

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

THOMAS C. and PAMELA McINTOSH,

Plaintiffs,

v.

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

Defendants.

CIVIL ACTION NO.: 1:06-CV-1080-LTS-RHW

**DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S RESPONSE
TO NON-PARTIES RICHARD AND ZACH SCRUGGS' OBJECTIONS [DOC. 1201]
TO MAGISTRATE JUDGE WALKER'S ORDER [DOC. 1194] COMPELLING
PRODUCTION OF CERTAIN DOCUMENTS**

Preliminary Statement

State Farm respectfully submits this response in opposition to the Scruggses' objections (Doc. 1201) to Magistrate Judge Walker's May 15, 2008 Order (Doc. 1194) compelling the production of certain documents. These objections follow in the wake of the Scruggses' earlier objections to Judge Walker's December 11, 2007 Order (Doc. 911) that denied a motion to quash their depositions, in response to which this Court issued its January 9, 2008 Order (Doc. 988), allowing their depositions to go forward following the resolution of the document issues by Judge Walker. On January 9, 2008, Judge Walker also issued an Order (Doc. 989) setting forth a process for the resolution of those issues, which were then robustly addressed by all interested persons and carefully decided by Judge Walker.

Yet continuing their quest not to produce any documents, despite the substantial reduction in their scope, the Scruggses have filed another objection with this Court, thus causing one to wonder: What information could possibly be contained in those documents that the Scruggses so desperately want to keep from ever seeing the light of day?

None of the Scruggses' objections satisfies their heavy burden of showing that Judge Walker's rulings were "clearly erroneous or contrary to law" – the legal standard that governs this Court's review.

The Scruggses' primary objection arises out of their misplaced and erroneous assertion that Judge Walker requested and received additional briefing on the issues addressed to events that transpired since the briefing cycle was completed at the end of January 2008. Nothing of the sort happened. As discussed more fully below, as an administrative matter, at a status conference with counsel for the parties to this matter, Judge Walker requested letters listing the outstanding discovery the defendants were still seeking. No briefing was requested as to any new developments and none was provided. Giving new meaning to the adage "no good deed goes unpunished," and with no small degree of irony, the Scruggses now complain to this Court that State Farm withdrew *two-thirds* of its document requests, *all* of which the Scruggses, as well as those associated with them, had previously objected to.

The balance of the Scruggses' objections are little more than a collateral attack on this Court's prior orders of October 1, 2007 (Doc. 563), and December 11, 2007 (Doc. 911) as affirmed on January 9, 2008 (Doc. 988). This Court's prior Orders rejected many of the same arguments that the Scruggses now recycle, and recognized the discoverability of the same areas of information generally at issue here and form part of the dispute, including Plaintiffs' bad faith claims, still pending before this Court.

This Court expressly holds that SKG's taking on representation of the Rigsbys, hiring them as "litigation consultants," and filing a *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 Renfro/State Farm

October 1 Order at 3.

Richard Scruggs testified in proceedings in Alabama, that the October 12, 2005 engineering report on the McIntosh property was among the first twenty documents the Rigsbys gave to Scruggs in February 2006. ... *This original engineering report* in the

McIntosh property has become a critical point in this litigation, as it *appears to be the linchpin of Plaintiffs' bad faith claims.*¹ Scruggs did not represent the McIntoshes when he received the engineering report. Indeed, he did not represent them until some time after the broadcast of an ABC television *20/20* program at the end of August, 2006. [O]n August 21, 2006, prior to the *20/20* broadcast, ... [ABC news producer Joe] Rhee told McIntosh there were two engineering reports on his property, ... stating that they 'had worked with Dickie Scruggs before and they respect each other and would stay with us till the end.' From this, one might reasonably infer that Scruggs was the source of Rhee's information regarding the McIntosh claim. ...

Defendants understandably desire to question Richard and/or Zach Scruggs about the report ... the circumstances surrounding the receipt of such documents and the chain of custody of the documents after the Scruggses received them. ... The Court is of the opinion that Defendants should be allowed to pursue this information from the Scruggses.

December 11 Order at 3-4 (emphasis added; citation omitted).

