

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION**

IN RE SUBPOENA DUCES TECUM  
TO AOL, LLC

Rule 45 Subpoena in a Civil Action  
Miscellaneous No. 1:07cv-mc-00034-GBL-BRP

THOMAS C. and PAMELA McINTOSH,

Plaintiffs,

Civil Action No. 1:06-CV-1080-LTS-RHW (S.D.  
Miss.)

v.

STATE FARM FIRE & CASUALTY  
COMPANY and FORENSIC ANALYSIS &  
ENGINEERING CO., et al.,

Defendants.

**DEFENDANT STATE FARM'S MEMORANDUM IN OPPOSITION TO MOTION  
BY CORI AND KERRI RIGSBY TO QUASH SUBPOENA SERVED ON AOL, LLC**

Defendant State Farm Fire and Casualty Company ("State Farm") respectfully submits this memorandum in opposition to the motion of Cori Rigsby (formerly Cori Rigsby Moran) and Kerri Rigsby to quash a subpoena served on AOL, LLC. As demonstrated below, there is no basis for this Court to quash the narrowly-tailored subpoena served on AOL, and the Rigsbys' motion is simply the latest in their continuing efforts to assist their current employer – the Plaintiffs' attorneys in the underlying *McIntosh* action – in stonewalling and delaying discovery in the underlying action.

The discovery sought from AOL is essential to State Farm's defense of this action. The Rigsbys have testified under oath that they stole State Farm's files relating to the McIntoshes and forwarded many of them by email to their home computer via their AOL email accounts. The

Rigsbys now claim that their home computer has crashed and these files cannot be retrieved. Thus, the subpoena at issue here may be the only means by which State Farm can obtain the requested discovery – and the only means by which the Rigsbys can comply with an outstanding discovery order issued by the Southern District of Mississippi.

None of the Rigsbys' objections meets their heavy burden in asking this Court to quash the subpoena properly served on AOL. In particular, the Electronic Communications Privacy Act does not represent a sweeping revision of discovery practices in federal courts and does not prevent the discovery of emails and related documents in response to a proper subpoena. *See, e.g., McCready v. eBay, Inc.*, 453 F.3d 882, 891-92 (7th Cir. 2006). The Rigsbys' remaining objections likewise have no basis in law or fact, and their motion must be denied.

## **I. FACTUAL BACKGROUND**

### **A. The Rigsbys' Role in this Litigation**

The Rigsbys' motion attempts to downplay their role in this litigation, portraying them as mere “non-party witnesses in an action pending in the Southern District of Mississippi.”<sup>1</sup> Pl. Mo. at 1. They are anything but peripheral players. Beyond being featured in an August 2006 ABC News *20/20* story and appearing in television commercials on this matter, *see E.A. Renfroe & Co., Inc. v. Moran*, 508 F. Supp. 2d 986, 989, 992 (N.D. Ala. 2007), they were most recently the subjects of a November 2007 editorial in the *Wall Street Journal*. *See Mississippi Hoods*, Wall St. J., Nov. 15, 2007, at A24 (“Mr. Scruggs convinced two Renfroe employees – sisters Cori Rigsby Moran and Kerri Rigsby – to steal documents to aid his civil litigation against State

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<sup>1</sup> For a more thorough treatment of the facts relating to the Rigsbys' involvement, *see E.A. Renfroe & Co., Inc. v. Moran*, 2007 WL 2404719, at \*1 (11th Cir. Aug. 24, 2007); *McIntosh v. State Farm Fire & Cas. Co.*, 1:06-cv-1080-LTS-RHW, at 1-3 (S.D. Miss. Oct. 1, 2007) (Ex. 6 hereto).

Farm.”) (attached hereto as Ex. 1).<sup>2</sup>

The Rigsbys’ actions in stealing State Farm’s records were the subject of a preliminary injunction pending in federal district court in Alabama, which was affirmed by the Eleventh Circuit. *See E.A. Renfroe & Co., Inc. v. Moran*, 06-AR-1752-S (N.D. Ala. Dec. 8, 2006) (“*Renfroe* Preliminary Injunction Order”) (attached hereto as Ex. 2), *aff’d*, 2007 WL 2404719 (11th Cir. Aug. 24, 2007). The district court found that the Rigsbys “clandestinely copied approximately 15,000 confidential documents off of State Farm’s computer and turned them over to The Scruggs Law Firm” (*id.* at 8) – all in violation of the confidentiality provisions of their employment agreements with Renfroe, as well as Renfroe’s Code of Conduct. *Id.* at 2-7, 8. The court also made specific findings of fact concerning the Rigsbys’ actions, noting that:

Renfroe became aware of Moran’s and Rigsby’s activities by seeing its two employees and Scruggs on the “20/20” television show, during which Scruggs, Moran and Rigsby all accused State Farm of egregious misconduct, and revealed to the general public the existence of State Farm records that allegedly prove that State Farm committed fraud on its policyholders.

