These depositions unnecessarily and unduly intrude upon their ability to work on those cases. This, too, is a burden that the Scruggses bear in having to comply with State Farm's subpoenas.

magistrate's order expanded the topics on which Defendants' could question Zachary Scruggs to include Richard Scruggs' receipt of State Farm documents and the Rigsbys' employment relationship with Scruggs Law Firm. The magistrate's order should thus be reversed to the extent that it goes beyond the limited topic on which State Farm represented to the Court that it sought Zachary Scruggs's testimony. If the Court denies the motion to quash and determines that Zachary Scruggs's deposition must proceed, then it should limit the scope of discovery to State Farm's expressed request: Zachary Scruggs's receipt of emails from the Rigsbys while they were employed by Renfroe/State Farm. *See id.*

Second, the magistrate's order with respect to Zachary Scruggs also errs because its factual findings do not support requiring Zachary Scruggs to testify to all three topics identified in the order. The only factual finding that Magistrate Walker made with respect to Zachary Scruggs is that he has represented the McIntoshes and the Rigsbys. *See* Doc. 911. Magistrate Walker did not find that Zachary Scruggs ever received any State Farm documents from the Rigsbys, nor did he make any findings that Zachary Scruggs ever received any non-privileged e-mails from the Rigsbys while they were employed by Renfroe.¹⁰ Further, to the extent that Zachary Scruggs has any knowledge about Richard Scruggs's receipt of State Farm documents from the Rigsbys or the Rigsbys' employment as litigation consultants, there is no reason to believe that information would be anything but cumulative of what the Rigsbys have already provided.

D. State Farm's Document Requests Are Improper And Unduly Burdensome.

Magistrate Walker did not order the Scruggses to comply with any document requests purportedly made by State Farm. But even if the magistrate's order could be read so broadly as to compel the Scruggses to produce documents, the order clearly limited the permissible scope of discovery to three topics: (i) the circumstances surrounding Richard Scruggs's receipt of State

¹⁰ Magistrate Walker only indirectly concludes that such an email was sent to Zachary Scruggs. *See* Doc. 911 at 4. However, even if Magistrate Walker had found that the Rigsbys sent Zachary Scruggs, their attorney, an email while they were employed by Renfroe, that communication would be privileged and it would be unduly burdensome to require him to submit to a full deposition about all of his communications with his client on the basis of his receipt of one email.

Farm documents from the Rigsbys; (ii) the Scruggses' employment relationship with the Rigsbys; and (iii) Zachary Scruggs' receipt of emails sent to him by the Rigsbys when they were employed by Renfroe/State Farm. Accordingly, any document request propounded by State Farm should be limited to those three topics.

Nevertheless, in State Farm's recent correspondence with counsel and the *McIntosh* parties, it is clear that State Farm believes that it is entitled to have the Scruggses comply with its Fed. R. Civ. P. 30(b)(5) document requests that it noticed to the plaintiffs and other parties to the *McIntosh* case. Exs. R,N and O. The Scruggses, however, are not parties to the *McIntosh* case. As non-parties, they can be compelled to provide discovery only through a subpoena. *See* Fed. R. Civ. P. 45. State Farm has yet to serve subpoenas for documents on the Scruggses. The subpoenas that State Farm served on the Scruggses on September 5, 2007 were for deposition testimony only. *See* Exs. P and Q. As the face of the subpoenas clearly show, the subpoenas that were served on the Scruggses do not command them to produce and permit inspection and copying of any documents. *Id.* As of today, counsel for State Farm and Renfroe have not served a *subpoena duces tecum* on the Scruggses in this action. Thus, State Farm's notice of Rule 30(b)(5) document requests are improper and ineffective to compel the non-party Scruggses to produce documents.

Even if State Farm had actually served a proper *subpoena duces tecum* on the Scruggses, the noticed requests for documents would be objectionable for all the same reasons discussed *supra* with respect to the *subpoenas ad testificatum* (e.g., attorney-client privilege, work-product doctrine, undue burden, etc.). Further, as the McIntoshes argued in the motion to quash, the document requests contained in State Farm's notices are substantially broader than the limited topics for which State Farm represented to the Court that it sought discovery from the Scruggses. For example, Document request number 1 seeks "any and all documents constituting or referring to communications in any form between" the Scruggses and their clients, the Rigsbys, the government, and any news media outlet (for the period from August 2005 to the present) irrespective of whether or not those communications have anything to do with the *McIntosh* case. Similarly, document request number 2 requests all documents received by the Scruggses from

any of the aforementioned entities (for the same time period). To require the Scruggses to produce every newspaper, magazine, and government document that they have received in the last two and a half years is unduly burdensome on its face.

