

IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

LAFAYETTE COUNTY

FILED

APR 08 2008

JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, PLLC

PLAINTIFF

V.

BY Mary Alice Busby Clerk ALC D. CIVIL ACTION NO. L07-135

RICHARD SCRUGGS, Individually; DON BARRETT, Individually;
SCRUGGS LAW FIRM, P.A.; BARRETT LAW OFFICE, P.A.;
NUTT & McALISTER, PLLC; and LOVELACE LAW FIRM, P.A.

DEFENDANTS

PLAINTIFF'S MOTION TO QUASH SUBPOENAS AND FOR SANCTIONS

Plaintiff, by and through counsel, submits this Motion to Quash Subpoenas pursuant to M.R.C.P. 45(d) and For Sanctions pursuant to M.R.C.P. 45(f), and would show unto the Court the following:

1. On April 3, 2008, Defendants Scruggs and the Scruggs Law Firm (hereinafter "Scruggs Defendants") served a subpoena duces tecum on the Tollison Law Firm. This subpoena is attached hereto as Exhibit A.
2. The Scruggs Defendants served a subpoena duces tecum on the Plaintiff and a witness subpoena on John Griffin Jones, a partner in the Plaintiff firm. These subpoenas are attached hereto as Exhibits B and C.¹

¹The Scruggs Defendants also served hearing subpoenas on Grady F. Tollison, Jr., Esq., and William K. Duke, Esq., on April 3, 2008. Both Tollison and Duke are attorneys of record for Plaintiff in the case at bar. On April 8, 2008, counsel for the Scruggs Defendants agreed to withdraw the hearing subpoenas of Tollison and Duke, and Plaintiff's counsel agreed to proceed as if these subpoenas had not been served. Still, these subpoenas caused Plaintiff's counsel to spend considerable time researching and drafting a legal challenge to the subpoenas of Plaintiff's counsel. The sanctions sought herein do not seek reimbursement for the time spent researching and drafting challenges to those two subpoenas. That being said, the hearing subpoenas served on Plaintiff's counsel do evidence an effort on the part of the Scruggs Defendants to annoy and harass the Plaintiff.

3. This Court has opened discovery and will conduct a hearing on a very narrow and limited issue. Pursuant to Order of this Court entered February 26, 2008, “[m]eanwhile, the parties shall be permitted 60 days from this date within which to conduct discovery **regarding the conduct alleged in Plaintiff’s Motion for Sanctions** (December 7, 2007).” (emphasis added). At the February 26, 2008, hearing, the Court stated succinctly: “An evidentiary hearing on plaintiffs’ [sic] requested sanction of striking the pleadings and entering a default judgment and other rights will be held to determine the truth or falseness of the plaintiffs’ [sic] allegation and its determination of actions to be taken.” See Exhibit D, transcript of hearing, p. 20:13-17.
4. The conduct alleged in Plaintiff’s December 2007 Motion for Sanctions was strictly confined to that of the Defendants and alleged attempts to bribe Judge Henry Lackey.
5. The Scruggs Defendants and their counsel have had since February 26, 2008 to propound discovery to the Plaintiff or to notice depositions. Yet, the Scruggs Defendants and their counsel waited until April 3, 2008 to serve these subpoenas - evidence that these tactics are either dilatory in nature or designed to annoy and harass the Plaintiff, or a combination of both.
6. Information and documents sought from the Tollison Law Firm are not relevant and are privileged.
7. The “Document List” attached to the subpoena of the Tollison Law Firm seeks “[a]ll notes, memoranda, electronic communications, letters, diary entries or written or recorded memorializations of any discussions, communications or conversations

between any attorney at Tollison Law Firm, P.A., on the one hand, and Judge Henry Lackey, on the other hand, that pertain, refer or relate in any manner to that matter styled *Jones, Funderburg, Sessums, Peterson & Lee, PLLC v. Richard Scruggs, et al.*, No. L07-135, pending in Lafayette County Circuit Court, excluding any such responsive documents previously provided to counsel for Defendants.” Plaintiff’s counsel does not concede that any such documents exist, but any such documents that might exist would clearly be work-product.

8. The “Document List” attached to the subpoenas of the Plaintiff and Jones seeks “[a]ll notes, memoranda, electronic communications, letters, diary entries or written or recorded memorializations of any discussions, communications or conversations between any attorney at Jones, Funderburg, Sessums, Peterson & Lee, PLLC, on the one hand, and any other person, on the other hand, that pertain, refer or relate in any manner to that matter styled *Jones, Funderburg, Sessums, Peterson & Lee, PLLC v. Richard Scruggs, et al.*, No. L07-135, pending in Lafayette County Circuit Court, excluding any such discussions, communications or conversations with your legal counsel.” Any such documents would clearly be work-product. These would be documents prepared by a party in anticipation of litigation or for trial. The Scruggs Defendants cannot show a substantial need for these materials to prepare for the hearing on the Motion for Sanctions. Even if the Scruggs Defendants could show the need, they could not then show that they could not obtain the same materials without undue hardship.
9. The work-product doctrine is addressed in M.R.C.P. 26(b)(3), which states that “ ...

a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the 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." The Scruggs Defendants cannot show that they have any substantial need of materials or information possessed by the Tollison Law Firm as would relate to the narrow issue of whether the Scruggs Defendants themselves engaged in actions as alleged to attempt to bribe Judge Lackey.

10. The Scruggs Defendants, in subpoenas duces tecum of the Tollison Law Firm, the Plaintiff, and John Griffin Jones, seek, among other things, documents and things provided by the U.S. Dep't of Justice that pertain or relate to the Scruggs Defendants and others including Ed Peters, Joey Langston, and Judge Bobby DeLaughter. If Plaintiff, Jones, or the Tollison Law Firm were in possession of any materials (and, again, Plaintiff does not concede the existence of any such documents), they would not be able to disclose such without the umbrella of a court order. This information is also irrelevant as Peters, Langston, and DeLaughter have not been associated with

any facts relevant to the Scruggs Defendants attempting to bribe Judge Lackey.

11. The Scruggs Defendants seek information and documents that mention or refer to Ed Peters.
12. The Tollison Law Firm, the Plaintiff, and John Griffin Jones are not aware of any allegations that Ed Peters, Joey Langston, or Judge Bobby Delaughter are in any way connected to the criminal acts of the Scruggs Defendants in attempting to bribe Judge Lackey. Unless the Scruggs Defendants have within their realm of knowledge facts currently unknown to the Tollison Firm, the Plaintiff, and Jones, about the cast of characters involved in attempting to bribe Judge Lackey, this information is clearly irrelevant to the hearing on the Motion for Sanctions and evidences an attempt by the Scruggs Defendants to annoy and harass the Plaintiff.
13. Miss. R. Evid. 401 states that “[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence. Miss. R. Evid. 402 states that evidence which is not relevant is not admissible.
14. The Scruggs Defendants are completely aware that seeking documents from a law firm are improper. Indeed, in a case styled E.A. Renfroe & Company, Inc. v. Moran et al., Northern Dist. of Alabama, Case No. 2:06-cv-1752-WMA, the Scruggs Defendants accused the Renfroe plaintiff of serving the subpoenas only to harass and annoy Scruggs and the Scruggs Law Firm. See Exhibit E, pg. 8, para. 1, a motion to quash filed in the Renfroe case in the Northern District of Mississippi and assigned

case no. 3:07MC036-SAA. In that motion, the Scruggs Defendants make many of the same arguments that Plaintiff is making herein.

