

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

v.

RICHARD F. SCRUGGS and THE  
SCRUGGS LAW FIRM, P.A.,

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Case No. 2:07-cr-00325-LSC-HGD

**DEFENDANTS' REPLY BRIEF IN RESPONSE**  
**TO ORDER TO SHOW CAUSE****I. INTRODUCTION**

Private counsel's Reply to the OSC invites the Court to approve criminal Allegations that lack any substantive or jurisdictional basis and that resulted from a process too flawed to withstand constitutional scrutiny. None of private counsel's arguments deserves to succeed.

**Innocence as a matter of law.** Private counsel ask this Court to ignore the Eleventh Circuit's decision that the Injunction expressly permitted disclosure of the Renfroe documents to law-enforcement officials. Instead, private counsel urge the Court to interpret the Injunction as permitting the Rigsbys and their agents only to *discuss their recollections* of the documents with law-enforcement officials. But that theory cannot survive an honest reading of the Injunction, which expressly authorizes the disclosure to law enforcement of "documents and tangible things"—not just mental impressions.

Private counsel also argue that the Court should ignore the Eleventh Circuit's decision because the appeals court had no opportunity to consider whether Scruggs's disclosure to law enforcement was a "sham." Private counsel's

sham” theory principally asserts that the Mississippi Attorney General didn’t really need the State Farm documents and requested them only “to assist the Defendants in their commercial business endeavors, and lawsuits.” RSP<sup>1</sup> at 9 n.3. Aside from being factually wrong, the “sham” theory fails as a matter of law because the Injunction’s law-enforcement exemption requires nothing more than a request from law-enforcement officials. It does not require any inquiry into the state of mind of the requesting officials, or any inquiry into the process by which those officials decided to request the documents. Due process forbids reading additional restrictions and qualifications into the Injunction’s law-enforcement exemption—yet the “sham” theory turns on doing just that.

The “sham” theory also assumes, wrongly, that there is something illegitimate about cooperation between law-enforcement officials who are investigating a fraud and private attorneys who are pursuing qui tam claims and civil class actions relating to the same fraud. In fact, such cooperation is desirable, and qui tam actions and civil class actions long have been viewed as useful adjuncts to law enforcement.

**Absence of jurisdiction.** The jurisdictional rule is simple: A nonparty cannot be held liable for criminal contempt for violating an Injunction unless he aided and abetted a primary contempt by a party. No primary contempt occurred here because—as Judge Acker found and as private counsel themselves reiterate—the Injunction issued four months after the Rigsbys had sent their copies of the documents to Scruggs and to law enforcement. No primary contempt; no aiding-and-abetting liability. Period.

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<sup>1</sup> “RSP” refers to the Reply of Special Prosecutors to Defendants’ Response to Show Cause Order and Request for Arraignment.

Recognizing that this objection is fatal, private counsel seize on *dicta* in *Alemite Manufacturing Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930), to argue that a nonparty who is “legally identified with” a party that committed contempt also may be held criminally liable for that contempt. This theory, which no court has adopted, fails to come to grips with the fact that the Rigsbys committed no contempt, as they couldn’t have been bound by an Injunction that issued months after the allegedly contemptuous conduct occurred. Thus, even assuming that a nonparty “legally identified with” the Rigsbys would share in their contempt liability, they have no contempt liability to share.

Moreover, private counsel fail to explain what “legally identified with” means, or how that expansive phrase could confine the district court’s contempt jurisdiction within constitutionally acceptable bounds. The district court’s unusual power to appoint criminal prosecutors already balances precariously on the brink of constitutional propriety, saved only by the rule limiting contempt jurisdiction to actual litigation parties. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 800 n.10 (1987). The vast expansion of contempt jurisdiction contemplated by private counsel’s “legally identified with” theory would tip the Rule 42(a)(2) prosecutor-appointment procedure over the constitutional precipice. Accordingly, private counsel’s new jurisdictional theory must be rejected.

**Lack of independence.** Private counsel assert their independence by attempting to minimize Judge Acker’s role in these proceedings. They characterize Judge Acker as a mere “witness” whose power ended when he accused Scruggs of contempt. But this contention simply ignores the undisputed facts of record, which show that Judge Acker directed private counsel to draft and file Allegations ratifying his conclusion that probable cause existed; that he reopened the issue of the Rigsbys’ contempt liability just to give the court a

jurisdictional toehold for prosecuting Scruggs; that he belatedly appointed a third private counsel recommended by the first two; that he signed the Allegations against Scruggs; and that he continues to consult with private counsel about this case. Judge Acker’s continuing involvement in this prosecution, and private counsel’s inability or unwillingness to exercise independent judgment, require that private counsel be dismissed, along with the tainted Allegations that they prepared at Judge Acker’s direction.