I. JUDGE WALKER'S ORDER IS NOT "CLEARLY ERRONEOUS OR CONTRARY TO LAW"

"The standard of review under 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a) prescribes that a magistrate judge's nondispositive pretrial orders shall not be disturbed unless 'found to be *clearly erroneous* or *contrary to law*.'" *Barnett v. Tree House Cafe, Inc.*, 2006 WL 3083757, at *2 (S.D. Miss. Oct. 27, 2006) (emphasis added); *see also Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995) (same). Likewise, Local Rule 72.1(A)(2) provides that a magistrate judge's ruling "shall [not] be reversed, vacated, or modified on appeal unless the district judge shall determine that ... the magistrate judge's ruling is clearly erroneous or contrary to law." The "clearly erroneous or contrary to law" standard is expressly distinguished from the "*de novo*" standard used for dispositive rulings. Fed. R. Civ. P. 72(b).

The "clearly erroneous" standard is among the strictest standards of review. It applies to discovery rulings, including those involving claims of privilege. *See, e.g., Thomas v. Hoffman-Laroche, Inc.*, 126 F.R.D. 522, 524 (N.D. Miss. 1989). This stringent standard requires the Scruggses to establish

¹ In light of recent legal rulings, State Farm believes it has good grounds to seek partial summary judgment as to Plaintiffs' bad faith and extracontractual damage claims. In order to present the strongest record in support of such a motion, State Farm would like to file such a motion following its completion of the outstanding discovery from the Scruggses and the Rigbys, in accordance with this Court's prior discovery orders, and sufficiently in advance of trial to allow this Court adequate time to address that motion.

“not that the magistrate judge *could have* exercised his discretion and ruled in [their] favor, but rather that [they are] *entitled* to a ruling in [their] favor as a *matter of law*.” *Barnett*, 2006 WL 3083757, at **2-3 (emphasis added). They have not met their heavy burden, nor can they.

It is well-recognized that “[a] magistrate judge is ‘far better situated to pass on discovery matters,’ than is the district judge. A magistrate judge is afforded broad discretion with respect to discovery matters because no one factor controls discovery disputes.” *Id.* (citation omitted). Indeed, “[n]umerous federal courts have commented on the [broad] discretion afforded to magistrate judges under Rule 72(a) when resolving discovery disputes.” *Brownlow v. Gen. Motors Corp.*, 2007 WL 2712925, at *3 (W.D. Ky., Sept. 13, 2007) (collecting cases). Thus, “[t]he court’s scope of review is significantly limited in a discovery situation.” *Thomas*, 126 F.R.D. at 524. “In conducting ... [its] review, the district court must refrain from second guessing the magistrate judge’s pre-trial discovery rulings.” *Ungar v. Palestinian Auth.*, 325 F. Supp. 2d 15, 25 (D.R.I. 2004). Yet, second guessing the ruling is precisely what the Scruggses invite without ever presenting a compelling argument to set aside or modify Judge Walker’s ruling under the standards that govern this Court’s review.

Judge Walker’s ruling was well within the ambit of the proper exercise of his discretion and the Scruggses cannot meet their “heavy burden,” *Wallin v. Alfaro*, 2005 WL 2125224, at *5 (D. Colo. Sept. 2, 2005), of proving that the ruling is clearly erroneous or contrary to law. Nor do they. Instead, they do little more than invoke the language of Rule 72(a) and couple it with conclusory statements that their objection should be granted. Such formulaic incantations of the Rule, without ever demonstrating in any compelling manner how the strict standard that they must meet is satisfied, do not suffice. *See Traveler’s Ins. Co. v. Monpere*, 1995 U.S. Dist. LEXIS 14783, at *5 (W.D.N.Y. Sept. 12, 1995) (mere incantations of language from statute and rule do not disguise that objections do not meet them). Thus, the objection must be denied and the discovery must be provided without further objection or delay.

II. STATE FARM'S LETTER ONLY ELIMINATED ISSUES; IT DID NOT CONTAIN ANY NEW BRIEFING

Apparently recognizing that they cannot possibly meet the applicable standards on the merits, the Scruggses initially seek to divert attention away from them. They complain they were not copied on a May 9, 2008 letter to Judge Walker that provided, in response to a request from the Court made during a status conference with counsel for the parties to this action, “a pared-down list” of outstanding discovery matters awaiting resolution by the Court, including the subpoena *duces tecum* document requests to the Scruggses. *See* Doc. 1201 at 1-2, 5-6; Doc. 1201-5 at 1-3.² State Farm took the Court’s request to heart and, as Judge Walker noted, in its May 9 letter “State Farm requests that the Court rule upon nine of its original 25 document requests from the Scruggses.” May 15, 2008 Order (Doc. 1194) at 8-9. Or, conversely, as the Scruggses put it, State Farm’s May 9 letter “essentially abandons sixteen of its original twenty-five requests” Doc. 1201 at 6.