15. This Court has the power to quash the subpoenas and sanction the Scruggs Defendants and their counsel. M.R.C.P. 45 (d)(1)(a) states that “[o]n timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it ... (ii) requires disclosure of privileged or other protected matter and no exception or waiver applied” M.R.C.P. 45(f) states that “[o]n motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, or tangible things is served and upon a showing that the subpoena power is being exercised in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, the court in which the action is pending shall order that the subpoena be quashed and may enter such further orders as justice may require to curb abuses of the powers granted under this rule. To this end, the court may impose an appropriate sanction.”
16. In conclusion, as the subpoenas seek irrelevant and privileged information and as the Scruggs Defendants and their attorneys are all aware that the information sought is irrelevant and privileged (evidencing an intent only to annoy and harass the Plaintiff), this Court should quash the subpoenas of Tollison Law Firm, Jones, and the Plaintiff and sanction the Scruggs Defendants and their attorneys.

WHEREFORE, PREMISES CONSIDERED, Plaintiff moves this Court to quash the subpoenas of the Tollison Law Firm, John Griffin Jones and the Plaintiff and sanction the Scruggs

Defendants and their counsel for issuing said subpoenas in bad faith and in an effort to annoy and harass the Plaintiff.

RESPECTFULLY SUBMITTED, this the 8th day of April, 2008.

JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, PLLC

By and through its attorneys,
GRADY F. TOLLISON, JR., MSB 8240
WILLIAM K. DUKE, MSB 6210
LeROY D. PERCY, MSB 10454
CAMERON ABEL, MSB 102319
TOLLISON LAW FIRM, P.A.
100 Courthouse Square
Post Office Box 1216
Oxford, Mississippi 38655
662-234-7070 Telephone
662-234-7095 Facsimile



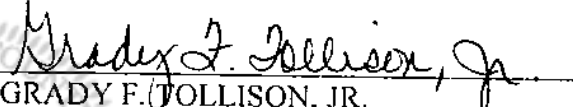
Grady F. Tollison, Jr.
GRADY F. TOLLISON, JR.
MSB #8240

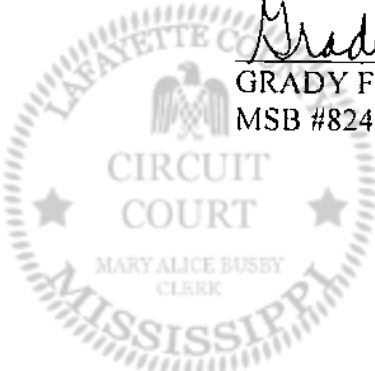
CERTIFICATE OF SERVICE

I, Grady F. Tollison, Jr., hereby certify that I have this date caused to be hand delivered, a true and correct copy of the foregoing document on this the 8th day of April, 2008 to:

J. Cal Mayo Jr.,
MAYO AND MALLETTE, PLLC
428 North Lamar Boulevard
Post Office Box 1456
Oxford, Mississippi 38655

Wilton V. Byars, III
Mr. Larry Moffett
DANIEL COKER HORTON & BELL, P.A.
265 North Lamar Boulevard, Suite R
Post Office Box 1396
Oxford, Mississippi 38655


GRADY F. TOLLISON, JR.
MSB #8240



IN THE CIRCUIT COURT OF LAFAYETTE COUNTY

JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, LLC

PLAINTIFF

v.

CIVIL ACTION NO. L07-135

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DON BARRETT, Individually;
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DEFENDANTS

SUBPOENA FOR PRODUCTION OF DOCUMENTS AND THINGS

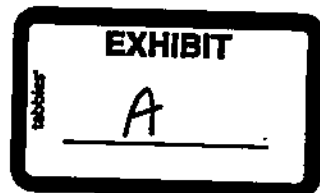
TO: Tollison Law Firm, PA
100 Courthouse Square
Oxford, Mississippi 38655

You are summoned to produce as evidence in this matter pending in the Circuit Court of Lafayette County, Mississippi, the documents and things requested on the attached "Document List". This Subpoena may be satisfied by producing same at the hearing on Tuesday, April 15, 2008 at 9:30.am. at the Lafayette County Chancery Building in Oxford, Mississippi.

FAIL NOT and have you then and there this Writ.

Given under my hand and the official seal of the Court this the 3 day of April, 2008.

_____, Clerk
By: Ashley Roberts, D.C.





PROOF OF SERVICE

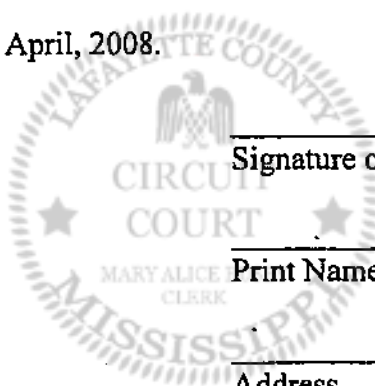
STATE OF MISSISSIPPI
COUNTY OF _____

I hereby certify, under penalty of perjury under the laws of the State of Mississippi, that I have on this date served, via personal delivery, this Subpoena, on the person at the place specified below.

Person Served: _____

Place of Service: _____

This the _____ day of April, 2008.



Signature of Server

Print Name

Address

(_____) _____
Telephone Number

ACKNOWLEDGMENT OF SERVICE

I, _____ for the Tollison Law Firm, hereby acknowledge service of this subpoena upon me.

This the _____ day of April, 2008.

Representative of the Tollison Law Firm

Document List

All notes, memoranda, electronic communications, letters, diary entries or written or recorded memorializations of any discussions, communications or conversations between any attorney at Tollison Law Firm, P.A., on the one hand, and Judge Henry Lackey, on the other hand, that pertain, refer or relate in any manner to that matter styled *Jones, Funderburg, Sessums, Peterson & Lee, PLLC v. Richard Scruggs, et al.*, No. L07-135, pending in Lafayette County Circuit Court, excluding any such responsive documents previously provided to counsel for Defendants.

All documents and things provided to any attorney at Tollison Law Firm, P.A., by any representative of the United States Department of Justice that pertain, refer or relate to any investigation of Tim Balducci, Steve Patterson, Richard Scruggs, Zach Scruggs, Sidney Backstrom, Joey Langston, Ed Peters or Judge Bobby DeLaughter.



IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

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case no. 3:07MC036-SAA. In that motion, the Scruggs Defendants make many of the same arguments that Plaintiff is making herein.

15. This Court has the power to quash the subpoenas and sanction the Scruggs Defendants and their counsel. M.R.C.P. 45 (d)(1)(a) states that “[o]n timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it ... (ii) requires disclosure of privileged or other protected matter and no exception or waiver applied” M.R.C.P. 45(f) states that “[o]n motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, or tangible things is served and upon a showing that the subpoena power is being exercised in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, the court in which the action is pending shall order that the subpoena be quashed and may enter such further orders as justice may require to curb abuses of the powers granted under this rule. To this end, the court may impose an appropriate sanction.”
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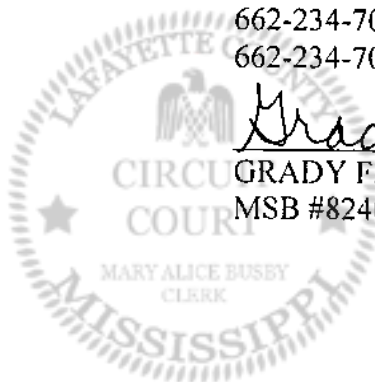
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Defendants and their counsel for issuing said subpoenas in bad faith and in an effort to annoy and harass the Plaintiff.