**Unconstitutionality of private-counsel appointments.** Private counsel offer no response at all to the argument that district courts lack constitutional authority to appoint private attorneys to prosecute criminal contempts after government prosecutors have refused to do so. Accordingly, private counsel have waived their opportunity to oppose that argument.

Accordingly, for all the reasons stated below and in defendants’ Response to the OSC, the Court should grant the relief specified at Part III, below.

## II. ARGUMENT

### A. **Scruggs is innocent as a matter of law under the Eleventh Circuit’s interpretation of the Injunction.**

Scruggs’s Response to the OSC showed that the Eleventh Circuit has now confirmed that the Injunction entered against the Rigsbys “specifically allows disclosure of the [State Farm] documents to ‘law enforcement officials.’” Defs’ Resp.,<sup>2</sup> Ex. G at 12.<sup>3</sup> The Eleventh Circuit’s ruling thus confirms that, as a matter of law, private counsel cannot establish any of the elements of criminal contempt, which require proof beyond a reasonable doubt that the defendant willfully

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<sup>2</sup> “Defs’ Resp.” refers to Scruggs’s Response to Order to Show Cause.

<sup>3</sup> The Eleventh Circuit thus adopted the interpretation that Judge Acker—and now private counsel—characterized as being “such a strained construction and so contrary to the injunction’s clear terms as to lack any credibility whatsoever.” *Renfroe* Doc. 145 at 20; RSP at 6.

violated a lawful order prohibiting his conduct with reasonable specificity. *See Romero v. Drummond Co.*, 480 F.3d 1234, 1242-43 (11th Cir. 2007) (specifying criminal-contempt elements). It should surprise no one that the United States Attorney for the Northern District of Alabama—the only professional prosecutor to have examined the alleged contempt—refused to pursue any charges.

Private counsel present three meritless arguments for ignoring the Eleventh Circuit’s ruling.

**1. Private counsel offer an untenable interpretation of the Injunction.**

Private counsel argue that the Injunction’s express law-enforcement exemption merely meant that the Rigsbys “could cooperate with law enforcement by *discussing . . . what they knew about* the documents” that they were supposed to have returned to Renfroe’s counsel. RSP at 5 (emphasis added).<sup>4</sup> In other

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<sup>4</sup> For the Court’s convenience, we again set forth the Injunction’s two key paragraphs:

[D]efendants, Cori Rigsby Moran and Kerri Rigsby, and their agents, servants, employees, attorneys, and other persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise (**with the express exception of law enforcement officials**) are hereby MANDATORILY ENJOINED to deliver forthwith to counsel for plaintiffs all documents and tangible things, in any form or medium, that either of defendants or anyone acting in conjunction with or at the request or instruction of either of them, downloaded, copied took or transferred from the premises, files, records or systems of Renfroe or of any of its clients, including, but not limited to State Farm Insurance Company and which refer or relate to any insurance claims involving damages caused or alleged to have been caused by Hurricane Katrina in the State of Mississippi.

Defendants and their agents, servants, employees, attorneys, and other persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are further ENJOINED not to further disclose, use or misappropriate any material described in the preceding paragraph **unless to law enforcement officials at their request**.

*Renfroe* Doc. 60 at 13-14 (first emphasis in original, second and third added).

words, private counsel contend that any law-enforcement exemption was strictly limited to the Rigsby's *intangible mental recollections* about documents no longer in their possession.

Private counsel's interpretation is insupportable for at least three reasons.

**First**, the Court of Appeals for the Eleventh Circuit already has rejected it. The Eleventh Circuit held instead that the Injunction "specifically allows disclosure of *the [State Farm] documents* to 'law enforcement officials.'" Defs' Resp., Ex. G at 12 (emphasis added).

