

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.,

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

DEFENDANTS' RESPONSE TO ORDER TO SHOW CAUSE**I. INTRODUCTION**

The "Allegations of Criminal Contempt of Court" charge Scruggs¹ with violating a civil injunction entered by Senior District Judge William M. Acker, Jr. in *E.A. Renfroe & Company, Inc v. Moran*. Sisters Cori Rigsby Moran and Kerri Rigsby, former claims adjustors for E. A. Renfroe & Company, uncovered documents exposing State Farm's fraudulent denial of Katrina-related insurance claims. The Injunction required the Rigsbys to return the State Farm documents to Renfroe. The Allegations assert that Scruggs violated this Injunction by giving a copy of the State Farm documents to an unnamed "third party"—in fact, the Mississippi Attorney General.

The charge against Scruggs is insupportable and must be dismissed on at least four independent grounds.

1. Scruggs is innocent of contempt as a matter of law. Three days after the Allegations were filed, the Eleventh Circuit confirmed that the Injunction that Scruggs allegedly violated contains an express exemption permitting the documents to be disclosed to, and used by, law-enforcement

¹ "Scruggs" refers to defendants Richard F. Scruggs and The Scruggs Law Firm, P.A.

officials—such as the Mississippi Attorney General. The Court of Appeals could not have been clearer:

- “[T]he district court exempted from the scope of the injunction disclosure of the documents to ... law enforcement officials.”
- “[T]he preliminary injunction ... permits disclosure to and use by law enforcement agencies.”
- “As we have said twice, the injunction specifically allows disclosure of the documents to ‘law enforcement officials.’”

Thus, as a matter of law, Scruggs’s disclosure of the State Farm documents to the Mississippi Attorney General—the only basis of this prosecution—could not have violated the Injunction or exposed him to liability for criminal contempt. The Court need go no further.

2. The district court lacked criminal-contempt jurisdiction over Scruggs. A court’s power to appoint private counsel to pursue criminal-contempt charges would “eradicate fundamental separation-of-powers boundaries” if not confined to “those particular persons whose legal obligations result from their earlier participation in proceedings before the court.” *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 800 n.10 (1987) [hereinafter, “*Young*”]. Scruggs is not one of those persons. He never was a party to, participated in, or represented anyone in, the *Renfroe* lawsuit. Accordingly, the district court lacked jurisdiction to enforce the Injunction against Scruggs, much less to appoint private counsel to prosecute him.

3. The district court’s appointments of private counsel and its continuing involvement in this prosecution violate the separation-of-powers principles and principles of prosecutorial neutrality and independence laid down in *Young* and in *Morrison v. Olson*, 487 U.S. 654 (1988).

In *Young*, the Supreme Court held that a judicial appointment of private counsel to prosecute a contempt must not create even “the appearance of impropriety,” *Young*, 481 U.S. at 806, and that private counsel appointed for that purpose must be as “disinterested” and “dispassionate” as a public prosecutor. *Id.* at 804-05. Instead of adhering to these mandates, the district court appointed private counsel who represent clients currently embroiled in civil litigation with Scruggs. Furthermore, private counsel were given no independence, and have exercised none. Instead they submitted to the district court’s command that they prepare and sign Allegations that simply reiterate the district court’s pre-appointment conclusions.

Likewise, in *Morrison*, the Supreme Court held that Congress can only delegate to the judiciary the power to appoint independent prosecutors if the appointing court thereafter does not “participate in” the investigation, “supervise” the prosecutors, or “review any of the[ir] actions.” *Morrison*, 487 U.S. at 677, 681, 683. Here, after appointing private counsel, the district court has continued to involve itself in the prosecution by telling private counsel exactly what they must do, by drafting and signing the Allegations with private counsel, and even by revising its own prior findings to shore up its assertion of jurisdiction over Scruggs. The Allegations have been fatally tainted by this conduct.

4. For reasons stated by Justice Scalia’s dissent in *Young*, it is unconstitutional for a court to appoint private counsel to prosecute a criminal contempt. Once the United States Attorney declines to prosecute, that should be the end of the matter.

Accordingly, for reasons set forth below, the Allegations should be dismissed. Failing that, new private counsel should be appointed to

prosecute the alleged contempt after being properly instructed on their duties and discretion—including their duty to conduct themselves with the dispassionate independence of regular prosecutors, and their discretion to decline to prosecute the alleged contempt if prosecution appears unwarranted.

II. BACKGROUND FACTS

A. **The Rigsby sisters expose State Farm’s fraud in handling homeowners’ insurance claims arising from Hurricane Katrina.**

Following Hurricane Katrina, the practices of the insurance industry—and those of State Farm in particular—have drawn sustained attention from Congress, federal and state prosecutors, and courts across the country. Investigations of State Farm and its claims-adjusting firm, Renfroe, are currently being conducted by, among others, the U.S. Attorney’s Office for the Southern District of Mississippi and by Mississippi Attorney General Jim Hood. Since shortly after Katrina, Scruggs has represented thousands of Katrina victims in litigation against State Farm and other insurers to secure homeowners their rightful coverage.

In February 2006, whistleblowers Cori and Kerri Rigsby, who worked as adjusters for Renfroe during Katrina, approached Scruggs with evidence that State Farm was fraudulently denying coverage on the ground that damage to its insured’s homes was caused by water (a claim not covered by most policies) instead of wind (a covered claim). *E.A. Renfroe & Co., Inc. v. Moran*, Northern District of Alabama, 2:06-cv-1752-WMA, Doc. 130 at 19:8-13; 34:20-25, 140:8-19.² In June 2006, the Rigsbys printed thousands

² All documents which are a part of the docket in *E.A. Renfroe & Co., Inc. v. Moran*, Northern District of Alabama, 2:06-cv-1752-WMA, will be subsequently referred to as “*Renfroe Doc. X*,” according to the docket number assigned each document in that case. Any document which is a part of the docket in the instant case will be referred to solely by its document number, e.g., “Doc. Y.”

of State Farm documents demonstrating this fraudulent conduct. *Id.* at 43:7-11, 105:18-106:6, 111:12-14. They provided one set of the documents to the U.S. Attorney and one set to the Mississippi Attorney General. *Id.* at 109:1-12. The Rigsbys delivered a third set to Scruggs later that summer. *Id.* at 109:19-24.