The May 9 letter did not provide any new argument or briefing. As an administrative matter, it effectively eliminated most of State Farm’s prior document requests that had already been fully briefed to the Court – by the Scruggses (Docs. 1078, 1107), by the Plaintiffs (Docs. 1051, 1094), by the Rigsbys (Docs. 1072, 1084), and by State Farm (Docs. 1073-75, 1083-84, 1110-11, 1131) – and had been awaiting decision since late January 2008. The Court did not invite any briefing to address the events that transpired since that time and none was provided, as a review of the letter reveals. It is, thus, odd that the Scruggses now complain that State Farm advised that Court that it was no longer pressing nearly two-thirds of its previous document requests – all of which the Scruggses, and others, had previously and robustly objected to. *See, e.g.*, Docs. 1107, 1107-2, 1078.

² Nor were the Scruggses copied on Renfroe’s corresponding May 8, 2008 letter to the Court, which also requested that the outstanding motions concerning the Scruggses be decided. *See* Ex. 1, attached hereto. The fact remains that these letters arose out of a ministerial request made during a status conference with the parties, not non-parties, and were merely an extension of a discussion that was not, but otherwise could have been, concluded at that time.

Moreover, in the space of two paragraphs, the Scruggses take two irreconcilable positions as to the consideration of the post-January 2008 events. They initially and erroneously assert that Judge Walker's "Order does not reflect that any of the pertinent changed circumstances were considered by the Magistrate Judge in reaching his decision." Doc. 1201 at 5. In a complete about-face, they then correctly acknowledge that "the Magistrate Judge was at least aware of the changed circumstances in this case, which are specifically referenced in footnote 7 of the Order." *Id.* at 6. Moreover, Judge Walker's recognition of the changed circumstances was also reflected in notes 4 and 5. Thus, whatever doubts the Scruggses were remarkably attempting to sow about Judge Walker's supposed lack of consideration of "any of the pertinent changed circumstances" (Doc. 1201 at 5) are squarely refuted by the very terms of Judge Walker's Order that they cite.

III. THE SCRUGGSES' OBJECTIONS ARE MISPLACED AND INSUFFICIENT

The Scruggses next advance an assortment of arguments, none of which shows that Judge Walker's ruling was clearly erroneous or contrary to law. What they do reveal is that the Scruggses are not happy with the ruling and would like this Court to second-guess it. Yet the law does not permit that.

A. Relevance

Federal Rule of Civil Procedure 26(b)(1) makes clear that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition and location of any documents" and that "relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." "The scope of production under a subpoena that is incorporated by the reference in Rule 45 to Rule 26(b) is *exceedingly broad* ... [a] court need not pass on the admissibility of the documents sought in advance of trial nor quash a subpoena demanding their production if there is *any* ground on which they might be relevant." 9A Wright & Miller, Fed. Prac. &

Proc. Civ. 2d § 2459 (2007) (emphasis added). Thus, in determining what constitutes permissible discovery under Rule 45, a court should consider that “[r]elevancy is *broadly* construed, and a request for discovery should be considered relevant if there is ‘*any* possibility’ that the information sought may be relevant.” *Nelson v. The Farm, Inc.*, 2007 WL 4570872, at *2 (D. Kan. Dec. 27, 2007) (emphasis added).

Against this broad standard, under Federal Rule of Civil Procedure 45, which governs subpoenas to non-parties, the Scruggses’ ability to make relevance objections is limited. *See, e.g., Laborers Pension Trust Fund-Detroit and Vicinity v. CRS Poured Concrete Walls, Inc.*, 2006 WL 3804912, at *5 (E.D. Mich., Dec. 22, 2006) (“it is not entirely clear that a non-party has standing to raise a relevance objection to the subpoena”); *Shore Acres Nursing Home, Inc. v. Continental Med. Sys., Inc.*, 1991 WL 53664, at *3 (E.D. Pa., April 2, 1991) (non-parties must obey subpoena unless it is quashed or modified as unreasonable or oppressive). Rule 45(c)(3)(A) provides but four grounds to quash or modify a subpoena: (i) unreasonable time to comply; (ii) travel of more than 100 miles; (iii) disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) undue burden.