*Id.* Accordingly, the district court ordered the Rigsbys and their attorneys to return those documents to Renfroe, their former employer. *Id.* at 14-15. To date, the Rigsbys and their sometimes-attorney, Mr. Scruggs, have not fully complied with that order. *See E.A. Renfroe*, 2007 WL 1748655, at \*1; *see also Mississippi Hoods*, at 2. As a consequence, on November 12, 2007, Renfroe filed a motion for compensatory sanctions for civil contempt. *See E.A. Renfroe & Co., Inc. v. Moran*, 06-AR-1752-S (N.D. Ala. Nov. 12, 2007) (attached hereto as Ex. 3).

The Rigsbys have admitted that, as part of their clandestine theft of State Farm’s records, they forwarded many of these stolen records by email to their home computer from a laptop

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<sup>2</sup> All exhibits denominated alphabetically are attached to the Rigsbys’ motion and all exhibits denominated numerically are attached hereto.

computer provided to them by State Farm. *See* C. Rigsby Dep. at 46:18-47:16 (excerpts of Cori Rigsby's May 1, 2007 deposition, attached hereto as Ex. 4); K. Rigsby Dep. at 40:1-23 (excerpts of Kerri Rigsby's May 1, 2007 deposition, attached hereto as Ex. 5). *Both Rigsbys admit that these emails were sent to their personal email accounts at AOL. See* C. Rigsby Dep. at 53:15-54:21; K. Rigsby Dep. at 44:10-12. However, the Rigsbys have asserted that many of the emails containing State Farm documents that were sent to their AOL accounts have "disappeared" from Cori Rigsby's home computer. K. Rigsby Dep. at 42:4-46:25.

Prior to seeking the documents that are the subject of this proceeding, State Farm sought these documents directly from the Rigsbys through discovery in the underlying action. In granting State Farm's motion to compel production of these documents, the *McIntosh* court concluded, as did the *Renfroe* court before it, that the Rigsbys improperly took State Farm documents while employed by Renfroe. According to the court:

[T]he Rigsbys began covertly copying voluminous State Farm documents which they at some point provided to [the McIntoshes'] counsel, the Scruggs Katrina Group (SKG). Both Cori and Kerri Rigsby left the employment with Renfroe, and in June 2006 both found lucrative employment as "litigation consultants" at SKG.

*See McIntosh v. State Farm Fire & Cas. Co.*, 1:06-cv-1080-LTS-RHW, at 1 (S.D. Miss. Oct. 1, 2007) ("*McIntosh* Discovery Order") (attached hereto as Ex. 6). The court went on to note that "[e]ach is paid an annual sum of \$150,000.00 by the Scruggs Firm/Group." *Id.* at 1 n.1.

In its dual role as counsel to the Rigsbys and the McIntoshes (as well as other witnesses identified in the *McIntosh* action), the Scruggs firm has fought that discovery at every opportunity. *Id.* at 2-3. In fact, both of the Rigsbys refused to produce any documents in response to subpoenas *duces tecum* served on them. *Id.* at 2 ("There is no dispute that the Rigsbys brought no documents with them to their depositions, despite State Farm's request for

documents in the deposition subpoenas”). Further, alluding to vague theories of privilege (but without producing a privilege log), the Rigsbys refused to answer questions at their depositions or to produce documents in response to State Farm’s requests. *Id.* In rejecting these purported objections and ordering the Rigsbys to comply with State Farm’s discovery, the *McIntosh* court admonished both the Rigsbys and their counsel:

This court expressly holds that SKG’s taking on representation of the Rigsbys, hiring them as “litigation consultants,” and filing the [now unsealed] *qui tam* lawsuit on their behalf should not, and *will not, be allowed to transform* everything they learned and *the things they physically took from their employer into privileged information* available only to SKG as their attorney and/or present employer. In defending itself in the present action, *State Farm may fully explore the Rigsbys’ knowledge of the McIntosh case and pertinent documents gained through their employment relationship with Renfroe[]*.

*Id.* at 3 (emphasis added). Moreover, the court held that “State Farm is entitled to know the basis for the Rigsbys’ charges of wrongdoing,” and ordered the Rigsbys “to produce the requested documents *within their actual or constructive possession.*” *Id.* at 5 (emphasis added).