B. Renfroe sues the Rigsbys and obtains an injunction requiring return of the documents, but containing an express law-enforcement exemption.

In September 2006, Renfroe sued the Rigsbys, alleging that their procurement of the State Farm documents had breached their employment contracts and violated the Alabama Trade Secrets Act (“the *Renfroe* suit”). Renfroe Doc. 2. Renfroe sought damages and an injunction requiring the documents to be returned. *Id.* **In the *Renfroe* suit, Scruggs was not and has never been a party, nor has he represented any party.** *Renfroe* Doc. 79.

The *Renfroe* suit was assigned to Judge William M. Acker, Jr., who issued a preliminary injunction on December 8, 2006. *Renfroe* Doc. 60. The accompanying opinion emphasized that “Renfroe is not seeking, and cannot seek, an order that would require the Attorney General of Mississippi or any other law enforcement agency, to share with Renfroe or anyone else any of its investigative materials, no matter where they came from.” *Id.* at 12-13.

The Preliminary Injunction contains two operative 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.**

Id. at 13-14 (first emphasis in original, second added).

C. Scruggs discloses his set of the State Farm documents to the Mississippi Attorney General at the Attorney General's request.

Scruggs learned of the Injunction on the afternoon of Friday, December 8, 2006. *Renfroe* Doc. 130 at 188:22-189:3. That evening, Scruggs called Mississippi Attorney General Hood about the Injunction, and they spoke over the weekend. *Id.* at 192:17-25, 201:11-13. Scruggs and Attorney General Hood agreed that the Injunction expressly allowed anyone holding the relevant documents to cooperate with law enforcement. *Id.* at 195:14-20. The Attorney General requested that Scruggs send his set of the State Farm documents to avoid disclosure to Renfroe. *Id.* at 201:11-18. Attorney General Hood also stated that he would confirm this request in writing. *Id.* at 202:14-23. On December 12, 2006, based on the Attorney General's oral request and on his promise that he would confirm that request by letter, Scruggs sent the Attorney General his set of documents by overnight delivery. *Id.* at 201:16-203:11. Later that day, an Assistant Attorney General sent Scruggs a letter confirming the request and noting that Attorney General Hood was "not comfortable" that the Injunction's

provision for securing the documents would keep them out of State Farm's hands. *Renfroe* Doc. 79-2.³

D. Judge Acker refers Scruggs to the U.S. Attorney to be prosecuted for criminal contempt.

Renfroe then filed a motion seeking to hold Scruggs and the Rigsbys in contempt for violating the Injunction. *Renfroe* Doc. 68. Scruggs appeared specially before Judge Acker to seek dismissal of the contempt proceedings on the grounds that (1) the court had no jurisdiction to enjoin him because he was a nonparty, and (2) he had not violated the Injunction. *Renfroe* Doc. 79.

Judge Acker rejected Scruggs's jurisdictional argument. *See Renfroe* Doc. 87. While Judge Acker had previously expressed doubt that he possessed the authority to enjoin Scruggs's conduct (once referring to that subject as "a can of worms," Ex. B to Evidentiary Submission (Excerpts from Transcript of Oct. 5, 2006 Hearing in *Renfroe*) at 23:11-24:20), Judge Acker now found that Scruggs, "as defendants' agent or attorney, knowingly violated and/or permitted or helped defendants [the Rigsbys] to violate" the Injunction. *Renfroe* Doc. 87 at p. 7. Judge Acker concluded that "Scruggs apparently was defendants' attorney and/or agent when it [sic] performed the acts which Renfroe contends violated the preliminary injunction." *Id.* at p. 6.

³ As Scruggs testified, the Attorney General and he were concerned that, if the State Farm documents were returned to Renfroe's counsel, they would end up in the hands of Renfroe and State Farm despite Judge Acker's Protective Order requiring Renfroe's counsel to keep the documents under lock and key. *See Renfroe* Doc. 130 at 194:6-16; 196:21-197:3; 198:3-21; *Renfroe* Doc. 60 at p. 9. If Renfroe and State Farm had access to the documents, it would have prejudiced the Attorney General's ongoing grand-jury investigations of Renfroe and State Farm. *See Renfroe* Doc. 130 at 194:6-16; 196:21-197:3; 198:3-21. As it turns out, this concern was well-founded. After the Attorney General returned the State Farm documents he received from Scruggs to Renfroe's counsel, they were, in fact, disclosed to Renfroe—in violation of the protective order. *See* Exhibit A to Evidentiary Submission (March 1, 2007 letter from Jack Held to Judge Acker). Yet, Renfroe's counsel—unlike Scruggs—has *not* been charged with contempt.

In March 2007, Scruggs appeared voluntarily at a civil-contempt hearing to testify regarding the Attorney General's request for the State Farm documents and Scruggs's response to the Injunction. *Renfroe* Doc. 130 at 290:16. At the hearing, Judge Acker acknowledged that there was "some ambiguity" in the Injunction because, if one interpreted the first paragraph as absolutely requiring the Rigsbys and their agents and attorneys to return the documents regardless of law-enforcement requests, then the second paragraph would become superfluous, as they would have nothing left to "disclose" or "use." *Id.* at 187:25-188:11 (emphasis added).

Despite acknowledging that the Injunction contained "some ambiguity" that went to the heart of Scruggs's alleged violation, Judge Acker issued an opinion on June 15, 2007 finding "sufficient evidence" against Scruggs to warrant referral to the United States Attorney for a criminal-contempt prosecution. *Renfroe* Doc. 146 at 19. Judge Acker promised that, "[i]f the government declines this request, the court will appoint another attorney to prosecute the contempt." *Id.* at 25.