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JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, PLLC

By and through its attorneys,
GRADY F. TOLLISON, JR., MSB 8240
WILLIAM K. DUKE, MSB 6210
LeROY D. PERCY, MSB 10454
CAMERON ABEL, MSB 102319
TOLLISON LAW FIRM, P.A.
100 Courthouse Square
Post Office Box 1216
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662-234-7070 Telephone
662-234-7095 Facsimile



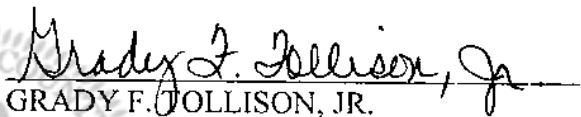
Grady F. Tollison, Jr.
GRADY F. TOLLISON, JR.
MSB #8240


CERTIFICATE OF SERVICE

I, Grady F. Tollison, Jr., hereby certify that I have this date caused to be hand delivered, a true and correct copy of the foregoing document on this the 8th day of April, 2008 to:

J. Cal Mayo Jr.,
MAYO AND MALLETTE, PLLC
428 North Lamar Boulevard
Post Office Box 1456
Oxford, Mississippi 38655

Wilton V. Byars, III
Mr. Larry Moffett
DANIEL COKER HORTON & BELL, P.A.
265 North Lamar Boulevard, Suite R
Post Office Box 1396
Oxford, Mississippi 38655


GRADY F. TOLLISON, JR.
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SUBPOENA FOR PRODUCTION OF DOCUMENTS AND THINGS

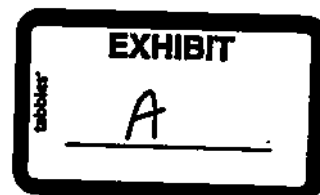
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FAIL NOT and have you then and there this Writ.

Given under my hand and the official seal of the Court this the 3 day of April, 2008.

_____, Clerk
By: Ashley Roberts, D.C.





PROOF OF SERVICE

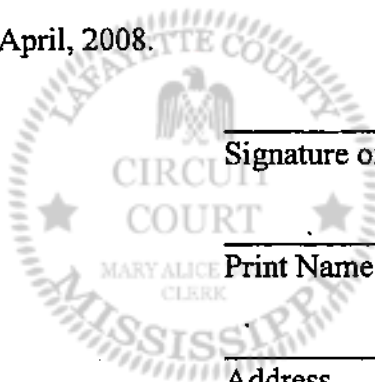
STATE OF MISSISSIPPI
COUNTY OF _____

I hereby certify, under penalty of perjury under the laws of the State of Mississippi, that I have on this date served, via personal delivery, this Subpoena, on the person at the place specified below.

Person Served: _____

Place of Service: _____

This the _____ day of April, 2008.



Signature of Server

Print Name

Address

(_____) _____
Telephone Number

ACKNOWLEDGMENT OF SERVICE

I, _____ for the Tollison Law Firm, hereby acknowledge service of this subpoena upon me.

This the _____ day of April, 2008.

Representative of the Tollison Law Firm



Document List

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All documents and things provided to any attorney at Tollison Law Firm, P.A., by any representative of the United States Department of Justice that pertain, refer or relate to any investigation of Tim Balducci, Steve Patterson, Richard Scruggs, Zach Scruggs, Sidney Backstrom, Joey Langston, Ed Peters or Judge Bobby DeLaughter.



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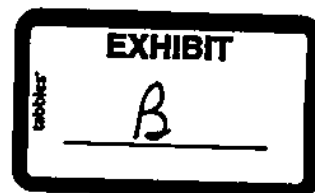
TO: Jones, Funderburg, Sessums, Peterson & Lee, PLLC
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Jackson, Mississippi 39236-3960

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FAIL NOT and have you then and there this Writ.

Given under my hand and the official seal of the Court this the 3 day of April, 2008.

_____, Clerk
By: Ashley Roberts, D.C.



PROOF OF SERVICE

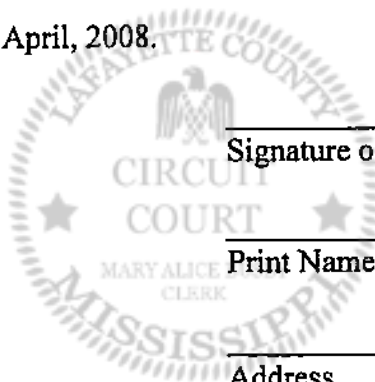
STATE OF MISSISSIPPI
COUNTY OF _____

I hereby certify, under penalty of perjury under the laws of the State of Mississippi, that I have on this date served, via personal delivery, this Subpoena, on the person at the place specified below.

Person Served: _____

Place of Service: _____

This the _____ day of April, 2008.



Signature of Server

Print Name

Address

() _____
Telephone Number

ACKNOWLEDGMENT OF SERVICE

I, _____ for Jones, Funderburg, Sessums, Peterson & Lee, PLLC, hereby acknowledge service of this subpoena upon me.

This the _____ day of April, 2008.

By: _____
Jones, Funderburg, Sessums, Peterson & Lee, PLLC

Document List

All notes, memoranda, electronic communications, letters, diary entries or other written or recorded memorializations of any discussions, communications or conversations between any attorney at Jones, Funderburg, Sessums, Peterson & Lee, PLLC, on the one hand, and any other person, on the other hand, that pertain, refer or relate in any manner to that matter styled *Jones, Funderburg, Sessums, Peterson & Lee, PLLC v. Richard Scruggs, et al.*, No. L07-135, pending in Lafayette County Circuit Court, excluding any such discussions, communications or conversations with your legal counsel.

All notes, memoranda, electronic communications, letters, diary entries or other written or recorded memorializations of any discussions, communications or conversations between any attorney at Jones, Funderburg, Sessums, Peterson & Lee, PLLC, on the one hand, and any other person, on the other hand, that mention or refer to Ed Peters (an attorney practicing in the Jackson, Mississippi area), excluding any such discussions, communications or conversations with your legal counsel.

All documents and things provided to any attorney at Jones, Funderburg, Sessums, Peterson & Lee, PLLC, by any representative of the United States Department of Justice that pertain, refer or relate to any investigation of Tim Balducci, Steve Patterson, Richard Scruggs, Zach Scruggs, Sidney Backstrom, Joey Langston, Ed Peters or Judge Bobby DeLaughter.



IN THE CIRCUIT COURT OF LAFAYETTE COUNTY

JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, LLC

PLAINTIFF

v.

CIVIL ACTION NO. L07-135

RICHARD SCRUGGS, Individually;
DON BARRETT, Individually;
SCRUGGS LAW FIRM, P.A.;
BARRETT LAW OFFICE, P.A.;
NUTT & McALISTER, PLLC; and
LOVELACE LAW FIRM, P.A.

DEFENDANTS

HEARING SUBPOENA

TO: John G. Jones
Jones, Funderburg, Sessums, Peterson & Lee, PLLC
901 North State Street
Jackson, Mississippi 39236-3960

Pursuant to and in accordance with Rule 45, Mississippi Rules of Civil Procedure, you are hereby commanded to appear before the Court listed below at the time, date, and place stated, to give evidence on behalf of the party identified below, and to attend Court from day to day thereafter until you are discharged by the Court.

Court: Circuit Court of Lafayette County, Mississippi

Time: 9:30 a.m. Date: Tuesday, April 15, 2008

At: Lafayette County Chancery Building in Oxford, Mississippi

Case: Jones, Funderburg, Sessums, Peterson & Lee, LLC v. Richard Scruggs, Individually; Don Barrett, Individually; Scruggs Law Firm, P.A.; Barrett Law Office, P.A.; Nutt & Mcalister, PLLC; and Lovelace Law Firm, P.A.