**Second**, private counsel's interpretation simply ignores what the Injunction says. The second paragraph of the Injunction states that the Rigsbys and their agents are enjoined "not to further *disclose*, use or misappropriate *any material described in the preceding paragraph* unless to law enforcement officials at their request." *Renfroe* Doc. 60 at 14 (emphases added). The "material described in the preceding paragraph" is not "intangible memories"; rather, it consists of "*all documents and tangible things*, in any form or medium," that the Rigsbys or their agents took from the premises, files, records, or systems of *Renfroe* or its clients and that related to Katrina claims. *Id.* at 13-14. Thus, the law-enforcement exemption by its very terms covers the disclosure to law enforcement of "documents and tangible things"—not just mental recollections concerning those documents and tangible things.

**Third**, private counsel's interpretation fails even to comport with Judge Acker's interpretation of the Injunction. At the March 2007 hearing, Judge Acker stated: "Now, you can't control[,] and the injunction didn't purport to try to control, delivery [of documents] to and use [of those documents] by the attorney general of Mississippi." *Renfroe* Doc. 130 at 23:14-16. Indeed, Judge Acker actually argued against private counsel's interpretation at the March hearing.

When counsel for Renfroe argued—incorrectly—that the second paragraph of the Injunction did not refer to documents, Judge Acker immediately responded, “Well, I’ll argue with you right now on that.” *Id.* at 188:5-6. Of course, it is the language of the Injunction—not Judge Acker’s private ideas about its meaning—that controls here. Yet it is telling that Judge Acker never articulated, and in fact disputed, private counsel’s interpretation.

Even if the Injunction *could* be read as private counsel suggest, its language does not “clear[ly], definite[ly], and unambiguous[ly]” support that interpretation and therefore cannot justify a conviction based on the Allegations. *Romero*, 480 F.3d at 1244. Private counsel forget that “any ambiguities or uncertainties” in a court order must be construed “in a light favorable to the person charged with contempt.” *Ga. Power v. N.L.R.B.*, 484 F.3d 1288, 1291 (11th Cir. 2007). Likewise, no finding of willfulness (the third element of a contempt charge) can be sustained where the defendant’s interpretation is at least objectively reasonable. *See Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2215 (2007). In view of the Eleventh Circuit’s interpretation and Judge Acker’s own comments, private counsel cannot plausibly deny that Scruggs’s interpretation of the Injunction was *at least* “objectively reasonable.”

As a matter of law, Scruggs did not violate the Injunction when he delivered documents and tangible things to the Mississippi Attorney General. That is as far as this Court needs to go to conclude that the Allegations, and this entire prosecution, must be dismissed with prejudice.

## **2. Private counsel’s “sham transaction” theories fail as a matter of law.**

Aside from their meritless reinterpretation of the Injunction, private counsel argue that a trial is needed to probe whether Scruggs’s delivery of the documents

to the Mississippi Attorney General was some sort of a “sham.” Although private counsel never quite spell out what they mean by “sham,” they appear to be offering two versions of this argument. Neither version furnishes the slightest basis for disregarding the Eleventh Circuit’s dispositive interpretation of the Injunction.

(a) **Version 1** of the sham theory posits a conspiracy between Scruggs and Attorney General Hood to evade the terms of the Injunction and thereby benefit the Rigbys’ qui tam action as well as the many civil claims filed by defrauded Katrina victims. Private counsel argue, in effect, that Hood’s request was a sham and therefore incapable of triggering the Injunction’s law-enforcement exemption. They theorize that Hood was not motivated by any legitimate law-enforcement purpose, but rather, by a desire to help Scruggs because he was a “confidential informant” who had contributed to Hood’s reelection campaign. *See* RSP at 9 n.3 & 11 n.5. Private counsel thus invite this Court to hold a trial in which the principal issue will be to examine what really motivated the Mississippi Attorney General to ask Scruggs for documents directly relevant to a massive fraud investigation.<sup>5</sup>

Fortunately, this judicial intrusion into the mental processes of a state’s chief law-enforcement officer will not be necessary, for private counsel’s “sham request” theory fails as a matter of law. It fails because it hinges on reading words into the Injunction that just aren’t there—a practice that cannot be permitted in a criminal-contempt prosecution. In determining whether a party is in contempt of a court order, the order ““may not be expanded beyond the meaning of its terms absent notice and an opportunity to be heard.”” *Ga. Power*, 484 F.3d at 1291

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<sup>5</sup> Private counsel would proceed with this investigation into the integrity of Scruggs and Attorney General Hood based only on wispy inferences from innocuous facts, including Scruggs’s Martindale-Hubbell listing, Scruggs’s work on behalf of a *prior* Attorney General, and Scruggs’s lawful, publicly disclosed campaign contributions to Attorney General Hood’s reelection campaign. *See* RSP at 11 n.5.

