

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

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THOMAS C. and PAMELA McINTOSH,	:	
	:	
Plaintiffs,	:	CIVIL ACTION NO. 1:06-CV-1080-LTS-RHW
- against -	:	
STATE FARM FIRE & CASUALTY CO. and :	:	
FORENSIC ANALYSIS & ENGINEERING	:	
CO., et al.,	:	
	:	
Defendants.	:	

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**STATE FARM’S MEMORANDUM IN RESPONSE IN OPPOSITION TO
SCRUGGSES’ MOTION (DOC. 1232) TO SEAL THEIR DEPOSITIONS**

The Scruggses have not met their burden to show good cause to seal their depositions in which they repeatedly asserted the Fifth Amendment. Both Scruggses are convicted felons, both pleaded guilty in open court, and both were sentenced in open court following well-publicized indictments for their roles in the bribery of a judge. Richard Scruggs is also already on the public record as asserting the Fifth Amendment in open court dozens of times.

The Scruggses’ request rests upon their illogical and hypothetical speculation that not sealing these transcripts “may seriously prejudice their Fifth Amendment right against self-incrimination in any future criminal proceedings” – even though they would apparently be re-asserting it – “by unfairly portraying them as asserting a constitutional privilege to conceal misconduct and by undermining the presumption of innocence.” Doc. 1232 at 3, ¶ 8. Beyond the fact that in criminal proceedings no adverse inference can be drawn from the assertion of the Fifth Amendment, *see, e.g., Mitchell v. United States*, 526 U.S. 314, 327-29 (1999); *Farace v. Indep. Fire Ins. Co.*, 699 F.2d 204, 210 (5th Cir. 1983) (citing *Griffin v. California*, 380 U.S. 690 (1965)), the pre-existing public record of their felony indictments, guilty pleas, sentencing, and prior public assertions of the Fifth Amendment certainly did

nothing to chill their wholesale assertion of the Fifth Amendment here. Nor did the prior Order of this Court, which specifically held that the Fifth Amendment did not apply to certain subjects, *see* June 20, 2008 Opinion (Doc. 1211) at 2, but as to which the Scruggses nonetheless invoked it.

Moreover, the speculative future harm that the Scruggses ostensibly seek to avoid is defeated by their public filing of the instant motion. In their papers, the Scruggses freely admit that “[d]uring the course of their depositions, the Scruggses invoked their Fifth Amendment rights,” Doc. 1232 at 1, ¶ 3, that “the Scruggses actually asserted their Fifth Amendment privileges,” *id.* at 3, ¶ 10, and that defendants supposedly “alleged activity of a criminal nature against both the Scruggses,” including “the Scruggses’ relationship with the Rigsbys.” *Id.* at 2, ¶ 4. Having freely and repeatedly disclosed that information in their papers, there is nothing left to protect. In fact, the substance of the Scruggses’ motion has already been reported in the media. *See, e.g.*, Holbrook Mohr, “Scruggs Wants Testimony Sealed,” Sun Herald, July 29, 2008 (available at <http://www.sunherald.com/306/v-print/story/711105.html>); Jan Goodrich, “Dickie and Zach: seal our *McIntosh* Fifth-taking, please,” July 29, 2008 (available at <http://www.fofo.us/2008/07/29/dickie-and-zach-seal-our-mcintosh-fifth-taking-pleas/>). The Scruggses’ motion should be denied.

This Court’s Local Rules reflect the principle that court records are presumptively public. Local Rule 83.6(A). Depositions cannot be sealed unless the movant demonstrates good cause. *See* Fed. R. Civ. P. 26. That is, the movant must “show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements,” *In re Terra Int’l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998), and must “‘show some plainly adequate reason therefor.’” *In re EEOC*, 709 F.2d 392, 402 n.7 (5th Cir. 1984) (citation omitted). The Scruggses have woefully failed to meet their burden to show specific or sufficient facts constituting good cause to seal their depositions.