Judge Acker's June 15th order again rejected Scruggs's jurisdictional objection, but included findings that should have defeated jurisdiction altogether. Whereas he previously had rejected the jurisdictional argument on the ground that Scruggs had acted "as defendants' agent or attorney," *Renfroe* Doc. 87 p. 7, Judge Acker now held that the Rigsbys "certainly were not the brains of the injunction-avoidance schemes" and that, "[a]fter they gave the documents to Scruggs they were, in effect, controlled by him." *Renfroe* Doc. 145 at 23-24. Thus, "[t]hey could be in criminal contempt only if held vicariously liable as agents or confederates of Scruggs." *Id.* at 23. Indeed, Judge Acker specifically concluded there was no "evidence to prove that either of [the Rigsbys] engaged in conduct that constitutes a basis

for punitive or criminal sanctions” because “the Rigsbys themselves did not have possession of the documents on or after December 8, 2006.” *Id.* at 24.

Judge Acker’s discussion of Scruggs’s innocence arguments displayed a similar inconsistency. Where he had once perceived “some ambiguity” in the Injunction, he now found its terms entirely clear and held that Scruggs’s interpretation of the Injunction as containing “an express carve-out for law enforcement” was “such a strained construction and so contrary to the injunction’s clear terms as to lack any credibility whatsoever.” *Id.* at 20. Judge Acker attacked Scruggs’s interpretation as “unduly blur[ring] the distinction between the injunction’s first and second paragraphs” because it “deems the words ‘disclose,’ ‘use,’ and ‘misappropriate’ in the second paragraph to be synonymous with the word ‘deliver,’ even though ‘deliver’ is the word that the court carefully chose for the first paragraph.” *Id.*

Judge Acker did not find civil contempt, however, because there was no evidence to contradict the testimony of the Rigsbys and Scruggs that they no longer possessed the State Farm documents. *Id.* at 13-14. In fact, shortly after Judge Acker denied Scruggs’s motion to dismiss, the set of documents that Scruggs had sent to the Attorney General was returned to Renfroe’s counsel in compliance with Judge Acker’s interpretation of the Injunction. *Renfroe Doc.* 130 at 83:19-84:9.

E. The United States Attorney refuses to prosecute Scruggs.

On July 25, 2007, following a “serious and thorough review,” the United States Attorney for the Northern District of Alabama declined to prosecute Scruggs. *Renfroe Doc.* 147.

F. Judge Acker appoints private counsel and “direct[s]” them to charge Scruggs with contempt.

The next day, Judge Acker appointed two private counsel, Charles E. Sharp, Sr. and Joel A. Williams of the Sadler Sullivan law firm, *see Renfroe* Doc. 148, which represents railway and insurance companies that are currently embroiled in civil litigation with the Scruggs firm. As private counsel admitted in a recent filing in the Eleventh Circuit writ proceeding, Mr. Sharp currently represents BNSF Railway Company and Norfolk Southern, both of which are defendants in an anti-trust case brought by Scruggs in the District of New Jersey.⁴ *See* Ex. D to Evidentiary Submission (Response of Special Prosecutors to The Eleventh Circuit's Order Dated Aug. 31, 2007) at 8-9. Private counsel also admitted that Mr. Williams currently represents Liberty Mutual, an insurance company to which Scruggs is adverse in ongoing Katrina-related matters. *See id.*

On July 31, 2007, Judge Acker issued an order stating that private counsel were “DIRECTED” 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. *Renfroe* Doc. 149.

G. Responding to Scruggs’s Writ Petition, Judge Acker tries to shore up his assertion of jurisdiction over Scruggs.

On August 6, 2007, Scruggs filed a Petition for Writs of Prohibition and Mandamus in the United States Court of Appeals for the Eleventh Circuit. *See* Ex. E to Evidentiary Submission (Scruggs’s Petition for Writs of Prohibition and Mandamus to the Eleventh Circuit). Among other things,

⁴ *See Dust Pro, Inc. v. CSX Transportation, Inc.*, District of New Jersey, 2:07-cv-02251-DMC-MF. The defendant railroad companies in that case—including Mr. Sharp’s clients—recently moved (unsuccessfully) to deny Scruggs’s *pro hac vice* application pending the outcome of this contempt proceeding. *See* Ex. C to Evidentiary Submission (July 9, 2007 Letter from Michael Graffinger in *Dust Pro* to Judge Falk).

the petition argued that nonparties cannot be prosecuted for contempt unless they aided and abetted contempt by a party—which could not possibly be the case here because Judge Acker held that the relevant parties, the Rigsby sisters, had *not* committed contempt.

Judge Acker, who was served with the petition as required, moved swiftly to address this jurisdictional argument. On August 13, 2007, Judge Acker amended his June 15 Memorandum and Order “insofar as they purport to exonerate the Rigsbys from criminal contempt.” *Renfroe* Doc. 150 at 2. Judge Acker claimed that this issue should be reexamined based on allegations contained in the Rigsbys’ *qui tam* complaint, which was unsealed on August 1, 2007.⁵

Judge Acker also responded to criticisms in Scruggs’s writ petition that Messrs. Sharp and Williams were disqualified from serving as special prosecutors due to their connections with companies being sued by Scruggs. On August 20th, Judge Acker appointed a third private counsel, Michael V. Rasmussen, “[u]pon the request and recommendation” of Sharp and Williams. *Renfroe* Doc. 152.

H. Judge Acker and private counsel jointly file allegations “reiterat[ing]” Judge Acker’s findings and omitting key exculpatory facts.

As planned, Judge Acker and the three private counsel filed on August 21, 2007 a charging instrument entitled “Allegations of Criminal Contempt of Court.” In those Allegations, “[t]he Court” stated that it had reviewed the record and “reiterate[ed] its conclusion” that probable cause exists to prosecute Scruggs for criminal contempt. Doc. 1 at 1 (emphases added).

⁵ In April 2006, the Rigsbys, represented by Scruggs, filed a *qui tam* action on behalf of the United States against, among others, State Farm and Renfroe. See *United States ex rel. Rigsby v. State Farm Mutual Ins. Co.*, Southern District of Mississippi, 1:06-cv-433.