Despite the legal constraints on their ability to raise relevance arguments, and wholly ignoring the fact that information contained in the documents ordered to be produced may well lead to the discovery of admissible evidence, the Scruggses assert that many of the documents ordered to be produced “had no relevance to this action even before the April 4 Order.” Doc. 1201 at 6. Whether before or after that Order, they are wrong.

In support of their misplaced argument, the Scruggses rely on this Court’s April 14, 2008 Order (Doc. 1180), which they say “has already excluded a wide range of media reports from evidence,” as rendering irrelevant “Requests No. 5 and 11 [which] seek documents related to contacts with the media.” Doc. 1201 at 6. Yet, the only “media reports” the April 14 Order precludes are those “regarding the Riggsby sisters.” April 14 Order (Doc. 1180) at 1.

Here, as shown above and as shown in this Court's December 11 Order (Doc. 911) at 3-4, State Farm is seeking documents concerning media contacts – whether with ABC News or any other media outlets to whom the Scruggses were shopping their stories – to shed light on the chain-of-custody of the original October 12, 2005 engineering report on the McIntosh property, among other things. Judge Walker was well within the ambit of the proper exercise of his discretion in limiting the scope of the Requests Nos. 5 and 11 and, as so limited, ordering the documents to be produced. As Judge Walker appropriately noted, “the Scruggses clearly used State Farm documents, including the McIntosh claim engineering reports, for purposes of the ABC 20/20 broadcast in August 2006,” May 15 Order (Doc. 1194) at 9-10, and the ruling cannot be seriously asserted to be clearly erroneous or contrary to law.

For many of the same reasons, the Scruggses' other make-weight “relevance” assertions, almost all of which concern the Rigsbys, fare no better under the standards that this Court must apply. Ignoring the fact that information contained in the documents ordered to be produced may very well lead to the discovery of admissible evidence (including issues concerning chain of custody) even if the documents themselves are inadmissible, the Scruggses erroneously assert that because the Rigsbys and the documents they stole from State Farm “have all been disqualified from this litigation,” they are “irrelevant.” Doc. 1201 at 7. Again, they are wrong. Admissibility and discoverability are different. Merely because the documents that the Rigsbys stole are inadmissible does not mean they cannot be seen, nor does it mean that the documents at issue cannot lead to the discovery of admissible evidence.

Judge Walker exercised his broad discretion in supervising the discovery by limiting the scope of such requests and, as so limited, ordering the documents to be produced. The Scruggses simply do not like that result and ask this Court to apply what amounts to a *de novo* review and set it aside. Yet, when Judge Walker made a “*de novo*” review of these very issues, he determined that certain documents should be produced. The Scruggses have not come forward with any compelling argument demonstrating that the ruling was clearly erroneous or contrary to law.

B. Fifth Amendment

Laboring under the misimpression that Judge Walker was required to address each and every ground asserted by the Scruggses – and, by extension, the Rigbys and the Plaintiffs – they complain that Judge Walker did not address their argument that the subpoena implicates their Fifth Amendment right against self-incrimination. *See* Doc. 1201 at 8. Incredibly, the Scruggses go so far as to suggest that “[t]hese objections are even *more* compelling *now* in light of the Scruggses’ *guilty pleas* in the criminal matter pending in the Northern District, for which they still await sentencing.” *Id.* (emphasis added). Having already *confessed guilt*, it is difficult to comprehend how the mere production of documents in an unrelated civil matter somehow *increases* the risk that they will incriminate themselves. That they have already done – in open court.

The Scruggses’ speculation that producing the documents “may” subject them to some undefined outcome in the civil case pending before Judge Acker in Alabama or a more severe sentence in the Northern District for their roles in the bribery of a judge – as if that offense, which strikes at the heart of the judicial system, does not already carry a stiff penalty – does not demonstrate that Judge Walker’s ruling was clearly erroneous or contrary to law.