Following up on the *McIntosh* court’s order compelling discovery from the Rigsbys, State Farm subpoenaed Cori Rigsby’s home computer, identified by both Rigsbys as the computer from which they accessed the AOL email accounts to which they forwarded the State Farm documents. C. Rigsby Dep. at 45:18-25; K. Rigsby Dep. at 44:10-21. In response to this subpoena, the Scruggs firm and Harlan F. Winn of Battle Fleenor Green Winn & Clemmer, LLP, both purporting to represent the Rigsbys, sent written objections to State Farm raising, *inter alia*, claims of privilege, overbreadth and concerns regarding the safe handling of the computer. *See* Winn October 2, 2007 letter and Scruggs October 3, 2007 letter (attached hereto as Exs. 7 and 8, respectively).

Notably, neither attorney felt compelled to mention in his objections that Cori Rigsby’s computer “crashed several weeks ago” and that she “is unable to find documents on the

computer or print them out.”<sup>3</sup> See Winn October 11, 2007 letter (attached hereto as Ex. 9). Indeed, this detail was concealed from State Farm for the “several weeks” – to use Mr. Winn’s own words – after its occurrence; for the two and a half weeks after the subpoena was served; and during the entire period of time that Cori Rigsby’s attorneys were, purportedly, engaging in good faith efforts to meet and confer regarding the subpoena. *Id.*

While State Farm’s motion to compel production of the relevant materials on Cori Rigsby’s computer was pending, her attorneys advised the *McIntosh* court that their “forensic computer expert” had “encountered technical problems with the hard drive.” See Non-Party Witness Cori Rigsby’s Status Report on Expert Analysis of the Hard Drive of Her Desktop Computer, at 1 (attached hereto as Ex. 10). The “expert” then shipped the computer to his out-of-state office, “where he unsuccessfully attempted to mirror the hard drive using equipment at its office.” *Id.* At this time, it is unknown whether *any* information can be retrieved from Cori Rigsby’s computer.

In response to State Farm’s motion to compel and Cori Rigsby’s status report, the *McIntosh* court ordered Cori Rigsby to send her computer, via Federal Express Overnight delivery, to U.S. Magistrate Judge Robert H. Walker’s chambers to allow a court-selected expert to examine the computer. See *McIntosh v. State Farm Fire & Cas. Co.*, 1:06-cv-0180-LTS-RHW (S.D. Miss. Oct. 25, 2007) (attached hereto as Ex. 11). Following that inspection, the expert is to produce copies of all information that can be extracted from the hard drive to the Rigsbys (for preparation of a privilege log and production of nonprivileged documents) and to

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<sup>3</sup> According to the “forensic computer expert” allegedly retained to perform an analysis of Cori Rigsby’s computer, the computer “stopped working in early September 2007.” Non-Party Witness Cori Rigsby’s Status Report on Expert Analysis of the Hard Drive of Her Desktop Computer, at 1 (Ex. 10 hereto).

the district court (for resolving any challenge to the Rigsbys' claims of privilege). *See McIntosh v. State Farm Fire & Cas. Co.*, 1:06-cv-0180-LTS-RHW (S.D. Miss. Nov. 19, 2007) (amending Oct. 25, 2007 order) (attached hereto as Ex. 12).

**B. The Discovery Sought Through the AOL Subpoena Is Critical.**

On September 24, 2007, State Farm filed a notice of intent to serve on AOL a subpoena issued by the Southern District of New York seeking emails from the Rigsbys' accounts. *See Ex. D.* On October 3, 2007, Mr. Winn sent State Farm written objections, including, *inter alia*, that the subpoena was overbroad. *See Ex. G.* In consideration of some of Mr. Winn's objections and State Farm's realization that AOL should properly be served in the Eastern District of Virginia, State Farm withdrew that subpoena shortly after the Rigsbys filed a motion to quash. *See Ex. F.*

On October 29, 2007, State Farm filed a second notice of intent to serve a subpoena on AOL. *See Ex. A.* The new subpoena was issued out of this Court and, to cure many of the objections previously raised on behalf of the Rigsbys, was more specifically tailored and more limited in scope. *Compare Ex. D at 3-4, with Ex. A at 3.*

As framed, the subpoena seeks only two categories of documents (Ex. A at 3), both of which are critical to State Farm's defense of the *McIntosh* action. Given that these documents are directly relevant to "the basis for the Rigsbys' charges of wrongdoing" and that email files held by AOL are held on behalf of its users, and thus are within its users' "constructive possession," production of the requested documents falls directly within the scope of the *McIntosh* court's order compelling discovery. *See McIntosh* Discovery Order at 5.