On Behalf of: Defendants Richard Scruggs and Scruggs Law Firm, P.A.

If this box is checked, you are also commanded to bring with you to Court the following documents or things (or the documents or things listed on the attached page[s]).

You are further commanded to bring this Subpoena with you to Court and to deliver it to the clerk at the time, date, and place stated above.

Given under my hand and the official seal of the Court this the 3 day of April, 2008.



_____, Clerk
By: Ashley Roberts, D.C.

PROOF OF SERVICE

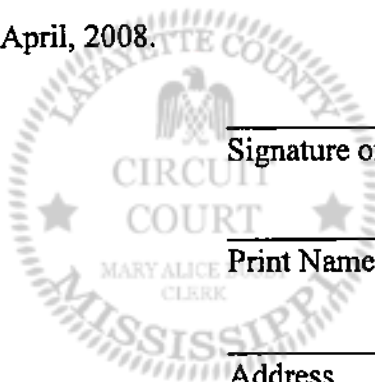
STATE OF MISSISSIPPI
COUNTY OF _____

I hereby certify, under penalty of perjury under the laws of the State of Mississippi, that I have on this date served, via personal delivery, this Subpoena, together with the fee for one day's attendance plus mileage allowed by law, on the person at the place specified below.

Person Served: _____

Place of Service: _____

This the _____ day of April, 2008.



Signature of Server

Print Name

Address

() _____
Telephone Number

ACKNOWLEDGMENT OF SERVICE

I, John G. Jones, hereby acknowledge service of this subpoena upon me, together with the fee for one day's attendance plus mileage allowed by law.

This the _____ day of April, 2008.

John G. Jones

Document List

All notes, memoranda, electronic communications, letters, diary entries or other written or recorded memorializations of any discussions, communications or conversations between you, on the one hand, and any other person, on the other hand, that pertain, refer or relate in any manner to that matter styled *Jones, Funderburg, Sessums, Peterson & Lee, PLLC v. Richard Scruggs, et al.*, No. L07-135, pending in Lafayette County Circuit Court, excluding any such discussions, communications or conversations with your legal counsel.

All notes, memoranda, electronic communications, letters, diary entries or other written or recorded memorializations of any discussions, communications or conversations between you, on the one hand, and any other person, on the other hand, that mention or refer to Ed Peters (an attorney practicing in the Jackson, Mississippi area), excluding any such discussions, communications or conversations with your legal counsel.

All documents and things provided to you by any representative of the United States Department of Justice that pertain, refer or relate to any investigation of Tim Balducci, Steve Patterson, Richard Scruggs, Zach Scruggs, Sidney Backstrom, Joey Langston, Ed Peters or Judge Bobby DeLaughter.



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IN THE CIRCUIT COURT OF THE THIRD JUDICIAL
DISTRICT OF LAFAYETTE COUNTY, MISSISSIPPI

JONES, FUNDERBURG, SESSUMS, PETERSON AND LEE, LLC PLAINTIFF

VS no. L-07-135

RICHARD SCRUGGS, DON BARRETT LAW FIRM,
BARRETT LAW OFFICE, NUTT AND
MCALISTER AND LOVELACE LAW FIRM DEFENDANTS

TRANSCRIPT OF THE HEARING HAD AND DONE IN THE CASE OF THE
ABOVE STYLED AND NUMBERED CAUSE, BEFORE THE HONORABLE
WILLIAM COLEMAN, CIRCUIT JUDGE, ON THE 26TH DAY OF FEBRUARY,
2008

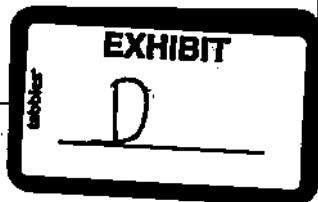
APPEARANCES:

Present and representing the Plaintiffs:
Honorable Grady Tollison, Bill Duke, Leroy Percy
Tollison Law firm
P.O. Box 1216
Oxford, MS

Present and Representing the Defendant SCRUGGS LAW FIRM:
Honorable Cal Mayo, Pope Mallette
Mayo and Mallette Law firm
Oxford, Ms

Present and Representing the Defendant Barrett Law firm:
Honorable Larry Moffett
Daniel Coker Horton and Bell
Oxford, Ms

Also present Honorable Ken Rutherford
Court Reporter Margaret Fair, CSR 1016



1 results requested by motion to enforce arbitration. If a
2 bribe resulted in a favorable result the offender wins. If
3 the Court is not in a position to strike request for
4 arbitration as a sanction, the offender again wins.

5 The plaintiff charged that sanction should be applied
6 to all defendants including defendant Barrett et al. They
7 contend that they are not responsible for the alleged
8 actions of other defendants and distinguish the Epps case
9 cited by the plaintiff but cite no authority that I see is
10 controlling.

11 The Court is of the opinion that the action for one is
12 the action for all as alleged in this matter.

13 An evidentiary hearing on plaintiffs' requested
14 sanction of striking the pleadings and entering a default
15 judgment and other rights will be held to determine the
16 truth or falseness of the plaintiffs' allegation and its
17 determination of actions to be taken.

18 Either side request any further clarification of my
19 ruling at this point.

20 BY MR. TOLLISON: Not on behalf of the
21 plaintiff, Your Honor, but if I may review
22 the request and be allowed to do some
23 discovery.

24 BY THE COURT: I will take that up.
25 Any further request for explanation.

26 BY MR. MAYO: No sir.

27 BY THE COURT: Now on the motion for
28 discovery. I think that would be
29 appropriate. Does the defense have any

FILED BY ASHLEY ROBERTS
FILED 11/28/07 3:07 PM Page 1
CASE NB CV2007-000135 - NA
CIRCUIT CIVIL COURT - CID = 36
CLERK MARY ALICE BUSBY
NOV 28 2007
DAVID BREWS, CLERK
Deputy

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI - WESTERN DIVISION

E.A. RENFROE & COMPANY, INC.,
Plaintiff,
v.
CORI RIGSBY MORAN, et al.,
Defendants.

Northern District of Mississippi - Western
Division Case No. 3:07MC036-SAA

Northern District of Alabama - Southern
Division Case No. 2:06-cv-1752-WMA

HEARING REQUESTED

**MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO QUASH AND STAY SUBPOENA IN A CIVIL CASE**

Petitioners Richard F. Scruggs, D. Zachary Scruggs, and Timothy Cantrell, all of the Scruggs Law Firm, move to quash deposition subpoenas served on them by E.A. Renfroe & Company. Renfroe brought the above-captioned case against sisters Cori and Kerri Rigsby after they publicly exposed Renfroe's fraudulent and unlawful conduct following Hurricane Katrina. All along, Renfroe has attempted to draft the Scruggs Law Firm into *Renfroe v. Moran* even though the firm is neither a party to the case nor acting as counsel in the case. Indeed, Renfroe instituted criminal contempt proceedings against Scruggs and the Scruggs Law Firm for an alleged violation of a preliminary injunction in the case. And Judge William M. Acker, Jr., who presides over *Renfroe v. Moran*, has appointed private attorneys to prosecute the criminal contempt case against Scruggs and the Scruggs Law Firm.