(citation omitted). Moreover, the focus in a contempt proceeding “is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.” *Id.* (citation omitted). Private counsel are therefore dead wrong when they assert that “the issue” here “is not what the defendants did, but what they intended.” RSP at 9.

When you look at what Scruggs did and what the Injunction actually said, there can be no question that defendants’ conduct “complied with the order at issue”<sup>6</sup>—not the order as rewritten in the minds of private counsel, but the real order. The Injunction says nothing about the “request” for disclosure except that it be made by law-enforcement officials. The Injunction sets no limitation on the process by which law-enforcement officials arrive at their decision to request the documents. It imposes no duty on the Rigsbys or their agents somehow to ascertain whether the requesting officials have a *bona fide* law-enforcement purpose—unaccompanied by any additional or collateral purposes—for requesting the documents. Nor does the Injunction prohibit law-enforcement officials from requesting the documents where doing so could benefit a qui tam relator or a class of civil plaintiffs injured by the fraud under investigation. In short, the “sham request” theory lacks any foundation in the language of the Injunction; and in a criminal-contempt prosecution, that is fatal. The Injunction expressly allowed Scruggs to disclose the documents to law-enforcement officials at their request, and he did. End of story.

The “sham” theory gets no boost from the string of “sham” cases cited by private counsel. *See* RSP at 8-9. None of those cases involved a criminal-contempt conviction, much less one where the defendant *obeyed* the terms of an order but did so with a supposedly improper motive or purpose, which is the crux

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<sup>6</sup> *Ga. Power*, 484 F.3d at 1291.

of private counsel’s “sham transaction” theory. Nor did any of those cases involve defendants who acted on an objectively reasonable interpretation of the governing law.<sup>7</sup>

Finally, the “sham request” theory is objectionable on public-policy grounds. Private counsel assume that there is something nefarious about cooperation between law-enforcement officials investigating a fraud and private attorneys who are pursuing qui tam actions and civil remedies relating to that fraud. Just the opposite is true. Qui tam actions and civil class actions have long been regarded as desirable adjuncts to law enforcement. *See United States ex rel. S. Praver and Co. v. Fleet Bank of Maine*, 24 F.3d 320, 324 (1st Cir. 1994); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 650-51 (Fed Cir. 1994). Indeed, when it strengthened the *qui tam* provisions of the federal False Claims Act in 1986, Congress acted in the belief that “amendments . . . which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government’s fraud enforcement effort.” S. Rep. No. 345, 99th Cong., 2d Sess. 8 (July 28, 1986), *quoted in* Joel M. Androphy, *Federal False Claims Act and Qui Tam Litigation* § 2.06[2][a][iv], at 2-42 n.36 (2007). Likewise, “it has been recognized that a suit by a private citizen which seeks to enforce important public policies for the benefit of a broad class of persons is a public rather than a private lawsuit, in which the class representative and his or her attorney have the status of private attorneys general.” Alba Conte & Herbert B.

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<sup>7</sup> *See, e.g., United States v. MacLean*, 227 Fed. Appx. 844, 845 (11th Cir. 2007) (affirming tax-evasion conviction of admitted tax protesters who used bogus trusts to conceal their income, did not file returns, and failed to pay taxes); *United States v. Day*, 405 F.3d 1293, 1294 (11th Cir. 2005) (affirming mail-fraud conviction of defendants who solicited contributions to sham non-profit organization and paid contributed funds into their personal accounts); *United States v. Ortiz*, 318 F.3d 1030, 1037-38 (11th Cir. 2003) (admitted straw purchaser convicted for falsely declaring on ATF form that he was “actual buyer” of firearm; court found that defendant “was put on notice [by the ATF form] that he is the ‘actual buyer’ only if the purchase of firearm is for himself or for a gift and, thus, as to what constitutes a violation of the law”).

Newberg, *Newberg on Class Actions* § 4:15, at 109-10 (4th ed. 2002). Accordingly, this Court should not strain to read the Injunction in a way that impedes cooperation between law-enforcement officials and private civil attorneys who are seeking to vindicate the same laws and values.<sup>8</sup>

(b) **Version 2** of the sham theory imagines “machinations” between Scruggs and the Rigsbys to evade the Injunction. *See* RSP at 9 n.3. The theory appears to be that, at some unspecified time, the Rigsbys transferred the State Farm documents to Scruggs because they believed or were advised that the documents then would be safely in the hands of someone who would not be subject to an order requiring that the documents be returned. *See* RSP at 9 n.3.