First, the subpoena seeks emails and their attachments to or from the Rigsbys' AOL email accounts for the ten months between *August 29, 2005* (the day Hurricane Katrina made landfall in Mississippi) and *October 23, 2006* (the date the complaint was filed in *McIntosh*) that relate to the issues raised in *McIntosh*. *Id.* As this appears to be the only way in which State

Farm will be able to obtain the documents the Rigsbys improperly forwarded to their home email accounts – all of which were provided to Mr. Scruggs for his use in the *McIntosh* action – it is essential that State Farm be able to review these documents in order to defend this action.

Second, the subpoena seeks emails from Cori Rigsby’s AOL account for the six weeks between *September 1, 2007* and *October 12, 2007*. *Id.* This request is narrowly limited to the “several week” period during which Cori Rigsby and her attorneys concealed the status of her home computer. *Id.* It is important for State Farm to learn when, or if, Ms. Rigsby’s computer actually crashed. Indeed, in light of the Rigsbys’ refusal to produce even a single document for more than five months, and given the *McIntosh* court’s issuance of an order compelling production of those documents, the timing of the computer’s sudden demise is, at best, suspect. Further, as her counsel has represented that Cori Rigsby was incapacitated while recovering from surgery during the same several week period of her computer’s incapacity (*see* Winn October 11, 2007 letter), it is not entirely clear how she could have sent any emails at all. State Farm should thus be able to discover what, if any, emails Ms. Rigsby was sending during the time period in question.

Even if the Rigsbys’ excuses were to be credited by this Court, by their own admission the only other source of this information besides AOL has crashed and, prior to that, several of the relevant emails had “disappeared” from the computer. Accordingly, production from AOL may be the only possible source for this critical discovery – and even if it were not, it is nonetheless discoverable under the governing authorities.

## **II. ARGUMENT**

### **A. The Rigsbys Have Not Satisfied Their Burden to Quash the Subpoena.**

The Rigsbys’ objections fall woefully short of satisfying their heavy burden of quashing a properly served subpoena. Their objections, many of which have been addressed in prior motion

practice in *McIntosh*, are conclusory statements, unsupported by any factual demonstration, and provide no basis for quashing the subpoena. Indeed, given the *McIntosh* court's order compelling discovery of documents that

**1. Standard for Quashing a Rule 45 Subpoena**

In general, “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.” Fed. R. Civ. P. 26(b)(1). This is true whether the discovery is sought from parties to the action or from third parties. *See, e.g., American Sec. Ins. Co. v. McDonald*, 2007 WL 1853857 (W.D.N.C. June 26, 2007).

In the Fourth Circuit, “[t]he party seeking to quash [a subpoena] bears a heavy burden to show compliance with the subpoena would be unreasonable and oppressive.” *Hardin v. Belmont Textile Machinery Co.*, 2007 WL 2300795 (W.D.N.C. Aug. 7, 2007) (citations omitted). Accordingly, the party resisting the discovery “has [the] burden to make a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.” *Auto Club Family Ins. Co. v. Ahner*, 2007 WL 2480322, at \*1, 3 (E.D. La. Aug. 29, 2007) (quoting *In re Terra Int’l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998)). The Rigsbys have offered no evidence, much less made a specific showing, that compliance with this subpoena would be unreasonable or oppressive.

**2. The Electronic Communications Privacy Act Does Not Prevent Discovery of the Rigsbys’ Email Communications.**

The Rigsbys’ argument that “the [Electronic Communications Privacy] Act, [18 U.S.C. §§ 2701, *et seq.*,] forbids AOL to divulge the emails and other documents of its subscribers even when sought by subpoena” (Pl. Mo. at 3-4) has no basis in law or fact. *See, e.g., McCready v. eBay, Inc.*, 453 F.3d 882, 891-92 (7th Cir. 2006). The cases cited by the Rigsbys purporting to support this sweeping revision of federal discovery practice through the ECPA are, on their face,

inapposite.