Petitioners now pray upon this Court for relief from Renfroe's latest abusive and harassing attempt to involve the Scruggs Law Firm. Petitioners move to quash Renfroe's subpoenas on four grounds. *First*, Renfroe's subpoenas seek discovery of information that is privileged and protected. The Scruggs Law Firm has represented the Rigsbys in matters directly related to Renfroe's lawsuit since February 2006. The Scruggs Law Firm also represents the Rigsbys in a *qui tam* action against Renfroe and State Farm Fire & Casualty Company pending in the United States District Court for the Southern District of Mississippi. Furthermore, the



Rigsbys provide consulting services to Scruggs and the Scruggs Law Firm in connection with other Katrina-related cases. Any relevant information Petitioners may have is privileged.

Second, Renfroe cannot meet the heightened burden necessary to depose opposing counsel. In addition to the *qui tam* case, the Scruggs Law Firm represents approximately thirty Gulf Coast homeowners in cases against Renfroe for its role in the fraudulent and unlawful scheme that the Rigsbys uncovered. Renfroe 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. The tactics Renfroe now employs have been regularly criticized for disrupting the adversarial system and lowering the standards of the legal profession.

Third, Renfroe's subpoenas will subject Petitioners to an 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 Petitioners' legal and professional relationships with the Rigsbys, as well as their conduct following the issuance of a preliminary injunction in *Renfroe v. Moran*. These are exactly the same matters on which Renfroe now seeks to examine Petitioners. To permit these depositions to go forward would jeopardize Scruggs and the Scruggs Law Firm's rights and defenses in the criminal contempt case.

Fourth, the Court should quash the subpoenas to stop Renfroe's harassment of Scruggs and Scruggs Law Firm employees. This is now the *fourth* set of subpoenas that Renfroe has issued to Scruggs Law Firm attorneys and employees in the last two months. Scruggs has raised objections (including the objections raised herein) to each round of Renfroe subpoenas, yet Renfroe has never responded to, much less addressed, a single one of these objections.

In the event that the Court does not quash Renfroe's subpoenas, Petitioners respectfully request that the Court stay their enforcement pending the resolution of the criminal contempt case. The criminal contempt case alleges that Scruggs and the Scruggs Law Firm failed to comply with the preliminary injunction issued in *Renfroe v. Moran*. Because the issues in the criminal contempt case overlap almost entirely with the topics about which Renfroe seeks to depose Petitioners, 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.

I. BACKGROUND FACTS

A. The Rigsbys' exposure of Renfroe's and State Farm's fraud.

Hurricane Katrina devastated the Gulf Coast beginning on August 29, 2005. Since then, despite having paid millions of dollars in premiums, countless Gulf Coast residents have been denied insurance coverage on the ground that the damage to their homes was caused by water (a claim not covered by most policies) rather than wind (a covered claim).

E.A. Renfroe & Company provides claims adjusters, primarily to State Farm Fire & Casualty Company, following catastrophes. Sisters Cori and Kerri Rigsby worked as adjusters for Renfroe assigned to work exclusively adjusting State Farm Katrina insurance claims in coastal Mississippi. While doing that, the Rigsbys came across documents evidencing fraudulent and potentially criminal claims-handling activities by State Farm. Ex. A at 19:8-13. In February 2006, the Rigsbys approached attorney Richard F. Scruggs with their concerns about Renfroe's and State Farm's practices and provided him with various claims documents, including a copy of an engineer's report concluding that the damage to a policyholder's home had been caused by wind. Attached to the report was a "sticky note" that read: "DO NOT Pay Bill-DO NOT discuss." *Id.* at 34:20-35:1; 128:15-21; 140:8-19. In April 2006, the Rigsbys provided Scruggs with additional documents evidencing the fraud they had discovered while working for Renfroe. *Id.* at 37:21-38:7.

In June 2006, the Rigsbys of their own resolve downloaded and printed thousands of State Farm documents demonstrating fraudulent conduct. *Id.* at 43:7-11; 105:18-106:13; 111:12-14. The Rigsbys provided one set of the documents to the U.S. Attorney and one set to the Mississippi Attorney General. *Id.* at 109:1-12. Later that summer, a third set of the documents were delivered to their attorney, Scruggs. *Id.* at 109:19-110:9.

Shortly after the Rigsbys provided the documents demonstrating Renfroe's and State Farm's fraudulent conduct to law enforcement authorities, they informed Renfroe of what they had done. Following their departures from Renfroe, the Rigsbys were retained as consultants by the Scruggs Katrina Group ("SKG"), a joint venture formed by a group of Mississippi attorneys, including the Scruggs Law Firm, to represent residents who were denied insurance coverage for

the damage they sustained to their homes during Hurricane Katrina. The Rigsbys assist SKG with its cases against State Farm and other insurance companies. *Id.* at 49:18-20, 73:17-24. The Rigsbys continue to work as consultants on SKG's cases today. *Id.* at 143:1-144:3.

B. The Scruggs Law Firm's civil litigation cases that are pending against Renfroe.

The Scruggs Law Firm represents plaintiffs suing Renfroe in multiple active cases that arise from Renfroe's participation in the fraudulent denial of Katrina damage claims. In April 2006, the Rigsbys, through the Scruggs Law Firm and Missouri counsel, filed a *qui tam* action which is currently pending in the United States District Court for the Southern District of Mississippi.¹ State Farm and Renfroe are named as defendants in that case. As relators on behalf of the United States, the Rigsbys allege that defendants Renfroe and State Farm presented to the United States government false claims for payment under the National Flood Insurance Program. Ex. B.

In coordination with SKG, the Scruggs Law Firm also represents twenty-one Gulf Coast homeowners in a multi-million dollar Racketeer Influenced and Corrupt Organizations Act civil case against Renfroe and State Farm 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.² The Scruggs Law Firm and SKG are also counsel to State Farm policyholders who have brought fraud and tort claims against Renfroe for participating in a fraudulent scheme to deny plaintiffs' Katrina damage claims.³

C. Renfroe's lawsuit against the Rigsbys.

The case that gives rise to the subpoenas at issue was filed in September 2006 when 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.

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

² 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.

³ See, e.g., *Willis v. State Farm Fire & Cas. Co., et al.*, S.D. Miss. Case No. 1:07-cv-01109-LTS-RHW; *McIntosh v. State Farm Fire & Cas. Co.*, S.D. Miss. Case No. 1:06-cv-1080-LTS-RHW.

Renfroe alleged that the Rigsbys' procurement of State Farm's documents breached their employment contracts and violated Alabama's Trade Secrets Act. Ex. C. Renfroe sought damages and an injunction requiring the return of any 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.

D. The preliminary injunction.

On December 8, 2006, Judge Acker issued the preliminary injunction requested by Renfroe. Ex. D. 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 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

E. The contempt proceedings.

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, Scruggs, and the Scruggs Law Firm in contempt for their failure to turn over documents covered by the preliminary injunction. Ex. E at 3. In response, 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

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. F. 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.

State Farm documents to the Mississippi Attorney General was covered by the preliminary injunction's law-enforcement exception. Ex. G.

On March 19, 2007, Judge Acker conducted a hearing on Renfroe's motion for contempt. Ex. A. Renfroe examined Cori Rigsby and Scruggs under oath with respect to their legal and consulting relationships following Hurricane Katrina as well as the Rigsbys' distribution of Renfroe and State Farm documents in 2006. Counsel for Renfroe stipulated that it would not argue that the testimony given by Cori Rigsby or Scruggs during the hearing amounted to a waiver of the attorney-client privilege. *Id.* at 32:23-33:24; 137:3-138:7.

On June 15, 2007, Judge Acker referred Scruggs and the Scruggs Law Firm to the U.S. Attorney for prosecution for criminal contempt. Ex. H 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 Scruggs. Ex. I. Judge Acker then appointed three private attorneys to prosecute Scruggs and his law firm. Ex. J. He directed the private attorneys to prepare a charging document "for his signature, as the charging party." Ex. K. 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. L.