Not only do State Farm's document requests go well beyond the scope of permissible discovery in the *McIntosh* case, they are so broad that it would be inherently burdensome to require the Scruggses to submit a privilege log for these requests. The Scruggses have had numerous privileged communications with their clients, the Rigsbys, and federal and state authorities since August 2005, the overwhelming majority of which have no relevance to the *McIntosh* case. Neither the Rigsbys nor the Scruggses are parties to the *McIntosh* case, nor have Defendants established that any information that the Scruggses might have is non-privileged, relevant, and crucial to this case. Compelling them to comply with overly-broad document requests which are not at all tailored to the facts of the *McIntosh* case and even compelling them to provide a privilege log in response to State Farm's expansive document requests is inherently unduly burdensome. Thus, even if State Farm had served proper subpoenas for documents on the Scruggses, they would have to quashed.

E. Even If The Court Determines That The Scruggses Have Relevant, Non-Privileged Information That Is Crucial To The *McIntosh* Case And Cannot Be Obtained From Other Sources, The Scruggses' Depositions Should Be Stayed While The Criminal Contempt Case Is Pending.

In the event that the Court does not reverse the magistrate's order and quash State Farm's subpoenas, the Scruggses request that the Court give priority to the criminal contempt case stay the enforcement of State Farm's subpoenas pending the resolution of the criminal contempt matter. As discussed above, Richard Scruggs and the Scruggs Law Firm are now defendants in a criminal contempt case that is currently pending in the Northern District of Alabama.¹¹ The criminal contempt case goes directly to Richard Scruggs and the Scruggs Law Firm's legal and professional relationships with the Rigsbys as well as their compliance with Judge Acker's

¹¹ Although the criminal contempt case is now pending against Scruggs and Scruggs Law Firm, the preliminary injunction purports to apply to Zachary Scruggs as well and the private attorneys appointed by Judge Acker to prosecute the criminal contempt case appear to have the authority to add additional defendants. Also, Renfroe has recently requested that Judge Acker *again* explore contempt with respect to Scruggs, Scruggs Law Firm, and the Rigsbys. Ex. V.

preliminary injunction. These are the same matters about which State Farm and Renfroe now seek the Scruggses' testimony. To require the Scruggses to testify about these matters would impose substantial and undue burden on them.

This Court has the power to stay the Scruggses' depositions due to the related criminal contempt case. *See United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970); *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1088 (5th Cir. 1979); *Texaco Inc. v. Borda*, 383 F.2d 607, 608 (3rd Cir. 1967). In fact, when considering whether to stay discovery in a civil case where a criminal case involving parallel issues is proceeding, the Fifth Circuit has advised that the "public interest" requires that priority should be given to the criminal case. *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962); *see also Javier H. v. Garcia-Botello*, 218 F.R.D. 72, 75 (W.D.N.Y. 2003) ("[T]he public's interest in the integrity of the criminal case is entitled to precedence over the civil litigant.").

The Court should stay "a civil proceeding during the pendency of a parallel criminal proceeding ... to avoid 'substantial and irreparable prejudice.'" *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983) (citing *SEC v. First Fin. Group of Tex., Inc.*, 659 F.2d 660, 668 (5th Cir. 1981)). "In determining whether to grant a stay, a court must also consider the status of the related criminal proceedings, which can have a substantial effect on the balancing of the equities." *In re Adelfia Communications Secs. Litig.*, No. 02-1781, 2003 WL 22358819, at *3 (E.D. Pa. May 13, 2003). In particular, where a criminal indictment has been returned, a court should strongly consider staying the civil proceedings until the related criminal proceedings are resolved. *Heller Healthcare Fin., Inc. v. Boyes*, 2002 WL 1558337 at *3 (N.D. Tex. July 15, 2002); *see also SEC v. Dresser Indus.*, 628 F.2d 1368, 1377 (D.D.C. 1980) ("strongest case" for stay exists where party is indicted for a serious offense and must defend a civil action involving the same matter).

A stay of the Scruggses' depositions is necessary here to avoid substantial and irreparable prejudice to them. The Allegations of Criminal Contempt have already been filed against Scruggs and the Scruggs Law Firm. The contempt charge contained in those Allegations arises from the same set of operative facts for which Magistrate Walker has now ordered the Scruggses

to testify: Richard Scruggs's receipt, custody, and disclosure of State Farm documents from 2006 to the present. The irreparable prejudice to the Scruggses is self evident: There is a high risk that the Scruggses' Fifth Amendment privilege against self-incrimination may be jeopardized if they are required to testify about the same matters that are at issue in the criminal contempt case. *See Javier H.*, 218 F.R.D. at 75 (citation omitted). Given that the Allegations charging criminal contempt have been filed against Scruggs and the Scruggs Law Firm, given that Scruggses are agents and employees of the Scruggs Law Firm, and given that Judge Acker's preliminary injunction purports to apply equally to Zachary Scruggs, there is a substantial danger of self-incrimination to both Scruggses, which weighs heavily in favor of granting their request for a stay. *See id.*

Moreover, a stay would not significantly prejudice the parties in this case. The issues upon which the magistrate ordered the Scruggses to testify are not crucial to the *McIntosh* case. State Farm and Renfroe have both examined the Rigsby sisters about the very same matters in the *McIntosh* case, and the Rigsbys have submitted to depositions, interrogatories, an in-court testimony in other cases about the very same matters. Further, Renfroe has already had the opportunity to examine Richard Scruggs with respect to documents obtained from Renfroe and his legal and working relationship with the Rigsbys. There simply is no compelling need to question the Scruggses on matters for which there has already been ample factual development. Any minor incremental benefit that State Farm and Renfroe might garner from the Scruggses' depositions is insubstantial compared to the Scruggses' weighty constitutional interests in defending themselves against the pending charges of criminal contempt. The Scruggses' request for a stay should be granted.