Contrary to the Rigsbys' spurious argument, the ECPA does not present a bar to discovery by subpoena upon an Internet provider. Rather, courts routinely allow properly tailored discovery requests to access users' stored emails from an Internet provider, even when the user or provider alleges that such access violates the ECPA. *See, e.g., Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 930-31 (N.D. Cal. 1996). Indeed, in *McCready v. eBay, supra*, the Seventh Circuit specifically rejected the very argument raised by the Rigsbys here. In that case, the plaintiff alleged that eBay's production of the plaintiff's stored electronic communications in compliance with a subpoena issued by defendants in another case subjected both eBay and the defendants to liability under the ECPA. The Seventh Circuit affirmed dismissal of the complaint, noting that "[g]ood faith reliance on a subpoena is a complete defense to actions brought under the ECPA . . . ." 453 F.3d at 892. In so holding, the court rejected the plaintiff's assertion that eBay's compliance was not in good faith because the subpoena was "phony," noting that "a look at the subpoena shows otherwise." *Id.* Given the subpoena's facial regularity, eBay's compliance with a subpoena "issued by a federal district court on behalf of a defendant in a pending lawsuit, seeking information about a party opponent which related to the case" fell "squarely within the statutory defense" (*id.*) and, accordingly, no liability could attach to eBay or the other defendants.

The Rigsbys' reliance on *F.T.C. v. Netscape Communications Corp.*, 196 F.R.D. 559 (N.D. Cal. 2000), is misplaced. That decision is limited by its holding to instances of government-issued subpoenas and the limitations specifically enumerated in the ECPA on such subpoenas. *Id.* at 560. In rejecting the attempted discovery, the court merely held that it would not "allow the FTC to use Rule 45 to circumvent the precautions and protections built into the

ECPA to protect subscriber privacy *from government entities.*” *Id* at 561 (emphasis added). In fact, further limiting that decision, another court in the Northern District of California specifically declined to quash a subpoena on the basis of the ECPA, noting simply “that the ECPA does not bar the Government’s request for” discovery from Google. *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 688 (N.D. Cal. 2006). Regardless, as there is no government entity seeking discovery in this matter, the *F.T.C.* decision is inapposite.

The other decision upon which the Rigsbys rely, *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir.), *cert. denied*, 543 U.S. 813 (2004), is likewise completely inapplicable to the subpoena before this Court. *Theofel* arose out of an underlying action in which the defendants served a subpoena that “ordered production of ‘[a]ll copies of e-mails sent or received by anyone’ at NetGate [the plaintiff’s Internet service provider], with no limitation as to time or scope” and without limitation “at the very least [as] to those sent to or from employees in some way connected to the litigation.” *Id.* at 1071. Plaintiff then filed the *Theofel* action, alleging, among other claims, that the defendants had violated the Stored Communications Act (Title II of the ECPA) and the Computer Fraud and Abuse Act<sup>4</sup> by using a “patently unlawful” subpoena to gain access to the e-mails stored by NetGate.

The district court dismissed the federal claims, but the Ninth Circuit reversed, relying in part upon an order by the Magistrate Judge in the underlying action that “soundly roasted” and

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<sup>4</sup> The Stored Communications Act provides a cause of action against anyone who “intentionally accesses without authorization a facility through which an electronic communication service is provided . . . and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage[.]” 18 U.S.C. §§ 2701(a)(1), 2707(a). The Computer Fraud and Abuse Act provides a cause of action against anyone who, among other things, “intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer if the conduct involved an interstate or foreign communication.” 18 U.S.C. §§ 1030(a)(2)(C), 1030(g).

sanctioned the attorneys and party that served the subpoena, finding that

“the subpoena, on its face, was massively overbroad” and “patently unlawful,” that it “transparently and egregiously” violated the Federal Rules, and that defendants “acted in bad faith” and showed “at least gross negligence in the crafting of the subpoena.”

*Id.* at 1071-72.<sup>5</sup> As to the plaintiff’s Stored Communications Act and Computer Fraud and Abuse Act claims, the court disagreed with the district court’s finding that the ISP had authorized the defendants’ access, finding that the subpoena’s invalidity vitiated any purported consent by the ISP:

The subpoena’s falsity transformed the access from a bona fide state-sanctioned inspection into private snooping. . . . The false subpoena caused disclosure of documents that otherwise would have remained private; it effected an “invasion ... of the specific interests that the [statute] seeks to protect.”

Accordingly, the court held that these claims could go forward. *Id.* at 1073-74, 1078.