The Allegations contain notable omissions of undisputed material facts. First, the most critical paragraph of the Allegations, paragraph 2, purports to quote the terms of the Injunction. Yet it deliberately deletes the words “**(with the express exception of law enforcement officials)**”—the words, originally printed in boldface, which make it clear that the Injunction does not require law-enforcement officials to return any State Farm documents, regardless of how they were obtained. *Id.* at ¶ 2. Second, the Allegations aver that on December 12, 2006, Scruggs, after receiving notice of the (misquoted) Injunction, caused the State Farm documents to be delivered to an unnamed “third party” with the “specific intent of preventing said materials from being delivered to counsel for the plaintiff.” *Id.* at ¶ 7. The Allegations betray no hint that it is undisputed that the “third party” to whom Scruggs disclosed the State Farm documents was the Attorney General of the State of Mississippi. *See Renfroe Doc. 146; Renfroe Doc. 130 at 164:13-165:9; 201:25-202:4.*

III. ARGUMENT

“Criminal contempt is a *sui generis* proceeding for the protection of the integrity of the Court. . . . Th[e]se proceedings are, therefore, within the control of the Court and the Court has the power and authority to order them dismissed.” *United States v. Barnett*, 346 F.2d 99, 100 (5th Cir. 1965); *United States v. Kelsey-Hayes Co.*, Criminal No. 44608, 1971 WL 572, *5-6 (E.D. Mich. Oct. 26, 1971). Dismissal is appropriate when (1) “the admission of basic facts and statements of position are such that it is manifest to the Court as a matter of law that there was no willful contumacious violation;” (2) when “there is a lack of probable cause;” or (3) when “further prosecution will not serve the public interest . . . [or] preserve the authority or dignity of the Court.” *Kelsey-Hayes*, 1971 WL 572 at *6;

see also United States v. Masselli, 638 F. Supp. 206, 210 (S.D.N.Y. 1986) (denying evidentiary hearing and dismissing contempt allegations where “there [were] no genuine issues of material fact to be resolved”); *In re United Corp.*, 166 F. Supp. 343, 345-46 (D.Del. 1958) (dismissing criminal contempt proceeding because evidence did not establish probable cause).

The Court should dismiss these proceedings because, as a matter of law, there was no willful contempt, and because it would neither serve the public interest nor preserve the Court’s authority to allow a prosecution to proceed based on a charging instrument procured by unconstitutional means.⁶

A. Dismissal of the Allegations is required because the Eleventh Circuit has ruled that the Injunction contains an express exemption allowing the documents to be disclosed to law-enforcement officials.

Three days after the Allegations issued, the Eleventh Circuit issued a per curiam opinion that eliminated the basis for this prosecution. *See* Ex. G to Evidentiary Submission (Aug. 24, 2007 Opinion of the Eleventh Circuit in *E.A. Renfroe & Co., Inc. v. Moran*, No. 06-16561). The opinion resolved the Rigsbys’ direct appeal from Judge Acker’s injunction order—the same

⁶ The fact that the Eleventh Circuit did not grant Scruggs’s mandamus petition, which featured several of the arguments presented in this brief, has no law-of-the-case or other preclusive effect. “[W]hen the denial of a petition for writ of mandamus is, or may be, the result of special limitations inherent in the writ, such a denial does not establish the law of the case.” *United States v. Dean*, 752 F.2d 535, 542 (11th Cir. 1985). As the Eleventh Circuit has observed, “[d]enial of a writ commonly rests on severe limitations of jurisdiction and discretion that prevent the court from applying ordinary tests of reversible error. If a decision is confined by these limitations, it should not preclude examination of the merits in later proceedings. Preclusion is appropriate only if denial rested on the merits of the questions presented rather than remedial limitations.” *Id.* at 541 (citation omitted).

Here, the Eleventh Circuit emphasized that mandamus requires “a showing of clear and undisputable right to relief” and that a party “is not entitled to mandamus merely because it shows evidence that, on appeal, would warrant reversal of the district court.” *Renfroe* Doc. 159 at 2 (citation omitted). Because the Eleventh Circuit’s denial of relief rested entirely on “special limitations inherent in the writ,” *Dean*, 752 F.2d at 542, that denial in no way constrains this Court’s discretion to dismiss these proceedings.

order that Scruggs is being prosecuted for violating here. Although the Eleventh Circuit upheld the order, it also took pains to note several times in its opinion that **“the district court exempted from the scope of the injunction disclosure of the documents to, and their use by, law enforcement officials.”** *Id.* at 4 (emphasis added).

Indeed, the Eleventh Circuit rejected two of the Rigsbys’ arguments for reversal—and thus upheld the Injunction—*only* because the Injunction contains an express law-enforcement exemption. **First**, the Eleventh Circuit relied on the law-enforcement exemption in rejecting the Rigsbys’ argument that the public policy of “ferreting out corporate wrongdoing” should preclude enforcement of their confidentiality agreement with Renfroe:

Finally, the Rigsbys say that the public policy concern of ferreting out corporate wrongdoing justifies their breach of the contractual duty under the confidentiality provision and counsels against enforcement of it. **But that concern is one that is adequately covered by disclosure of the alleged wrongdoing to state and federal law enforcement agencies.** As Renfroe put it in its brief, “Renfroe makes no complaint about the Rigsbys’ participation in any investigation by a governmental law enforcement agency. The fact that the Rigsbys gave copies of documents to the Mississippi Attorney General and [federal law enforcement] is not at issue in this litigation.” **As we explained earlier, the preliminary injunction, which is all that we have before us, permits disclosure to and use by law enforcement agencies.**

Id. at 10 (emphases added).

Second, the Eleventh Circuit cited the law-enforcement exemption as its basis for rejecting the Rigsbys’ argument that the injunction “exposes them to criminal liability in Mississippi for violating subpoenas they have received requiring them to produce documents to a grand jury there.” *Id.* at 12. “No, it doesn’t,” the Court succinctly responded. **“As we have said**

twice, the injunction specifically allows disclosure of the documents to ‘law enforcement officials.’” *Id.* (emphasis added).