The Allegations of Criminal Contempt ("Allegations") that Judge Acker's private attorneys filed allege that Scruggs's December 12, 2006 disclosure of State Farm documents to Attorney General Hood was a willful violation of Judge Acker's preliminary injunction. Ex. L at 3-4. After the Allegations were filed, Judge Acker recused himself from the criminal contempt case. Ex. K. The other judges and magistrate judges of the Northern District of Alabama have also recused themselves from the case. Ex. M. At present, the criminal contempt case has been referred to the chief judge of the United States Court of Appeals for the Eleventh Circuit so that it may be reassigned to a district judge from outside the Northern District of Alabama. *Id.*

F. Renfroe's subpoenas to Scruggs and Scruggs Law Firm employees.

Although Renfroe has already had the opportunity to examine both Scruggs and the Rigsbys, under oath, on multiple occasions, about their relationship and their handling of

Renfroe's documents, Renfroe now seeks yet another opportunity to question Petitioners about the same matters. In the last two months, Renfroe had already served four sets of subpoenas for documents and testimony on Scruggs, Zachary Scruggs, and various employees of the Scruggs Law Firm. Exs. N, O, P, and S.⁵ All of the Scruggs Law Firm witnesses objected to the first three rounds of subpoenas in writing. Exs. Q and R. Renfroe's counsel never responded to any of those objections. Instead, Renfroe served a *fourth* round of subpoenas on Petitioners on November 15, 2007. Ex. S. This fourth set of subpoenas does not contain any identification of, or express limitation on, the matters about which Renfroe seeks Petitioners' testimony.

Although Renfroe's fourth round of subpoenas are issued out of this Court and seek depositions of nonparties which are to proceed in this district, Renfroe inexplicably moved to compel Petitioners' testimony in the Northern District of Alabama. Ex. T. Renfroe, however, withdrew that motion and has now moved this Court to compel Petitioners' depositions.⁶ Ex. U. Renfroe asserts in its motion to compel that it seeks to depose Petitioners about *all* of the claims at issue in *Renfroe v. Moran*, the substance of the work that the Rigsbys have performed as consultants for SKG, and the Rigsbys' compliance with Judge Acker's preliminary injunction. *Id.* at 2-3. In short, Renfroe aims to depose Petitioners on matters that are directly relevant to its defense in the Katrina cases brought against it by the Scruggs Law Firm and SKG and directly relevant to the pending criminal case against Scruggs.⁷

⁵ In the same time period, Renfroe also served subpoenas on Scruggs Law Firm attorney Sidney Backstrom and *qui tam* co-counsel from Missouri Edward D. Robertson, Jr., Anthony L. Dewitt, Mary Doerhoff Winter, and Todd P. Graves. All of the attorneys objected in writing to those document requests and depositions.

⁶ The motion to compel has not been assigned a case number. Petitioners' counsel became aware of Renfroe's motion to compel when they received a copy of it by fax from Renfroe's counsel. Ex. U. Renfroe's motion to compel appears to be improper under Uniform Local Rule 83.1. As far as the undersigned is aware, Renfroe's counsel are not admitted to practice before this Court. They are not members of the Mississippi bar; they have not submitted an application for admission by comity; and a member of the bar of this Court has not signed the motion to compel. As such, the motion to compel should be stricken and that miscellaneous proceeding should be dismissed. If the Court does not strike Renfroe's motion to compel, then Petitioners request that this memorandum also serve as their opposition to the motion to compel.

⁷ Prior to filing this motion, counsel for Scruggs met and conferred with counsel for Renfroe on November 20, 2007. Although counsel was unable to resolve the dispute over the subpoenas, counsel for Renfroe agreed that the requested depositions would not proceed while a motion to compel and/or motion to quash those subpoenas was pending. Ex. U at 4.

II. ARGUMENT

Petitioners Scruggs, Zachary Scruggs, and Cantrell respectfully request that the Court quash Renfroe's subpoenas on four independent grounds. *First*, the matters on which Renfroe seeks to depose Petitioners are protected by the attorney-client privilege, the work-product doctrine, a joint-prosecution privilege with the United States government, and a common-interest privilege. Each of these privileges or protections is sufficient to quash Renfroe's subpoenas. *Second*, virtually all courts, including the United States Court of Appeals for the Fifth Circuit, disfavor depositions of opposing counsel. The Fifth Circuit has adopted a three-part test for determining when a deposition of opposing counsel is so crucial that it is to be permitted. Renfroe, however, is unable to meet that test because it has not and cannot establish that (i) no other means exist to obtain the information other than to depose Petitioners; (ii) the information sought by Renfroe is relevant and nonprivileged; and (iii) the information sought is *crucial* to the preparation of Renfroe's case in *Rigsby v. Moran*. *Third*, the subpoenas should be quashed because requiring Petitioners to comply with them is unreasonable and unduly burdensome in light of the extraordinary criminal contempt case currently pending against Scruggs and the Scruggs Law Firm. *Fourth*, the subpoenas, like the three other sets of similarly improper subpoenas Renfroe served and then abandoned, were served to harass and annoy Scruggs and the Scruggs Law Firm.

If the Court denies the motion to quash, Petitioners alternatively move to stay the enforcement of the subpoenas for their testimony until the criminal contempt case against Scruggs and the Scruggs Law Firm is concluded. The matters for which Renfroe seeks Petitioners' testimony are exactly the issues in the criminal contempt case. To require Petitioners' deposition testimony would thus threaten their Fifth Amendment privilege against self-incrimination and could substantially prejudice the defense of the criminal contempt case. Moreover, a stay would not substantially prejudice the parties in *Renfroe v. Moran* given the multiples sources available to Renfroe for obtaining the information that it seeks from Petitioners.

A. Renfroe's subpoenas should be quashed because they seek discovery of information that is privileged and protected, Renfroe cannot meet the *Shelton* test, and the subpoenas subject petitioners to unreasonable and undue burden.

Petitioners move to quash Renfroe's subpoenas pursuant to Federal Rule of Civil Procedure 45, which provides that on timely motion, the court which issues the subpoenas shall quash or modify any 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).

1. Renfroe is not entitled to discover information that is protected by attorney-client privilege, the work-product doctrine, a joint-prosecution privilege, and a common-interest privilege.

a. Attorney-client privilege.

Renfroe seeks the discovery of information that reflects communications between the Rigsbys and the Scruggs Law Firm, which has represented the Rigsbys since February 2006 and currently represents the Rigsbys in the *qui tam* case that is currently pending against Renfroe and State Farm. *See* Ex. U at 2-5. 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 Scruggs, Zachary Scruggs, and the Scruggs Law Firm for which Renfroe seeks discovery were of a confidential nature and made for the purpose of seeking or giving legal advice. When the Rigsbys initially approached the Scruggs Law Firm in February 2006, they did so with concerns and questions regarding their own legal rights given their employment with Renfroe. 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).

The Rigsbys also approached Scruggs for representation in the *qui tam* case, which was filed in April 2006. In that litigation, the Rigsbys are *qui tam* relators and represent the United States government against Renfroe and State Farm. Both the Rigsbys' and Renfroe's conduct

following Hurricane Katrina are at issue in the *qui tam* case. Any communications that the Rigsbys had with the Scruggs Law Firm and its attorneys relating to Renfroe, State Farm, and Hurricane Katrina litigation are protected by the attorney-client privilege. Although Renfroe recognizes that the Rigsbys are clients of the Scruggs Law Firm, Renfroe has not offered any reason why the Rigsbys' communications with the Scruggs Law Firm would not be privileged. *See Ex. U* at 4-5. Accordingly, Renfroe's subpoenas should be quashed on attorney-client privilege grounds.⁸

b. Work-product doctrine.