In stark contrast to the facts in *Theofel*, State Farm’s subpoena seeks only documents to or from the Rigsbys who, as described above, are certainly connected to the litigation. The request is likewise limited in time to those periods relevant to the pending action and are further limited in scope to only those documents that relate to the parties to the action. Moreover, unlike the plaintiffs in *Theofel*, State Farm properly filed and served a notice of intent to serve the subpoena, and the Rigsbys were aware of the request long before any of the requested documents

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<sup>5</sup> Indeed, a review of the Magistrate Judge’s order quashing the subpoena and granting sanctions reveals that the plaintiffs also failed to provide the defendant with any prior notice of the subpoena as required by Rule 45(b)(1). *See Farey-Jones v. Buckingham*, No. 01-0181 Misc. MMC, at 4 (N.D. Cal. Feb. 1, 2002) (attached hereto as Ex. 13). In fact, the plaintiffs did not notify the defendants that the subpoena had issued until the day the plaintiffs received a portion of the production from the Internet service provider – a fact that the plaintiff concealed from the defendant for nearly two weeks. *See id.* at 4-5. Nevertheless, the Magistrate Judge specifically noted that the plaintiffs was free to serve a second subpoena on the Internet service provider, provided that he complied with certain pre-service requirements, including that “he must craft a proposed new subpoena that is dramatically narrower in scope and specifically tailored to the matters in dispute in the pending litigation.” *Id.* at 1-2.

might be produced. Accordingly, none of the “patently unlawful” and “egregious[]” deficiencies in the subpoena at issue in *Theofel* are present in this action and, therefore, the subpoena can be enforced without violating the provisions of the ECPA.

**3. The Rigsbys’ Claims of Privilege Must Be Rejected Because They Have Not Provided a Privilege Log.**

As in prior proceedings, the Rigsbys argue here that everything they have stolen is privileged due the various roles they and their attorneys play in the multiple lawsuits spawned by their improper behavior. *See, e.g.*, Pl. Mo. at 4. As in those prior proceedings, this Court should reject the Rigsbys’ unsupported assertions of privilege, including their vaguely asserted claim of law enforcement privilege. *See McIntosh* Discovery Order at 2-3.

Moreover, to assert a legitimate privilege claim, the Rigsbys must provide the Court and State Farm with a privilege log describing “the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.” Fed. R. Civ. P. 45(d)(2); *see McIntosh* Discovery Order at 4 (“As to any document claimed to privileged, the Rigsbys shall provide a privilege log which meets the requirements of Rule 25(b)(5)(A)” and “[c]ontemporaneously with the production to State Farm, the Rigsbys are ordered to produce to the Court for *in camera* review any documents withheld under claim of privilege”). As their motion is silent as to this threshold requirement, it may be denied on this basis alone.

The fact that the Rigsbys no longer in possess the documents as to which they claim a privilege does not relieve them of their duty to prepare a privilege log where, as here, they are aware of the documents whose production they seek to resist. For example, in *In re Grand Jury Subpoena*, 274 F.3d 563, 576 (1st Cir. 2001), a corporation was served with a subpoena ordering it to produce documents relating to the affairs of another corporation it had acquired. The acquired corporation’s former lawyer and two former officers intervened and moved to quash the

subpoena on the ground that the documents were privileged. *Id.* at 568. The First Circuit upheld the denial of the motion to quash, holding that the intervenors had failed to provide a privilege log as to documents they had previously turned over to the law firm for the parent corporation. In so holding, the court rejected the intervenors' "suggest[ion] that they were hampered in their ability to present a list of privileged documents by the district court's refusal to hold an evidentiary hearing":

After all, the intervenors were not without knowledge of the communications to which the subpoena pertained; [the former lawyer for the acquired corporation] originally had possession of them and turned them over to [the lawyer for the parent corporation] . . . . Despite this knowledge, the intervenors made no effort to prepare a privilege log. That omission is fatal. . . . *[A] party who possesses some knowledge of the nature of the materials to which a claim of privilege is addressed cannot shirk his obligation to file a privilege log merely because he lacks infinitely detailed information.* To the contrary, we read Rule 45(d)(2) as requiring a party who asserts a claim of privilege to do the best that he reasonably can to describe the materials to which his claim adheres.

*Id.* at 576 (emphasis added).

In this case, the Rigsbys have more than "some knowledge" of the documents they secretly forwarded from State Farm's files to their own personal AOL accounts, and therefore must be required to produce a privilege log. Moreover, to the extent they claim that irrelevant personal information may be contained within the documents requested by State Farm, any such claims can be easily addressed through appropriate procedures, such as those contemplated by the *McIntosh* court with respect to the production of documents (if any) retrieved by the computer forensics expert from Cori Rigsby's computer. See Ex. 12, *McIntosh v. State Farm Fire & Cas. Co.*, 1:06-cv-0180-LTS-RHW (S.D. Miss. Nov. 19, 2007) (amending order dated Oct. 25, 2007) ("[T]he expert shall be instructed to make two identical bates-numbered copies of all information which can be extracted from the computer, and to provide one copy of said information to counsel for Rigsby, and one copy to the Court. The Court's copy will be kept

sealed unless State Farm challenges Rigsby's claim of privilege with respect to a document, in which case the Court will examine the challenged document to ascertain whether it is protected from discovery.").