Version 2 of the sham theory fails because it simply assumes what private counsel need to establish: namely, that the Injunction prohibited the Rigsbys and their agents (etc.) from giving the documents to law-enforcement officials. That assumption is wrong for two independent reasons.

**First**, it is undisputed that the Rigsbys transferred the documents *months* before the Injunction issued—indeed, one month before the *Renfroe* action was even filed. At that time, the Injunction didn’t exist and couldn’t have prohibited anyone from doing anything. Indeed, Judge Acker exonerated the Rigsbys of contempt based on his finding that the Rigsbys gave all of their Katrina-related State Farm documents to Scruggs by the beginning of August 2006—a month before Renfroe filed its lawsuit and four months before the Injunction issued. *See Renfroe* Doc. 145 at 3-4. Private counsel likewise allege in their Reply that “in June and July 2006, the Rigsbys gave their only copies of the documents to their

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<sup>8</sup> In this regard, Scruggs also notes that Attorney General Hood has been a participant in the Department of Justice Hurricane Katrina Fraud Task Force. *See* First Year Report to the Attorney General at 32 (Sept. 2006) (*available at* [http://www.usdoj.gov/katrina/Katrina\\_Fraud/docs/09-12-06AGprogressrpt.pdf](http://www.usdoj.gov/katrina/Katrina_Fraud/docs/09-12-06AGprogressrpt.pdf)).

attorney Scruggs and to law enforcement.” RSP at 5; *see also* RSP at 16 (alleging that Scruggs had been “entrusted with the documents” prior to December 8, 2006). Private counsel are alleging a sham or conspiracy to avoid compliance with an injunction that hadn’t issued yet. A conspiracy to avoid compliance with an Injunction that doesn’t exist cannot possibly form the basis for a criminal-contempt conviction.

**Second**, under the express terms of the Injunction, the Rigsbys could have given the documents *directly* to the Mississippi Attorney General upon request, with or without Scruggs’s help. The Eleventh Circuit has held that the Injunction “permits disclosure [of the documents] to and [their] use by law enforcement agencies.” Defs’ Resp., Ex. G. at 10. Thus, Version 2 of the “sham” theory makes no sense. The Rigsbys didn’t need Scruggs to help them “avoid compliance with the injunction” as private counsel suggest, because *the Injunction itself* gave them the freedom to give the documents to law enforcement. RSP at 10 n.3.

In sum, private counsel’s “sham” theories furnish no reason to disregard the Eleventh Circuit’s holding that the Injunction expressly permitted the very conduct that the Allegations portray as contemptuous.

**3. Private counsel fail in their attempt to minimize the importance of the Eleventh Circuit’s interpretation of the Injunction.**

Finally, private counsel argue that this Court should disregard the Eleventh Circuit’s interpretation of the Injunction because the appeals court had no opportunity to consider their “sham transaction” theory or Scruggs’s conduct. RSP at 9 n.3, 10. But the “sham transaction” theory is meritless for all of the reasons stated above. Moreover, the Eleventh Circuit did not need to know about private counsel’s “sham” allegations against Scruggs to accurately interpret the Injunction. The Injunction came into existence prior to any conduct that allegedly violated it; it

meant whatever it meant; and it continued to possess that meaning regardless of what Scruggs did or didn't do later. Scruggs's conduct must be assessed in light of that fixed and pre-existing meaning—not the other way around. *See Ga. Power*, 484 F.3d at 1291 (words of allegedly violated court order “‘may not be expanded beyond the meaning of its terms’”) (citation omitted).

Accordingly, under the plain meaning of the Injunction as affirmed by the Eleventh Circuit, Scruggs is innocent of contempt as a matter of law; and the Allegations, and this entire proceeding, must be dismissed with prejudice.

**B. Private counsel cite no facts capable of altering the conclusion that the district court lacked criminal-contempt jurisdiction over Scruggs as a matter of law.**

Scruggs's Response to the OSC showed that the Injunction could not have bound anyone but a party to the *Renfro* action, and that Scruggs never was a party to that action. Accordingly, the district court lacks criminal-contempt jurisdiction over Scruggs—*unless* private counsel can prove that he aided and abetted an act *by the Rigsbys* that, in and of itself, violated the Injunction. If the Rigsbys committed no such act, however, then the aiding-and-abetting exception cannot apply, and this prosecution must be dismissed. *See Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930).