Renfroe'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 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 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)*.

The only interactions that Petitioners have had with the Rigsbys that are arguably relevant to *Renfroe v. Moran* concern the *qui tam* case and other Hurricane Katrina cases for which SKG and the Scruggs Law Firm have anticipated bringing or actually litigated. Therefore,

⁸ Renfroe's counsel stipulated in a 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. A* at 32:23-33:24; 137:3-138:7.

the deposition testimony Renfroe seeks from Petitioners will necessarily implicate the legal theories, opinions, and mental impressions that were developed by Scruggs and SKG attorneys in anticipation and furtherance of litigation against Renfroe, State Farm, and other insurance companies that have fraudulently denied Katrina damage claims of Gulf Coast residents. The work-product doctrine protects Petitioners from having to disclose this information to Renfroe.

Additionally, to the extent that Renfroe seeks discovery of Scruggs attorneys' interactions with the Rigsbys that occurred within the scope of the Rigsbys' employment as consultants for 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 as consultants; the opinions that they provided as consultants; the mental impressions that they arrived at in the scope of their employment as consultants; and the conclusions that they reached as consultants are *all* protected by the work-product doctrine.

Nor has Renfroe made the showing of *compelling* need that would entitle it to access the mental impressions, conclusions and legal theories of Petitioners or their consultants. There is no reason to believe that Renfroe cannot obtain that information, it seeks here from other sources, without undue hardship. And Renfroe has never bothered to explain why it needs the testimony of Petitioners. The mere possibility that an attorney' deposition might yield admissible evidence (a possibility Renfroe has not even demonstrated) cannot overcome the strong presumption against inquiries into attorney work product.

c. Joint-prosecution privilege.

Petitioners' communications with the United States government regarding Renfroe's and State Farm's fraudulent conduct after Hurricane Katrina are protected from Renfroe's discovery by a joint-prosecution privilege, which the Rigsbys, as relators, and the Scruggs Law Firm 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"). Renfroe's first and second subpoenas to the Scruggs Law Firm attorneys contain document requests and written deposition questions that demonstrate Renfroe's interest in the Scruggs attorneys' *qui-tam*-related communications with the United States government. Exs. N, O, and P. Any such 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 Scruggs with the United States government. The Scruggs attorneys, the Rigsbys, and the United States government have not waived the joint-prosecution privilege.

d. Common-interest privilege.

To the extent that Renfroe seeks discovery of Petitioners' communications with the United States government, Mississippi Attorney General Jim Hood, Rigsbys' counsel in *Renfroe v. Moran*, or 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 Scruggs attorneys share a common legal interest with private parties, governmental entities, and attorneys that are litigating Renfroe’s and State Farm’s fraudulent conduct relating to Hurricane Katrina damage claims. The common-interest privilege protects Petitioners from having to disclose any communications that were made between attorneys, governmental entities, and private parties who are litigating against or anticipate litigating against Renfroe and State Farm for their fraudulent conduct with respect to Hurricane Katrina damage claims.⁹

2. Renfroe is not entitled to depose its opposing counsel in related cases.

Renfroe is well-aware that the Scruggs Law Firm represents several Gulf Coast residents who are suing Renfroe and that the firm also represents the Rigsbys in the *qui tam* case, which, like *Renfroe v. Moran*, also concerns the Rigsbys’ disclosure of Renfroe’s and State Farm’s fraudulent conduct in the wake of Hurricane Katrina. Renfroe is also well-aware that it could not depose its opposing counsel in any of those cases. In an attempt to do an end-run around that prohibition, Renfroe now seeks to elicit testimony that it could not get from its opposing counsel in the Hurricane Katrina cases by seeking to depose Petitioners in the *Renfroe v. Moran* case. This is precisely the type of games-playing tactics that numerous courts have “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*

⁹ Although Renfroe cannot make the requisite showings to warrant enforcing the subpoenas, Petitioners respectfully request that, if the Court does find that Renfroe has demonstrated that it is entitled to certain information from them and declines to stay the depositions, 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 limit the topics on which Renfroe may depose Petitioners, limit the format by which Renfroe may seek to depose Petitioners to written questions, and require that any questions first be submitted to the Court for its review. The underlying litigation at issue in this case is complex and the issues raised by these subpoenas are highly sensitive. It is especially important that the Court and all parties involved proceed with caution.

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.”).

It would be unreasonable and fundamentally unfair to permit Renfroe to depose its opposing counsel in the *qui tam* case and other Katrina cases on matters that are at issue in those cases, and for which Renfroe has no compelling necessity. See *Nat’l Union Fire Ins. Co. v. Blasio*, 2007 U.S. Dist. LEXIS 61142 at *6 (N.D. Miss. Aug. 20, 2007) (Alexander, M.J.) (party is not automatically entitled to depose an attorney even when the information sought is not privileged or protected). 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 most unusual circumstances.” *Id.* (citing *Buford*, 133 F.R.D. at 491).

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).

Renfroe cannot meet the rigorous *Shelton* test. Renfroe has not made any showing that no other means exist to obtain the information that it seeks to obtain from Petitioners. In fact, Renfroe has twice deposed both Rigsbys and has already questioned Scruggs on the topics it seeks to question him on again. Similarly, Renfroe has not made any showing that the information that it seeks to obtain from Petitioners is relevant and non-privileged. As explained above, any arguably-relevant information that Petitioners might have is privileged or otherwise protected from discovery under multiple doctrines. Finally, Renfroe has not *made* a showing that

the information it seeks from Petitioners is *crucial* to the preparation of its case in *Renfroe v. Moran*. Accordingly, Renfroe's subpoenas to Petitioners should be quashed because Renfroe has not, and cannot, meet all three prongs of the *Shelton* test.

3. Renfroe's subpoenas subject Petitioners to unreasonable and undue burden.

The Court must also quash Renfroe's subpoenas because they will subject Petitioners to unreasonable and undue burden. 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)). In balancing a subpoena's benefits and burdens, the court must "'consider whether the information is necessary and unavailable from any other source.'" *Id.*

There are four reasons why Renfroe's subpoenas should be quashed for imposing unreasonable and undue burden on Petitioners. *First*, an extraordinary criminal contempt case is pending against Scruggs and the Scruggs Law Firm, and Renfroe proposes to depose Petitioners on matters directly related to the criminal contempt case. Scruggs and his law firm's legal and professional relationships with the Rigsbys are at the heart of the criminal case. Petitioners 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 in the criminal contempt case. The Court should quash Renfroe's subpoenas to prevent Petitioners from having to bear this unreasonable burden.

Second, Renfroe's subpoenas subject Petitioners to unreasonable and undue burden by seeking to elicit testimony from attorneys and employees of the Scruggs Law Firm, which serves as Renfroe's opposing counsel in many substantially-related cases.

Third, the information that Renfroe seeks from Petitioners can be obtained from other sources. Renfroe has discovery tools such as interrogatories and document requests that are

available to it in *Renfroe v. Moran*, the *qui tam* case, and the other Katrina cases. It can use those discovery tools to uncover the factual information that it might seek to elicit from Petitioners. It does not need Petitioners' testimony to develop that factual information, nor is there any reason to believe that Petitioners have any more information to offer Renfroe than do the Rigsbys. Moreover, Renfroe has already had an opportunity to examine Scruggs in *Renfroe v. Moran*. 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. Renfroe has not demonstrated any compelling need to reexamine Scruggs, nor is any reason apparent.