Yet one need not read too far between the lines to recognize the apparent subtext. Scruggs has already come perilously close to a contempt citation for failing to follow the Order of Chief Judge Mills in the Northern District of Mississippi, which denied Scruggs’ motion to quash State Farm’s subpoena for his deposition in *State Farm v. Hood*, No. 2:07-cv-188-DCB-MTP (S.D. Miss.). Judge Mills found that despite the fact that “the court’s intent [in its order] ... should have been clear to all parties,” Scruggs “appears to have used” certain language in the order “for tactical purposes, to limit” State Farm’s rights – conduct which Judge Mills ruled “is clearly unacceptable, and the court will not tolerate any further attempts to violate its ... order,” and that “[a]ny future non-compliance ... will be dealt with

as contempt.” See *State Farm v. Hood*, No. 3:08-cv-00012-MPM (N.D. Miss. Feb. 4, 2008) (Doc. 18); *McIntosh* Docs. 1131, 1131-2.

Here, we have another State Farm subpoena seeking discovery from the Scruggses, which they have adamantly objected to at every turn. The Scruggses would certainly not want to risk a contempt citation from this Court for any failure to comply with this Court’s Orders prior to their sentencing by Judge Biggers, which is currently set for July 2, 2008, see *United States v. Scruggs*, No. 3:07-cr-00192-NBB-SAA (N.D. Miss. May 29, 2008) (Doc. 195), while the consequences of a contempt citation diminish markedly after their sentencing.

Despite the Scruggses’ gauzy arguments that their Fifth Amendment rights might be violated by the mere act of producing various documents, nothing about Judge Walker’s ruling is clearly erroneous or contrary to law.

First, this “act-as-production” privilege is widely-recognized to be a weak one. Thus, for example, in *Fisher v. United States*, 425 U.S. 391, 411-12 (1976), the Court qualified it by acknowledging that although the act of production had communicative aspects, it was doubtful that an admission of the existence and possession of certain papers rose to the level of “testimony” protected by the Fifth Amendment.

Second, the sole case that the Scruggses’ cited to Judge Walker for this assertion arises in the context of a grand jury subpoena for documents belonging to a sole proprietor – as opposed to a collective business organization – as part of an investigation of suspected corruption by that sole proprietor. *United States v. Doe*, 465 U.S. 605, 606 (1984). The Fifth Circuit has applied *Doe* very narrowly, finding that individuals have no such privilege from producing records from a collective entity, even if that entity is a one-man corporation. See *In re Grand Jury Proceedings*, 814 F.2d 190, 192-93 (5th Cir. 1987) (citing *Bellis v. United States*, 417 U.S. 85, 88 (1974)). Indeed, in order to assert such a privilege, the documents *must* be “the private property of the person claiming the privilege, or at least in

his possession in a purely personal capacity.” *Bellis*, 417 U.S. at 90 (quoting *United States v. White*, 322 U.S. 694, 699 (1944)). Thus, in *Bellis*, the Court held that because the individual law partner held partnership records in a representative capacity, he could not assert a Fifth Amendment privilege as to those documents. *Id.* at 100-01. Here, of course, the Scruggses have previously asserted that the subpoenaed documents over which they purport to assert Fifth Amendment rights are literally possessed by collective “entities” such as “the Scruggs Law Firm” and “the SKG,” *see* Doc. 1201-4 at 4-5 (even though they are in their control, *see* Doc. 1075 at n.3).

Third, and *fatally* to the Scruggses’ claims, any such privilege can *only* be asserted on a document-by-document basis, subject to an *in camera* review by the Court. *See United States v. Dean*, 23 Fed. Appx. 448 (6th Cir. 2001) (following *United States v. Grable*, 98 F.3d 251, 257 (6th Cir. 2001)); *United States v. Drollinger*, 80 F.3d 389, 393 (9th Cir. 1996) (“As the Eleventh Circuit held in *United States v. Argomaniz*, [925 F.2d 1349, 1355 (11th Cir. 1991),] the required inquiry is best made in an *in camera* proceeding, where the defendant is given ‘the opportunity to substantiate his claims of the privilege and the district court is able to consider the ... documents requested by the summons.’”); *see also United States v. Barile*, 2007 WL 3534261, *3 (N.D.N.Y. Nov. 13, 2007) (“the Fifth Amendment cannot be invoked broadly, but applies only on a document-by-document ... basis. ... To receive the protection of this privilege, Respondent is directed to (1) describe each document ... and produce each document ... in an *in camera* proceeding”) (emphasis omitted). Despite the fact that these omissions were pointedly noted by State Farm in January 2008, *see* Doc. 1111 at ¶ 6, the Scruggses have *never* made any such showing, have *never* availed themselves of such procedures, and have *never* even requested the Court for the opportunity to do so. “Parties must take before the magistrate not only their best shot but all of their shots.” *Borden v. Sec’y of Health and Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987) (internal quotation marks omitted). Inasmuch as the Scruggses never availed themselves of these procedures, even after their omissions were pointed out three and a half months before the issuance of

the May 15, 2008 Order, it cannot be concluded that Judge Walker's ruling was clearly erroneous or contrary to law, nor can it be concluded "that [they are] *entitled* to a ruling in [their] favor as a *matter of law*." *Barnett*, 2006 WL 3083757, at **2-3 (emphasis added).