That is precisely the situation here. As a matter of law, the Rigsbys committed no contemptuous act for Scruggs to aid and abet. “The duty to comply with injunctions assumes the existence of a valid and operative order.” 19 *Fed. Proc.*, L. Ed. § 47:150. Here, however, the Injunction did not issue until four months after the Rigsbys sent Scruggs the documents. Recognizing this, private counsel don't even try to demonstrate that the Rigsbys themselves committed any act that violated the Injunction. They do not cite a single allegation that, if proven, would establish that necessary fact. Instead, they rely on irrelevant allegations

about Scruggs’s dealings with the Rigsbys—*e.g.*, that Scruggs held the documents that the Rigsbys obtained from Renfroe; that Scruggs represented the Rigsbys in matters other than the *Renfroe* case; that Scruggs stood to earn fees from those representations; that Scruggs employed the Rigsbys; and so on. *See* RSP at 15-16. But none of these allegations, if proven, would establish that the Rigsbys committed any act that violated the Injunction.

As a matter of law, therefore, Scruggs cannot be found guilty of aiding and abetting a violation of the Injunction by the Rigsbys. “It is generally recognized that there can be no conviction for aiding and abetting someone to do an innocent act.” *Shuttlesworth v. City of Birmingham*, 373 U.S. 262, 265 (1963). Accordingly, “[t]he law requires a guilty principal before the aider and abettor can be punished.” *Edwards v. United States*, 286 F.2d 681, 683 (5th Cir. 1961) (citation omitted); *see also Ligon v. Deloitte, Haskins & Sells*, 957 F.2d 546, 547 (8th Cir. 1992) (“A primary violation is the *sine qua non* for aiding and abetting liability”).

Private counsel therefore propose an entirely different legal test. Citing an out-of-context snippet of language from *Alemite*—a precedent overwhelmingly hostile to their position<sup>9</sup>—private counsel assert that the district court has criminal-contempt jurisdiction over Scruggs if he is “legally identified with” the Rigsbys in other matters. RSP at 12-17. But private counsel fail to explain how criminal-contempt liability could be premised upon being “legally identified with” a party who committed no contempt. Accordingly, the “legally identified with” theory adds nothing.

The “legally identified with” theory also fails because private counsel fail to explain what this expansive phrase means or how it places any meaningful

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<sup>9</sup> *See* Defs’ Resp. at 22-23 & n.11 (discussing *Alemite*, 42 F.2d at 832-33).

restriction on the category of persons subject to a district court’s contempt jurisdiction. As the Supreme Court pointed out in *Young*, the district court’s appointment of private prosecutors—an unusual judicial exercise of a quintessentially executive function—survives constitutional scrutiny *only* because the court’s contempt jurisdiction is carefully limited to “those particular persons whose legal obligations result from their earlier participation in proceedings before the court.” 481 U.S. at 800 n.10.<sup>10</sup> But no such limitation would restrain private counsel’s “legally identified with” theory. Under that test, apparently, an attorney who takes on an antitrust case for a client in Alabama might become bound by an injunction entered against the client in an employment case in Alaska, a land-sale case in California, or a libel case in Wyoming. *See* Defs’ Resp. at 22-23 n.11. As applied here, private counsel’s theory would subject Scruggs to criminal liability for violating an Injunction issued in a case in which he never participated as a party, as an attorney, or otherwise. This unfettered expansion of jurisdictional authority for private prosecutors would effectively “eradicate fundamental separation-of-powers boundaries,” *Young*, 481 U.S. at 800 n.10, and cannot withstand constitutional scrutiny.

In short, private counsel’s “legally identified with” theory offers no test for determining whether a district court’s exercise of the unusual power to appoint private prosecutors has overstepped jurisdictional and constitutional bounds.

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<sup>10</sup> *See* Defendants’ Response at pages 20-21 n.10 for a discussion of the precedential status of these statements by the Supreme Court in *Young*, which private counsel wrongly urge the Court to dismiss as mere *dicta*. Private counsel would prefer that the Court rely on the *district court’s* decision in *Young*—which the Supreme Court reversed! *See* RSP at 16-17 (discussing *United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc.*, 602 F.Supp. 1052 (S.D.N.Y. 1985), *rev’d*, 481 U.S. 787 (1987)). In support of their aiding-and-abetting theory they also cite, as Judge Acker did, *Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985)—which we distinguished in Defendants’ Response at page 23 n.12.