Fourth, Petitioners are neither parties in *Renfroe v. Moran*, nor have they made an appearance there as counsel for a party. That they are third parties to that dispute is a factor that weighs against burdening them with depositions for which Renfroe has no necessity. *See Katz v. Batavia Marine & Sporting Supplies, 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).

In sum, Renfroe simply cannot demonstrate the necessity of Petitioners' testimony. On the other hand, the burdens to Petitioners of testifying, including the risks posed to their defense of the pending criminal contempt case, are substantial. The subpoenas should therefore be quashed.

4. Renfroe's Harassment of Scruggs and His Firm Must Be Stopped.

The Court should quash the subpoenas to Petitioners to stop Renfroe's harassment of Scruggs, Scruggs Law Firm employees, and other opposing counsel representing plaintiffs suing Renfroe. *See Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 814 (9th Cir. 2003) (affirming lower court's decision to quash subpoena "served for the purpose of annoying and harassment . . ."); *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55, 66 (1st Cir. 2003) (a factor in quashing a subpoena is whether the "subpoena was issued primarily for purposes of harassment . . ."); Fed. R. Civ. P. 45(c)(3). This is the *fourth* set of subpoenas in this case that Renfroe has issued to Scruggs Law Firm attorneys and employees in the last two months. Petitioners have now expended considerable resources responding to these subpoenas as well as

Renfroe's improperly-filed motion to compel in the Northern District of Alabama. It is time to bring Renfroe's annoyances and harassment of Scruggs and his firm's attorneys and employees to a stop.

B. Petitioners' Depositions Should be Stayed While the Criminal Contempt Case is Pending.

As an alternative, Petitioners request that the Court give priority to the criminal contempt case against them and stay the enforcement of Renfroe's subpoenas pending the resolution of the criminal matter. Scruggs and the Scruggs Law Firm are now defendants in a criminal contempt case that is currently pending in the Northern District of Alabama.¹⁰ The criminal contempt case goes directly to Scruggs and the Scruggs Law Firm's legal and professional relationships with the Rigsbys as well as their compliance with Judge Acker's preliminary injunction. These are the same matters about which Renfroe now seeks Petitioners' testimony. To require Petitioners to testify about these matters would impose substantial and undue burden on them.

This Court has the power to stay Petitioner's 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 in a 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

¹⁰ Although the criminal contempt case is now pending against Scruggs and Scruggs Law Firm, the preliminary injunction purports to apply to all three Petitioners 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.

(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 Adelpia Communications Secs. Litig.*, No. 02-1781, 2003 WL 22358819, at *4 (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).

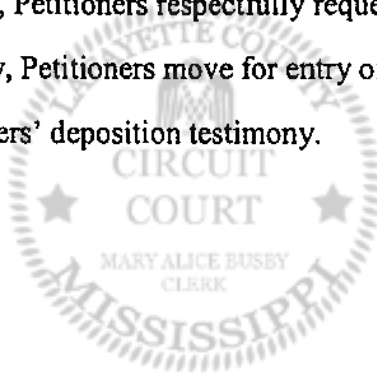
A stay of Petitioners' depositions is necessary here to avoid substantial and irreparable prejudice. The Allegations of Criminal Contempt have already been filed against Scruggs and the Scruggs Law Firm. The contempt charge contained in those Allegations arises from the same set of operative facts for which Renfroe now seeks Petitioners' testimony: Scruggs's disclosure of the State Farm documents to the Mississippi Attorney General and their (the Rigsbys, Scruggs, and his law firm's) compliance with Judge Acker's December 8, 2006 Preliminary Injunction. The irreparable prejudice to Petitioners, especially Scruggs, is self evident: There is a high risk that Petitioners' 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 Petitioners are agents and employees of the Scruggs Law Firm, and given that Judge Acker's preliminary injunction purports to apply equally to all three Petitioners, there is a substantial danger of self-incrimination to all three Petitioners, which weighs heavily in favor of granting their request for a stay. *See id.*

Moreover, a stay would not significantly affect the progress of discovery in *Renfroe v. Moran*, nor would it prejudice the parties in that case. Discovery has been open and ongoing since March 2007. Renfroe has already had the opportunity to examine Scruggs with respect to his legal and working relationship with the Rigsbys. Renfroe has also examined the Rigsby

sisters about the very same matters on multiple occasions and through multiple methods (e.g., depositions, interrogatories, in-court testimony, etc.). Further, the Rigsbys have submitted to depositions in other cases about the very same matters. There simply is no need to question Petitioners on matters for which there has already been ample factual development. Despite adequate opportunity, Renfroe has never identified any specific need that it has to depose Scruggs again, nor has Renfroe identified any reason why the information that it seeks from Petitioners cannot be obtained from other sources. Simply put, any minor incremental benefit that Renfroe might garner from Petitioners' depositions is insubstantial compared to Petitioners' weighty constitutional interests in defending themselves against the pending charges of criminal contempt. Petitioners' request for a stay should be granted.

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court quash Renfroe's subpoenas to them. Alternatively, Petitioners move for entry of an order staying enforcement of Renfroe's subpoenas for Petitioners' deposition testimony.



Finally, Petitioners respectfully request a hearing on their Motion.

Dated: November 28, 2007

Sid Backstrom

Sidney A. Backstrom (MSB# 98890) *with PERMISSION*
SCRUGGS LAW FIRM, P.A. *By CHRISTOPHER*
P.O. Box 1136 *ROBERTSON*
Oxford, MS 38655
Tel: (662) 281-1212
Fax: (662) 281-1312
Email: sbackstrom@scruggsfirm.com

John Kecker

John W. Kecker (*Pro Hac Vice*) *with PERMISSION*
Brook Dooley (*Pro Hac Vice*) *By CHRISTOPHER*
Travis LeBlanc (*Pro Hac Vice*) *ROBERTSON*
Warren A. Braunig (*Pro Hac Vice*)
KEKER & VAN NEST, LLP
710 Sansome Street
San Francisco, California 94111
Tel: (415)391-5400
Fax: (415)397-7188
Email: jkecker@kvn.com
Email: bdooley@kvn.com
Email: tleblanc@kvn.com
Email: wbraunig@kvn.com



Bruce Rogers

Bruce F. Rogers (*Pro Hac Vice*) *with PERMISSION*
BAINBRIDGE, MIMS, ROGERS & *By CHRISTOPHER*
SMITH, LLP *ROBERTSON*
Suite 415, The Luckie Building
600 Luckie Drive
P.O. Box 530886
Birmingham, Alabama 35253
Email: brogers@bainbridgemims.com
Email: reubanks@bainbridgemims.com

Counsel for Petitioners

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 28th day of November, 2007, I have caused the above and foregoing MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH AND STAY SUBPOENA IN A CIVIL CASE to be delivered for filing to the clerk's office by United States mail, first-class postage prepaid, and a copy of the same to be delivered for service by United States mail, first-class postage prepaid upon the following:

Jack E. Held, Esquire
J. Rushton McClees, Esquire
Sirote & Permutt, P.C.
Post Office Box 55727
Birmingham, Alabama 35255-5727

Barbara Ellis Stanley, Esquire
Helms & Greene, LLC
One City Centre, Suite 1290
1021 Main Street
Houston, Texas 77002



Bill Taylor
Armit Mehta
Jason Acton
Zuckerman Spaeder LLP
1800 M Street, NW Suite 1000
Washington, DC 20036-5802

By _____