C. "Necessity" and "Availability from Other Sources"

Apparently overlooking the fact that on their objections it is *their burden* to demonstrate that Judge Walker's ruling was clearly erroneous or contrary to law, the Scruggses halfheartedly assert that, in the motion practice before Judge Walker, State Farm did not show its need for the documents or that they could not have been obtained elsewhere.

As was the case before Judge Walker, the Scruggses seek to rely on a statement from an inapposite Fifth Circuit case that cites Wright & Miller for the proposition that the Court must consider whether the information is "necessary and unavailable from any other source." Doc. 1201 at 10; *cf.* Doc. 1107 at 11 (same). First, in the case they cite, *Positive Black Talk, Inc., Inc. v. Cash Money Records, Inc.*, 393 F.3d 357, 377 (5th Cir. 2004), the court quashed the plaintiff's subpoena that sought nothing more than expert opinion testimony from a witness who had "no personal knowledge" of the facts and whose expert opinion "was actually provided at trial by [plaintiff's] other expert witness." Nothing even remotely like that situation is present here. Second, as they did before Judge Walker, they also omit the next sentence from Wright & Miller, which provides that "it obviously is a highly case specific inquiry and entails an exercise of judicial discretion." 9A Wright & Miller, Fed. Prac. & Proc. Civ. 2d § 2463.1 (2007). As a review of the May 15 Order reveals, Judge Walker made a highly case specific inquiry and properly exercised the broad judicial discretion that is vested in a federal Magistrate Judge when making a discovery ruling.

Moreover, Wright & Miller go on to make clear that the burden of establishing *undue burden* rests squarely on person who moves to have the subpoena quashed – *i.e.*, the Scruggses – and that the person who seeks to have it quashed cannot, as the Scruggses do, rest on mere assertion.

Under Rule 45(c)(3)(A)(iv) the burden to establish that a subpoena *duces tecum* imposes an undue burden is on the person who moves to have it quashed. That person cannot rely on a mere assertion that compliance would be burdensome and onerous without showing the manner and extent of the burden and the injurious consequences of insisting upon compliance with the subpoena. Nor can the party seeking to quash a subpoena rely on a discovering party's failure to cite case authority supporting the subpoena.

Id. As with their other lamentations, the Scruggses' arguments of burden and the like rest on nothing more than mere assertion and the formulaic incantation of legal terms and conclusory statements.

Further, "[t]he fact that [evidence] might be obtained, at least in part, from others has no pertinence because a person may not avoid a subpoena by saying that the evidence sought from him is obtainable from another," *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 998 (10th Cir. 1965), and "nothing in the Federal Rules of Civil Procedure requires a litigant to rely solely on discovery obtained from an adversary instead of utilizing subpoenas." *State Farm Mut. Auto. Ins. Co. v. Accurate Medical, P.C.*, 2007 WL 2993840, at *1 (E.D.N.Y. 2007) (citing *Covey*).

Against this background, the Scruggses go on to advance various corollary arguments, such as "seek the documents from ABC News or Joe Rhee," *see* Doc. 1201 at 11, or from unidentified "other sources," *see id.* at 13 – all of whom, following the Scruggses' approach, could just as easily turn around and say, "seek them other sources, such as the Scruggses." Yet, the discovery rules are designed to preclude such facile gamesmanship. Judge Walker was well within the ambit of his broad discretion on a discovery ruling to order the production of the documents from the Scruggses. Nothing that the Scruggses have presented demonstrates otherwise.

Time and again, the Scruggses merely, but impermissibly, advance arguments that invite this Court to second guess Judge Walker's carefully considered and carefully drawn ruling. But nothing that the Scruggses have presented establishes "not that the magistrate judge *could have* exercised his discretion and ruled in [their] favor, but rather that [they are] *entitled* to a ruling in [their] favor as a

matter of law.” *Barnett*, 2006 WL 3083757, at **2-3 (emphasis added). Consequently, under the strict standards that govern this Court’s review, their objections must be denied.