V. CONCLUSION

For the foregoing reasons, the Scruggses respectfully request that the Court reverse the magistrate's December 11, 2007 order, Doc. 911. The Scruggses further request that the Court quash State Farm's subpoenas to the Scruggses. Alternatively, the Scruggses move for entry of an order staying enforcement of State Farm's subpoenas while the criminal contempt case is pending.

Dated:

/s/ John W. Keker

John W. Keker (*Pro Hac Vice*)
Brook Dooley (*Pro Hac Vice*)
Travis LeBlanc (*Pro Hac Vice*)

KEKER & VAN NEST, LLP
710 Sansome Street
San Francisco, California 94111
Tel: (415) 391-5400
Fax: (415) 397-7188
Email: jkeker@kvn.com
Email: bdooley@kvn.com
Email: tleblanc@kvn.com

/s/ Christopher T. Robertson

Christopher T. Robertson

THE SCRUGGS LAW FIRM, P.A.
P.O. Box. 1136
Oxford, Mississippi 38655
Tel: (662) 281-1212
Fax: (662) 281-1312
Email: chrisrobertson@scruggsfirm.com

Counsel for Richard Scruggs and Zachary Scruggs

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:

H. Benjamin Mullen, Esq.
John A. Banahan, Esq.
Matthew E. Perkins, Esq.
Bryan, Nelson, Schroeder,
Castigliola & Banahan, PLLC
Post Office Drawer 1529
Pascagoula, MS 39568-1529
E-mail: ben1@bnscb.com
E-mail: john@bnscb.com
Email: perkins@bnscb.com

Larry G. Canada, Esq.
Kathryn Breard Platt, Esq.
Galloway, Johnson, Tompkins, Burr & Smith
701 Poydras Street, Suite 4040
New Orleans, LA 70139
E-mail: lcanada@gjtbs.com
Email: kbreard@gjtbs.com

Dan W. Webb, Esq.
Roehelle R. Morgan, Esq.
Norma Carr Ruff, Esq.
Webb Sanders & Williams, P.L.L.C.
P.O. Box 496
Tupelo, MS 38802-0496
Email: dwebb@webbsanders.com
Email: rrm@webbsanders.com
Email: rrm@webbsanders.com
Email: ncr@webbsanders.com

Joseph M. Hollomon, Esq.
Law Offices of Joseph M. Hollomon & Associates
P.O. Box 22683
Jackson, MS 39225
Email: jhollomon@att.net

H. Hunter Twiford, Esq.
David Norris, Esq.
McGlinchey Stafford, PLLC
Suite, 1100, City Centre South
P.O. Box 22949
Jackson, MS 39225-2949
Email: htwiford@mcglinchey.com
Email: dnorris@mcglinchey.com

Christine Lipsey, Esq.
McGlinchey Stafford, PLLC
One American Place, 14th Floor
Baton Rouge, LA 70825
Email: clipsey@mcglinchey.com

Amy L. Averill, Esq.
Thomas M. Byrne, Esq.
Valerie S. Sanders, Esq.
Sutherland Asbill & Brennan, LLP
999 Peachtree St., NE
Atlanta, GA 30309
Email: amy.averill@sablaw.com
Email: tom.byrne@sablaw.com
Email: valerie.sanders@sablaw.com

Grady F. Tollison, Jr., Esq.
Cameron Abel, Esq.
Tollison Law Firm, P.A.
P.O. Box 1216
Oxford, MS 38655
Email: grady@tollisonlaw.com

Don Barrett, Esq.
Marshall H. Smith, Jr., Esq.
BARRETT LAW OFFICE
P.O. Box 987
Lexington, MS 39095
Phone: (662) 834-2376

Mary E. McAlister, Esq.
Derek Wyatt, Esq.
David McCarty, Esq.
NUTT & McALISTER
605 Crescent Blvd., Suite 200
Ridgeland, MS 39157
Phone: (662) 898-7302

Dewitt M. Lovelace, Esq.
LOVELACE LAWFIRM, P.A.
36474 Emerald Coast Pkwy., Suite 4202
Destin, FL 32541
Phone: (850) 837-6020

Mike Moore, Esq.
MOORE LAW FIRM, LLC
P.O. Box 321048
Flowood, MS 39232
Phone: (601) 933-0070

/s/ CHRISTOPHER T. ROBERTSON
CHRISTOPHER T. ROBERTSON