**4. Any Assertion of Attorney-Client Privilege Must Be Rejected on the Basis of the Crime-Fraud Exception to the Privilege.**

Even if the Rigsbys' claims of attorney-client privilege otherwise had merit, they are unavailing here, as their conduct falls within the crime-fraud exception to the privilege. The Rigsbys admit that, through the use of their email accounts, they improperly funneled thousands of pages of confidential State Farm documents to attorney Scruggs so the documents could be used in the underlying action and other lawsuits against State Farm. *See* K. Rigsby Dep. at 38:6-12; C. Rigsby Dep. at 46:18-47:16. These exchanges went on for months, during which time the Rigsbys continued to purloin confidential documents and information for use by Scruggs and the Scruggs Katrina Group. *See, e.g.*, K. Rigsby Dep. at 37-39 (describing how Kerri Rigsby used her State Farm-issued computers to email confidential claim files to her personal email account and then forwarded them to Scruggs and other members of the SKG); *see also E.A. Renfroe* Preliminary Injunction Order at 9 ("Without knowing the precise terms of the relationship between Scruggs and the two defendants, it is apparent that they are all three now engaged in a cooperative effort.").

Under the crime-fraud exception, otherwise privileged communications or work product made for, or in furtherance of, the purpose of committing a crime or fraud will not be privileged or protected. *See In re Grand Jury Subpoena*, 419 F.3d 329, 338-39 (5th Cir. 2005). "[A]lthough referred to as an 'exception' to the attorney-client privilege and work product doctrine, the crime/fraud exception is not truly an exception. Rather, it is an exclusion of certain activity from the protective reach of the privileges." *Rambus, Inc. v. Infineon Technologies AG*,

222 F.R.D. 280, 287 (E.D. Va. 2004) (footnote omitted). Indeed, a basic element the proponent must prove to establish the applicability of the attorney-client privilege is that the communication was *not* made “for the purpose of committing a crime or tort.” *In re Grand Jury Proceedings*, 517 F.2d 666, 670 (5th Cir. 1975).

The Rigbys’ untoward conduct falls squarely within the crime-fraud exception to the attorney-client privilege. Courts have recognized the criminality of an employees’ theft of confidential documents from their employers (as distinct from obtaining the documents via legal means), despite the employees’ attempts to don the mantle of legitimate “whistleblowers.” For example, in *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 697, 702-04 (E.D. Va. 2007), the defendant argued that although he stole proprietary documents from his former employer, he should not be held liable for breaching the confidentiality provisions of his employment agreement because he needed the documents “to function as an effective Sarbanes-Oxley whistleblower.” *Id.* at 702. This Court rejected that argument:

By no means can the policy [of encouraging whistleblowers] fairly be said to authorize disgruntled employees to pilfer a wheelbarrow full of an employer’s proprietary documents in violation of their contract merely because it might help them blow the whistle on an employer’s violations of law, real or imagined. Endorsing such theft or conversion would effectively invalidate most confidentiality agreements, as employees would feel free to haul away proprietary documents, computers or hard drives, in contravention of their confidentiality agreements, knowing they could later argue they needed the documents to pursue suits against employers under a variety of statutes protecting employees from retaliation for publicly reporting wrongdoing. . . .

Nor would enforcing contracts like [the employment agreement] burden legitimate whistleblower activity, as putative whistleblowers would still be free to consult lawyers, pursue and exhaust administrative remedies, and file their whistleblower claims, in the course of which pertinent documents could be obtained via legal process.

*Id.* at 703.

The Court’s characterization of the defendant’s conduct in *JDS* as “theft or conversion”

applies equally here. Moreover, “[t]he term ‘crime/fraud exception’ . . . is ‘a bit of a misnomer,’ as many courts have applied the exception to situations falling well outside of the definitions of crime or fraud.” *Rambus*, 222 F.R.D. at 288 (citations omitted); *see also Parrott v. Wilson*, 707 F.2d 1262, 1271 (11th Cir.) (stating that crime-fraud exception applies to work product created as a result of lawyers’ “unprofessional conduct”), *cert. denied*, 464 U.S. 936 (1983).

A party seeking to pierce the attorney-client privilege must make a *prima facie* showing “that the client intended to further an ongoing crime or fraud during the attorney-client representation.” *Grand Jury Subpoena*, 419 F.3d at 346. Once a *prima facie* showing is made, the privilege is vitiated for all communications or documents that “reasonably relate to the fraudulent activity.” *Id.* (citation omitted). In cases such as this, where “the client’s entire representation [was] in furtherance of the alleged crime or fraud” (*id.* at 344 n.12), no privilege attaches at all.