The Eleventh Circuit’s ruling that the Injunction contains an express law-enforcement exception is fatal to this prosecution and requires that the Allegations be dismissed. To establish criminal contempt, private counsel will have to prove beyond a reasonable doubt that (1) there was a “lawful and reasonably specific order” that (2) Scruggs violated (3) “willfully.” *Romero v. Drummond Co. Inc.*, 480 F.3d 1234, 1242-43 (11th Cir. 2007). But the Eleventh Circuit’s ruling interpreting the Injunction makes it impossible, as a matter of law, for private counsel to prove any of these elements beyond a reasonable doubt.

As to the first element, the Eleventh Circuit’s recent decision makes clear that the Injunction is lawful and reasonably specific—but not in the way that private counsel might wish. Rather, the wording of the Injunction specifically negates any possibility of guilt on Scruggs’s part. The Eleventh Circuit held that the Injunction survives legal scrutiny *only* because it expressly “permits disclosure to and use by law enforcement agencies.”⁷ Ex. G at 10. Thus, the Eleventh Circuit has endorsed the very interpretation of the Injunction that Scruggs presented to Judge Acker, and that Judge Acker’s June 15 Opinion characterized as being “such a strained construction and so contrary to the injunction’s clear terms as to lack any credibility whatsoever.” *Renfro* Doc. 145 at 20. The Eleventh Circuit’s

⁷ Indeed, if no such express exemption existed, it might well have to be implied judicially; for it is troubling to consider the public-policy implications of a criminal conviction based on the contemnor’s compliance with a lawful request by law-enforcement officials. Such a conviction seems fundamentally unfair, and an interpretation of the injunction that would authorize it should be avoided if there is any reasonable alternative interpretation.

endorsement of Scruggs’s interpretation, and its implicit rejection of Judge Acker’s, ought to end the case.

Private counsel may argue that, even if the Injunction permits “disclosure” of the documents to law-enforcement officials, as the Eleventh Circuit held, it still requires *return* of the same documents to Renfroe’s counsel. But Judge Acker himself acknowledged the hole in that argument. At the March 2007 contempt hearing, he observed that if one interpreted the Injunction’s first paragraph as absolutely requiring the Rigsbys and their agents and attorneys to return the documents regardless of law-enforcement requests, then the second paragraph would become superfluous, as they would have nothing left to “disclose” to law enforcement or to otherwise “use.” *Renfroe* Doc. 130 at 187:25-188:11 (emphasis added).

At the very least, the difficulty that Judge Acker perceived in his own interpretation of the Injunction creates “some ambiguity”—to use Judge Acker’s phrase—making it impossible for private counsel to prove that the Injunction was “a clear, definite, and unambiguous order requiring [or prohibiting] the action in question.” *Romero*, 480 F.3d at 1244 (brackets in original). The need for clarity is especially acute here because “[t]he judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one.” *Int’l Longshoremen’s Ass’n v. Philadelphia Marine Trade Ass’n*, 389 U.S. 64, 76 (1967). Accordingly, “unbroken lines of authority . . . caution us to read court decrees to mean rather precisely what they say [and] . . . read any ‘ambiguities’ or ‘omissions’ in such a court order as redounding to the benefit of the person charged with contempt.” *NBA Props., Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990) (Breyer, J.) (internal citations and modifications omitted). Thus, even if the court ignores the Eleventh Circuit’s ruling and assumes that the

Injunction did not expressly *permit* Scruggs to provide the documents to the Attorney General, it was anything but a “clear, definite, and unambiguous order” *prohibiting* that conduct. *Romero*, 480 F.3d at 1244.

Even if the Court set aside *both* the Eleventh Circuit’s decision and Judge Acker’s admission that his interpretation renders the Injunction ambiguous, the context in which the Injunction was issued rendered it less than “clear, definite, and unambiguous.” *Id.* “The reasonable specificity element involves a factual inquiry that must be evaluated in the context in which it is entered and the audience to which it is addressed.” *United States v. Bernardine*, 237 F.3d 1279, 1282 (11th Cir. 2001). The relevant context here is that, prior to issuing the Injunction, Judge Acker disclaimed any intent to interfere with the ongoing investigations of State Farm or with any cooperation with law enforcement. Ex. B at 16:18-22; *Renfroe* Doc. 60 at 12-13. And when Renfroe voiced concerns about Scruggs having access to the State Farm documents, Judge Acker responded by saying: “I don’t think that I can reach out through them and stop either Mississippi from conducting a criminal investigation and proceeding with the grand jury in whatever it produces or can stop plaintiffs’ lawyers in Mississippi or Alaska.” *Renfroe* Doc. 46 at 30:20-25.

Like Judge Acker, Renfroe repeatedly disclaimed any intent to bar anyone from providing documents to law enforcement. Renfroe’s purpose in seeking the Injunction is particularly relevant context for interpreting the Injunction. *See Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1297 (11th Cir. 2002). Indeed, “[t]he language of an injunction must be read in the light of . . . the relief sought by the moving party . . . and the mischief that the injunction seeks to prevent.” *United States v. Christie Indus., Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972). It is therefore pertinent that Renfroe’s Complaint

stated that it is “cooperating with both federal and Mississippi authorities and assumes that Defendants will do the same. This lawsuit is not about that cooperation.” *Renfroe* Doc. 2 at ¶ 30. Renfroe also stipulated that “the giving of information and documents to a governmental investigator conducting any kind of investigation” would not violate any obligation imposed by contract or tort law, or any fiduciary duty. *Renfroe* Doc. 46 at 40:23-41:11. In light of these statements, the Court should dismiss the Allegations on the ground that the Injunction did not “clear[ly], definite[ly], and unambiguous[ly]” bar Scruggs from disclosing the Renfroe documents to Attorney General Hood.