Accordingly, private counsel's argument must be rejected and this prosecution dismissed with prejudice.

**C. Private counsel's brief only confirms that they have not been granted, and have not exercised, the independence required by the *Young* and *Morrison* decisions.**

Private counsel offer nothing of substance in response to Scruggs's argument that they were prevented from exercising, and have not exercised, the dispassionate judgment and independence required by the *Young* and *Morrison* decisions. See *Young*, 481 U.S. 787; *Morrison v. Olson*, 487 U.S. 654 (1988). Private counsel respond chiefly by characterizing Scruggs's arguments as "esoteric" and by trying to distinguish *Morrison* on the ground that the appointing court in that case had three judges instead of one. See RSP at 19. In fact, *Morrison* is directly on point because it holds the appointment of special prosecutors unconstitutional if the appointing court "participate[s] in any matters relating to an independent counsel [it has] appointed." *Morrison*, 487 U.S. at 677.

Private counsel claim that Judge Acker is "merely a witness" whose "power ended with raising the allegations of contempt" (RSP at 18); but all of the undisputed evidence of record suggests otherwise. Even after appointing private counsel Sharp and Williams, Judge Acker:

- Issued an order that "DIRECTED" private counsel to prepare and present to him for signature a charging document "consistent with the findings of this court contained in its order of June 15, 2007," and thereafter to file that document. *Renfro* Doc. 149.
- Amended his earlier order exonerating the Rigsbys from criminal contempt, and thus reopened the contempt case against them for no other apparent purpose than to shore up his assertion of jurisdiction over Scruggs. *Renfro* Doc. 150.

- Appointed a third private counsel upon the request and recommendation of the first two. *Renfroe* Doc. 152.
- Co-authored, signed, and jointly filed with the three private counsel the Allegations, in which “[t]he Court” stated that it had reviewed the record and “reiterat[ed] its conclusion” that probable cause exists to prosecute Scruggs for criminal contempt. (Amazingly, this document misquotes the Injunction and fails to disclose that the allegedly contemptuous conduct consisted of delivering documents to the Mississippi Attorney General at his request.)
- Continues to have discussions with private counsel, as they admit in their Reply. *See* RSP at 18.

If anything, private counsel’s Reply—with its disregard for a dispositive Eleventh Circuit ruling, its unfounded attacks on the integrity of the Mississippi Attorney General, and its admission that private counsel continue to discuss this matter with Judge Acker—only confirms their lack of independent judgment and Judge Acker’s continuing participation.

Accordingly, all three private counsel must be dismissed, along with the tainted Allegations that they prepared and filed at Judge Acker’s direction.

**D. Private counsel have waived their right to oppose Scruggs’s argument that the constitutional separation-of-powers doctrine forbids courts from appointing private attorneys to prosecute criminal contempts.**

Private counsel offer no response to Scruggs’s argument that Justice Scalia’s *Young* concurrence was right and that federal courts lack constitutional authority to appoint private attorneys to prosecute contempts. *See* Defs’ Resp. at 27-28. Accordingly, private counsel have waived any counterargument on this point. *Cf. Nicholson v. Johanns*, No. 06-0635-WS-B, 2007 WL 521152, \*2 (S.D. Ala. Feb.

15, 2007) (dismissing claims where plaintiff's opposition brief "ma[de] no attempt to rebut" defendant's arguments for dismissing those claims).

### III. CONCLUSION

For the foregoing reasons, Scruggs asks this Court

(1) to dismiss the Allegations and this prosecution entirely, with prejudice; or, failing that, and in the alternative,

(2) to dismiss the Allegations without prejudice, void the prior appointment of private counsel, and order the appointment of new attorneys who will be instructed (a) that they must adhere to all Department of Justice guidelines and other ethical rules that would apply to the U.S. Attorney if she had undertaken the same prosecution, and (b) that they may decline to prosecute after reviewing the case.

RESPECTFULLY SUBMITTED this the 25th day of October, 2007.

/s/ John W. Kecker

John W. Kecker

/s/ Steven A. Hirsch

Steven A. Hirsch

/s/ Brook Dooley

Brook Dooley

/s/ Travis LeBlanc

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I hereby certify that on October 25, 2007, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the following:

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