For the reasons outlined above, this showing is easily made: Scruggs clearly engaged in “unprofessional conduct,” and the Rigsbys have no right to claim privilege with respect to communications designed to assist them in the theft or conversion of State Farm’s confidential documents. Accordingly, this Court should reject the Rigsbys’ claims of privilege and order the production of the requested documents from the Rigsbys’ emails accounts.

**5. The Rigsbys Have No Standing to Raise a Claim of Undue Burden on the Part of AOL.**

The Rigsbys go to great lengths to argue a point that State Farm does not dispute: that they have standing to raise objections to the subpoena to the extent they have *privilege* concerns. *See* Pl. Mo. at 1-2 n.1. They neglect, however, to note that they lack standing to raise objections as to any purported undue *burden* posed by the subpoena. *See, e.g., Mayes v. City of Oak Park*, 2007 WL 187941, at \*1 n.1 (E.D. Mich. Jan. 22, 2007). Any claim of alleged burden is

especially suspect where, as here, “the non-party, itself, has not objected.” *G.K. Las Vegas Ltd. Partnership v. Simon Property Group, Inc.*, 2007 WL 119148, at \*3 (D. Nev. Jan. 9, 2007).

Putting the standing issue aside, the Rigsbys’ undue burden claim must still be rejected. First, as the subpoena seeks no response from the Rigsbys, it poses no burden on them. Moreover, the Rigsbys’ vague and unsubstantiated assertions of undue burden cannot meet their heavy burden in asking this Court to quash the subpoena. Because the Rigsbys lack standing to raise an objection of undue burden on behalf of AOL and because AOL itself has raised no objection, the Rigsbys’ undue burden objection must be rejected.

**6. The Place and Time of Production in the Subpoena May Be Modified.**

State Farm acknowledges that it erred in specifying a post office box rather than a street address as the place for production of the documents designated in the subpoena served on AOL. Indeed, had the Rigsbys raised that easily-cured point in Mr. Smith’s November 1, 2007 letter to State Farm’s counsel, instead of placing all of their focus on the spurious argument that the ECPA prohibits all email discovery, State Farm would have gladly and immediately provided the street address for the place of production.

Accordingly, State Farm requests that this Court modify the subpoena to provide for production at the offices of Brenner, Evans & Millman, P.C., 411 East Franklin Street, Suite 200, Richmond, VA 23218-0470, at a reasonable time after the issuance of its decision in this matter. *See Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004) (“modification of a subpoena is preferable to quashing it outright”).

**B. There Is No Basis for Sanctions in this Matter.**

Stealing a page from Plaintiffs’ playbook, the Rigsbys have reflexively sought sanctions in response to nearly every discovery request propounded to them, apparently in the hope that the

*in terrorem* effect of such requests will deter State Farm from its attempts to obtain legitimate discovery. Despite these repeated requests for sanctions by Plaintiffs' counsel and counsel working in cooperation with them, sanctions have never been issued.

The Rigsbys' current motion for sanctions is likewise without merit, as it rests on the baseless argument that the subpoena issued to AOL violates the ECPA. Even were this Court to disagree with State Farm and grant the motion to quash, sanctions would not follow. *See Dravo Corp. v. Liberty Mut. Ins. Co.*, 160 F.R.D 123, 128-29 (D. Neb. 1995) (even though court quashed non-party subpoena issued by defendant, court denied non-party's motion for sanctions because subpoena was based on "nonfrivolous argument" and thus was "objectively reasonable"). Moreover, State Farm took "reasonable steps" to narrowly tailor the subpoena so as to comply with Rule 45(c)(1), as evidenced by its reissuance of a new subpoena, more limited in scope, in response to objections raised on the Rigsbys' behalf. *See Orgulf Transport Co. v. Grillot Co., Inc.*, 1998 WL 313732, at \* 2 (E.D. La. June 12, 1998) (Rule 45 sanctions warranted only where issuing party acts in "patently unreasonable" manner, and not where party makes good faith "attempt[] to comply with Rule 45(c)(1)'s restraint").

Because there is no basis to quash the narrowly tailored subpoena served on AOL, and because the subpoena was served in good faith and in accordance with the applicable law, the Rigsbys' request for sanctions here must be rejected.

### **III. CONCLUSION**

For the foregoing reasons, State Farm respectfully requests that this Court deny the Rigsbys' motion, together with such other and further relief as this Court deems just and proper.

STATE FARM FIRE AND  
CASUALTY COMPANY

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