As to the second criminal-contempt element—a violation—Scruggs’s conduct fell squarely within the express law-enforcement exemption that the Eleventh Circuit has found to exist. The Eleventh Circuit’s twelve-page opinion stated three separate times, in substance, that the “the injunction specifically allows disclosure of the documents to ‘law enforcement officials.’” Ex. G at 11. While the Allegations refer only to an unnamed “third party,” there is no question that on December 12, 2006, Scruggs disclosed the State Farm documents to Mississippi Attorney General Jim Hood at the request of Hood himself, as confirmed in writing by Hood’s office.⁸ Thus, private counsel will be unable to prove beyond a reasonable doubt that Scruggs violated the Injunction.

As to the third element, willfulness has been described “as a volitional act done by someone who knows or should reasonably be aware that his conduct is wrongful.” *United States v. Cable News Network, Inc.*, 865 F. Supp. 1549, 1558 (S.D. Fla. 1994) (internal quotation omitted). Here, as

⁸ See *Renfroe* Doc. 130 at 188:22-189:3, 192:17-25, 195:14-20, 201:11-203:11; *Renfroe* Doc. 79-2.

Scruggs testified before Judge Acker, he gave the documents to law-enforcement officials in the correct belief that the Injunction allowed him to do so. *See Renfroe* Doc. 130 at 194:17-195:20. The Mississippi Attorney General concurred in that belief. *See id.* at 194:6-195:30. There can be no showing of willfulness on these facts.

Accordingly, this Court should find, as a matter of law, that no criminal-contempt conviction is possible here and should dismiss the Allegations.

B. Dismissal of the Allegations is required because Judge Acker exceeded his jurisdiction by appointing private counsel to pursue criminal-contempt charges against a nonparty.

A federal court's prosecution of an alleged criminal contempt under Federal Rule of Criminal Procedure 42(a)(2) raises concerns about the constitutional separation of powers—concerns that the Supreme Court allayed in *Young* by pointing to the narrow jurisdictional limitations on whom a court may prosecute for judicial contempts. Judge Acker overstepped those limitations here, rendering the prosecution both extra-jurisdictional and an affront to federal separation-of-powers guarantees.

In *Young*, the U.S. Supreme Court was confronted with the question of whether and when a district court may appoint private lawyers to prosecute a criminal contempt. The district court had appointed private lawyers, who represented a famous leather-goods manufacturer, to prosecute the contempt of an injunction that the manufacturer had obtained against certain trademark infringers. *See Young*, 481 U.S. at 790-93. Exercising its supervisory power over the lower federal courts, the Supreme Court reversed the infringers' contempt convictions. In so doing, the *Young* court set out the following principles.

(1) “While a court has the authority to initiate a prosecution for criminal contempt, its exercise of that authority must be restrained by the principle that only the *least possible power adequate to the end proposed* should be used in contempt cases.” *Id.* at 801 (emphasis added) (citation and internal quotation marks omitted).

(2) “A private attorney appointed to prosecute a criminal contempt . . . certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.” *Id.* at 804. The court emphasized that a prosecutor tasked with investigating and prosecuting contempt must make a “dispassionate assessment” of the propriety of criminal-contempt charges (*id.* at 805) and must exercise his considerable discretion with independence and professional judgment.⁹ The court also expressed concern that appointing an interested private prosecutor may create “*opportunities* for conflicts to arise” and thus create “at least the *appearance* of impropriety.” *Id.* at 806.

(3) “[T]he court has jurisdiction in a contempt proceeding only over those particular persons whose legal obligations result from their earlier participation in proceedings before the court.” *Id.* at 800 n.10. This point was made by the authors of the principal opinion in response to Justice Scalia’s criticism that the majority’s reasoning, carried to its logical conclusion, would justify “an inherent power on the part of *Congress* to prosecute and punish disobedience of its laws—which [no] rational person would suggest.” *Id.* at 821 (emphasis added).¹⁰ The authors of the principal

⁹ *See, e.g., id.* at 803 (prosecutor’s duty “is to seek justice, not merely to convict”); *id.* at 804 n.14 (listing ethical rules requiring lawyer’s exercise of independent professional judgment); *id.* at 807 (discussing prosecutor’s broad discretion).

¹⁰ This response to Justice Scalia’s concurrence is contained in Part III-B of the court’s opinion, which failed to obtain a fifth vote only because three Justices disagreed with its unrelated holding that harmless-error analysis did not apply. *See* 481 U.S. at 825-27

opinion distinguished Justice Scalia’s hypothetical about Congress by observing that, “[i]n punishing contempt, the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, *arising directly from the parties’ participation in judicial proceedings*. *Id.* at 800 (emphasis added). By contrast, the congressional prosecutorial power [that] the concurrence hypothesizes would admit of no such limit; the parties potentially subject to such power would include the entire population.” *Id.* at 800 n.10. Thus, it was *only* the extremely narrow limits on the class of persons subject to the judiciary’s contempt jurisdiction that enabled the Supreme Court to conclude that acknowledging “the limited authority of courts to appoint contempt prosecutors” would establish no principle capable of “eradicat[ing] fundamental separation-of-powers boundaries.” *Id.*

It is those “fundamental” boundaries that the district court transgressed in pursuing this prosecution. Scruggs does not belong to the limited class of persons subject to the district court’s contempt jurisdiction because his purported “legal obligation” not to cooperate with the Mississippi Attorney General did not and could not have “result[ed] from [his] earlier participation in proceedings before the [*Renfro*] court.” *Id.* at 800 n.10. Scruggs never was a party to the *Renfro* litigation, nor did he ever appear in that litigation as counsel for any party. Indeed, he has never even been admitted to practice in Judge Acker’s courtroom. Under the analysis in *Young*, he cannot be a proper target of a judicial contempt prosecution.

Faced with this objection, Judge Acker erroneously invoked the “aiding and abetting” exception to the rule against prosecuting nonparties for contempt. *See Renfro* Doc. 87 at 6. But Judge Acker’s June 15 decision

(Rehnquist, C.J., Powell, J., and O’Connor, J., concurring in part and dissenting in part)).

itself undermined that theory by concluding that, if anything, the *Rigsbys* were *Scruggs's* agents and were “controlled by him” in effectuating any “injunction-avoidance schemes.” *Renfroe* Doc. 145 at 23-24. That finding categorically *rules out* applying the “aiding and abetting” exception to *Scruggs*. “By definition, the servant does not control the principal. If the court does not have jurisdiction over the principal, it is not easy to see why the court should have the power to bind [him] through an order directed against [his] servant.” *Doctor's Assocs., Inc. v. Reinert & Duree, P.C.*, 191 F.3d 297, 304 (2d Cir. 1999).