D. Attorney-Client and Work Product Privilege

The Scruggses’ passing argument that the Court ignored “their assertion of the attorney-client privilege and the work product privilege,” Doc. 1201 at 1, does not withstand scrutiny. The very reason this Court previously ordered a reconsideration of the privilege issues rested upon the recognition of the fact that “[t]he Magistrate, faced with ‘the Scruggses’ blanket claims of privilege as to the documents requests,’ declined to accept those claims *and was not in a position to evaluate claims of privilege.*” January 9 Order (Doc. 988) at 2 (emphasis added). Yet, rather than doing anything to put the Court in a proper position to evaluate claims of privilege, to this day, the Scruggses have *never* submitted, or offered to submit, a privilege log with respect to any documents over which they attempt to assert a privilege.

As State Farm noted in its papers to Judge Walker, *see* Doc. 1075 at ECF pp. 5-6, Rule 45(d)(2) requires that “[a] person withholding subpoenaed information under a claim that it is privileged ... *must* ... describe the nature of the withheld documents ... in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.” (emphasis added). In other words, a privilege log is required. “The operative language [of Rule 45] is mandatory and, although the rule does not spell out the sufficiency requirement in detail, *courts consistently have held that the rule requires a party resisting disclosure to produce a document index or privilege log.*” *In re Grand Jury Subpoena*, 274 F.3d 563, 575 (1st Cir. 2001) (collecting cases) (emphasis added). Privilege logs are “the universally accepted means of asserting privileges in discovery in the federal courts; the general objection that, for example, a request for production of documents calls for the production of documents which are privileged is condemned as insufficient.” *Avery Dennison Corp. v. Four Pillars*, 190 F.R.D. 1, 1 (D.D.C. 1999) (citations omitted).

In the May 15 Order (Doc. 1194), Judge Walker correctly noted that “sweeping generalities and blanket assertions of privilege ... provide insufficient foundation for the relief they seek,” *id.* at 5, that the documents they Rigsbys stole and gave to Scruggs “are discoverable, and are not protected by attorney-client privilege or attorney work product,” *id.* at 6, that “the Court has simply not been presented sufficient information to hold that any particular document request infringes on any legitimate privilege,” *id.* at 6, and that, as to the Scruggses, “[t]he Court has been provided nothing upon which to base a finding of privilege” *Id.* at 11.

As Judge Walker aptly stated in this context, “[t]he Court is not omniscient and cannot bar discovery based on speculation that a request might lead to disclosure of privileged information.” *Id.* at 6. And as Judge Walker aptly stated in a related context, “[t]he issues surrounding the document requests have existed for months. ... Finding no reason to further delay the disposition of these issues so that the depositions of Richard and Zach Scruggs can proceed, the Court denies the” requested relief. *Id.* at 7. For months, the Scruggses have known that they have never submitted a privilege log.

Even when this Court, through its January 9 Orders (Docs. 988, 989), gave the Scruggses a second chance to establish a claim of privilege, they knowingly and intentionally failed to submit a log and did absolutely nothing to enhance their blanket and generalized assertions of privilege. Their failure to provide a privilege log is properly deemed a waiver of any privilege that could have possibly applied. *See, e.g., In re Grand Jury Subpoena*, 274 F.3d at 575-76; *Agee v. Wayne Farms, L.L.C.*, 2007 WL 2903208, at *3 (S.D. Miss. Oct. 1, 2007).

The Scruggses’ erroneous complaints that these issues have been ignored by the Court, when they have been ignored by them, ring hollow. They have do nothing to establish “that [they are] entitled to a ruling in [their] favor as a matter of law.” *Barnett*, 2006 WL 3083757, at **2-3.

CONCLUSION

For the foregoing reasons, State Farm respectfully requests that this Court deny the Scruggses' objections to Judge Walker's May 15, 2008 Order.

Dated: June 2, 2008

Respectfully submitted,

/s/ John A. Banahan

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CERTIFICATE OF SERVICE

I, **JOHN A. BANAHAN**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that I have this date electronically filed the foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

DATED, this the 2nd day of June, 2008.

/s/ John A. Banahan
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