Similarly, in *Alemite Manufacturing Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930)—a case that Judge Acker relied upon—Judge Learned Hand held that “no court can make a decree which will bind any one but *a party* . . . ; it cannot lawfully enjoin the world at large.” Accordingly, a nonparty may be punished for contempt only “when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, *an act of a party*.” *Alemite*, 42 F.2d at 833 (emphasis added). Nor can a court enlarge upon its equitable jurisdiction merely by purporting to independently enjoin the party’s “agents, employees, associates and confederates.” *Id.* at 832. “[I]f the *defendant* is not involved in the contempt, the *employee* cannot be; the decree has not been disobeyed. . . . [I]t is not the act described which the decree may forbid, but only that act *when the defendant does it*.” *Id.* at 833 (emphases added).¹¹

¹¹ Judge Acker also cited *Alemite* for the proposition that *Scruggs* is bound by the Injunction simply because he is “legally identified with” the *Rigsbys* in other matters. See *Renfroe* Doc. 87 at 6 (quoting *Alemite*, 42 F.3d at 833); see also Doc. 1 at ¶ 5. But that language cannot be taken out of context to give it the sweeping meaning that Judge Acker and private counsel apparently attribute to it. The opinion elsewhere makes clear that one can be punished for contempt only if he is a party or aided and abetted a party. *Scruggs* was neither a party to the *Renfroe* suit, nor could he have aided and abetted a

Here, the defendants did *not* do it. Judge Acker himself found that the Rigsbys did *not* violate the Injunction. *Renfroe* Doc. 145. It is, of course, both legally and logically impossible for Scruggs to have “aided and abetted” the contempt of parties who committed no contempt. Accordingly, the “aiding and abetting” exception cannot excuse the district court’s fundamental lack of jurisdiction or its attendant violation of separation-of-powers principles.¹²

Recognizing that Scruggs’s jurisdictional objection is fatal, Judge Acker issued an “Amendment” on August 13 announcing his intention to revisit his finding that the Rigsbys committed no criminal contempt. *See Renfroe* Doc. 150. Although Judge Acker stated that the Amendment had been prompted by the unsealing of the Rigsbys’ *qui tam* complaint, he cited nothing in that complaint that logically could have caused him to reconsider his earlier conclusion that the Rigsbys did not commit criminal contempt. *See id.* More specifically, Judge Acker cited no new basis for retracting his dispositive findings that “the Rigsbys . . . did not have possession of the documents on or after December 8, 2006” and that, “[a]fter [the Rigsbys] gave the documents to Scruggs they were, in effect, controlled by him.” *Renfroe* Doc. 145 at 23-24. Judge Acker likewise cited nothing newly

party, because Judge Acker found that the Rigsbys themselves committed no contempt. Further, Judge Acker’s reliance on the “legally identified with” verbiage would generate absurd results. If representation in a single matter bound a lawyer to all of his client’s other matters, as Judge Acker and private counsel suggest, then a lawyer taking on an antitrust case in Alabama would become bound by injunctions against the client in employment cases in Alaska, or even Argentina. Judge Hand surely did not intend to impose such a sweeping form of strict liability against lawyers; and adopting such a rule would not advance any rational public policy.

¹² Judge Acker also relied on *Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985), where the court affirmed findings of contempt against two non-parties who aided a defendant in a securities action in violating a temporary restraining order prohibiting him from transferring and concealing funds received from the plaintiff. That case is plainly distinguishable because *the defendant himself* had been held in contempt for violating the TRO and jailed for over two months. *Id.*

revealed in the *qui tam* complaint that could justify his statement that he is now “not . . . sure of the exact relationship that existed between the Rigsbys . . . and Scruggs.” *Renfro* Doc. 150 at 1-2. Certainly, the fact of an attorney-client relationship is nothing new. Long before Judge Acker issued his June 15th decision exonerating the Rigsbys, Scruggs testified at the March 2007 evidentiary hearing that he had an ongoing attorney-client relationship with the Rigsbys. *See Renfro* Doc. 130 at 142:15-25. Thus, the conclusion is inescapable that Judge Acker issued the Amendment not because any compelling new facts or law had come to his attention, but rather, in a belated attempt to shore up his assertion of jurisdiction over Scruggs.

C. Dismissal, or the appointment of new prosecutors, is required because the private counsel appointed by the district court lack the independence required by the *Young* and *Morrison* decisions.

On two separate occasions, the Supreme Court has emphasized that a court that appoints a special prosecutor must step aside after doing so and allow that prosecutor to carry out his functions with dispassionate independence. Unfortunately, that is not what happened here. Judge Acker’s continued involvement in this prosecution has fatally tainted the Allegations, which therefore must be dismissed. Failing that, at a minimum, this Court must appoint new private counsel who are properly instructed on their duties and discretion under the *Young* decision.

These conclusions derive from two Supreme Court precedents. In *Young*, the high court held that “[a] private attorney appointed to prosecute a criminal contempt . . . certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.” *Young*, 481 U.S. at 804. *Young* therefore forbids the appointment of private attorneys to serve as mere rubber stamps for the court’s determinations instead of providing their

own “dispassionate assessment” of the propriety of criminal contempt charges. *Id.* at 805.

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld the constitutionality of the independent-counsel provisions of the Ethics and Government Act of 1978.¹³ But the Court observed that Congress’s decision to give a specialized court (called the “Special Division”) the authority to appoint independent counsel “would be improper” under the Appointments Clause “if there was some ‘incongruity’ between” the new appointment power and “the functions normally performed by the courts.” *Id.* at 676. The Court found no such incongruity in the statute under consideration—but only because Congress had made the appointing judges “ineligible to participate in any matters relating to an independent counsel they have appointed” (*id.* at 677) and because the statute “simply does not give the [Special] Division the power to ‘supervise’ the independent counsel in the exercise of his or her investigative or prosecutorial authority.” *Id.* at 681. The Court likewise held that the statute did not “pose[] any threat to the ‘impartial and independent federal adjudication of claims within the judicial power of the United States,’” in part because it “gives the Special Division itself no power to review any of the actions of the independent counsel or any of the actions of the Attorney General with regard to the counsel.” *Id.* at 683 (citations omitted). Under *Morrison*, therefore, Rule 42 is likely to be found unconstitutional if interpreted to authorize Judge Acker to “participate in” the special prosecutors’ investigation, to “supervise” their work, or to “review any of the[ir] actions.” *Id.* at 677, 681, 683.

But Judge Acker has continued to do all of these things. Private counsel have not been granted, and have not exercised, the independence

¹³ 28 U.S.C. §§ 49, 591 *et seq.* (1982).

and dispassionate judgment required of them. The problems began when Judge Acker first appointed two lawyers with clients currently involved in litigating huge cases against the Scruggs firm in two different industries. *See Renfroe* Doc. 148. That circumstance, in itself, created “at least the appearance of impropriety.” *Young*, 481 U.S. at 806.¹⁴ Judge Acker then “DIRECTED” private counsel to prepare and present to him for signature a charging document “consistent with” his own prior findings that Scruggs willfully violated the Injunction and deserves to be prosecuted for it. *Renfroe* Doc. 149. Private counsel complied with that request. The Allegations that they filed and signed jointly with Judge Acker state that “[t]he Court” has reviewed the record and “reiterates its conclusion” that probable cause exists to prosecute Scruggs for criminal contempt. Doc. 1 at 1 (emphases added). Moreover, as previously discussed, the Allegations effectively enshrine Judge Acker’s theory of the case—namely, that the Injunction contains no law-enforcement exemption that could apply to Scruggs’s conduct. Judge Acker’s improper post-appointment participation also extends to his “amendment” of his earlier ruling exonerating the Rigsbys. Judge Acker issued his Amendment just a week after being served with Scruggs’s writ petition; and he appears to have had no plausible reason for the Amendment other than his desire to fend off the jurisdictional attacks set forth in the petition.

“[I]t is the duty of federal courts to construe a statute in order to save it from constitutional infirmities.” *Morrison*, 487 U.S. at 682. Accordingly,

¹⁴ Contrary to a suggestion made by private counsel Sharp and Williams in a submission to the Eleventh Circuit, Scruggs objects equally to the appointment and continuing role of Mr. Rasmussen. Mr. Rasmussen was appointed at the behest of Messrs. Sharp and Williams, making his appointment objectionable on that ground alone; and like them, he was directed to, and did, draft and sign Allegations that rubber-stamped Judge Acker’s finding of probable cause to prosecute Scruggs. Like the other two private counsel, therefore, he failed to make any “dispassionate assessment” of the charges.

this Court should construe Rule 42 as prohibiting Judge Acker’s ongoing participation in this prosecution. Since Judge Acker co-authored the Allegations, his influence taints the entire proceeding and the case should be dismissed. Alternatively, the events described above confirm that private counsel have failed to meet the *Young* standard of dispassionate independence and that this Court should at least grant the second remedy set forth in the Conclusion, below, by appointing new private counsel and instructing them properly on their duties and discretion.

D. Dismissal of the Allegations is required because the constitutional separation-of-powers doctrine forbids courts from appointing private attorneys to prosecute criminal contempts.

In the alternative, and for reasons stated more fully in Justice Scalia’s *Young* concurrence, Rule 42(a)(2) is unconstitutional and should be declared so. Under Article III, § 1 of the Constitution, the federal courts are granted solely “[t]he judicial power of the United States,” which is “the power to decide, in accordance with the law, who should prevail in a case or controversy.” *Young*, 481 U.S. at 816 (Scalia, J., concurring in judgment). In contrast, the power to prosecute those accused of violating the law is an executive power vested in the President. U.S. CONST. art. II, § 2, cl. 1; *see Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Appointing private counsel to pursue a charge of criminal contempt is therefore not a proper exercise of judicial power. Indeed, the Fifth Circuit once held that “[i]t follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.” *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (*en banc*). Rule 42(a)(2) also fails to resolve intractable practical issues arising from this sort of prosecution—*e.g.*, if the court convicts but the Executive refuses to arrest

and incarcerate, what then? “[N]o one has ever supposed that the Judiciary has an inherent power to arrest and incarcerate.” *Young*, 481 U.S. at 818 (Scalia, J.).

The U.S. Attorney has declined to prosecute. That should be the end of the matter. Accordingly, this Court should dismiss the Allegations.

IV. REQUEST FOR EVIDENTIARY HEARING IF CASE PROCEEDS

For the reasons discussed above, this Court should dismiss these proceedings entirely. However, if the Court decides that this matter should proceed, Scruggs respectfully requests the opportunity to take discovery on the related issues of (1) whether private counsel is disinterested and has exercised the independent “dispassionate assessment” required by *Young*, and (2) the extent to which Judge Acker has violated the rule in *Morrison* by participating in or supervising private counsel’s investigation of Scruggs.

Scruggs further requests that the Court set a date for an evidentiary hearing on these issues. The *Young* and *Morrison* issues go to the very propriety of these proceedings and must be resolved before the case proceeds further. Scruggs anticipates that the hearing would not take more than two days. Scruggs intends to call Judge Acker and private counsel—Messrs. Sharp, Williams, and Rasmussen. If the Court wishes, Scruggs will brief the issue of his right to the requested discovery and to an evidentiary hearing.

V. CONCLUSION

For the foregoing reasons, Scruggs ask this Court

(1) to dismiss the Allegations and this prosecution against Scruggs entirely, or, failing that, and in the alternative,

(2) to void the prior appointment of private counsel and to appoint new attorneys with instructions 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 that they may decline to prosecute after reviewing the case.

RESPECTFULLY SUBMITTED this the 21st day of September, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 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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