Their papers are cursory, conclusory, and devoid of any sufficient factual showing. Indeed, the Scruggses have not even submitted, or offered to submit, their deposition transcripts to this Court for *in*

camera review. Thus, among other things, the Scruggses simply leave this Court guessing to the extent to which, if at all, any of the questions might have been directed to any issues that might be the subject of an on-going criminal investigation relating to the Scruggses. The reason for this omission appears to be self-evident. As Judge Senter observed when rejecting the Scruggses' prior assertions of the Fifth Amendment in this matter, the discovery that State Farm was seeking did *not* appear to have any bearing on any criminal proceedings that were pending or known to be contemplated.

The Scruggses assert a Fifth Amendment privilege [to Request No. 5]. This objection will be overruled. The criminal contempt proceedings in the United States District Court for the Northern District of Alabama has been dismissed, and the requested documents do not appear to me to have any bearing on any other criminal proceedings now pending or known to be contemplated. This ruling will also apply to the Scruggses' Fifth Amendment objections to Requests No. 9, No. 10, No. 17, No. 23, and No. 25.

June 20, 2008 Opinion (Doc. 1211) at 2.¹ Instead, the Scruggses simply ask for a blanket sealing order.

To the extent the Scruggses are suggesting – though it is far from clear that they are – that they will be embarrassed if their depositions are not sealed, *cf.* Doc. 1232 at 3, ¶ 9, then they “must demonstrate that the embarrassment will be particularly serious.” *Cipollone v. Liggett Group, Inc.*, 785

¹ As set forth in the June 20, 2008 Opinion (Doc. 1211), those requests are described as follows:

“**Request No. 5** was narrowed to a requirement that the Scruggses produce documents evidencing communications with the media leading up to, including, or in any way related to the [August 2006] 20/20 broadcast, and all documents which the Scruggses provided to the media in connection with that investigation/broadcast.” *Id.* at 2.

“**Request No. 9** for all documents concerning communications between the Scruggses and Brian Ford, the engineer who prepared the October 5, 2005, engineering report for the McIntosh property, was granted.” *Id.* at 3.

“**Request No. 10** for all documents concerning communications between the Scruggses and any State Farm employee who worked on any Hurricane Katrina claim, was narrowed to require only the production of documents concerning communications in any way related to the Rigsbys or the McIntosh claim.” *Id.*

“**Request No. 17** for all documents represented to the Scruggses to have been taken from, removed from, copied from, forwarded from, or downloaded from, directly or indirectly, any State Farm office or State Farm computer system, including, without limitation emails, pertaining to or arising out of Hurricane Katrina was narrowed to require only the production of such documents that were not produced by State Farm in discovery in this case.” *Id.*

“**Request No. 23** for the production of documents picked up or otherwise retrieved by Richard Scruggs from a highly placed source at State Farm on a trip to Bloomington, Illinois, which Richard Scruggs referenced in a March 30, 2006, interview was granted.” *Id.* at 4.

“**Request No. 25** for all documents concerning any financial interest the Scruggses have in this or any other State Farm-related Hurricane Katrina matter following their withdrawal as counsel of record was granted.” *Id.* at 4.

F.2d 1108, 1121 (3d Cir. 1986). The Scruggses have made no such showing, *cf. In re Terra Int'l, Inc.*, 134 F.3d at 306, and it would be wholly inappropriate for them to attempt to do for the first time on reply since it would “deprive a non-moving party of a meaningful opportunity to respond.” *Mullen v. Treasure Chest Casino, L.L.C.*, 1997 WL 539917, at *3 n.4 (E.D. La. Aug. 29, 1997); *see also Cates v. Creamer*, 2008 WL 2620097, at *2 (N.D. Tex. June 27, 2008). Merely having some level of embarrassment, and they have not even shown that, is not sufficient to seal the transcript. *See Flaherty v. Seroussi*, 209 F.R.D. 295, 298-99 (N.D.N.Y 2001); *Hawley v. Hall*, 131 F.R.D. 578, 585-85 (D. Nev. 1990). Nor does a mere preference for privacy, which again they have not shown, constitute good cause. *See Sierra Club v. Franklin County Power of Ill.*, 2006 WL 1389014, *1 (S.D. Ill. May 19, 2006).

It is no secret that the Scruggses are convicted felons. In *United States v. Scruggs*, they pleaded guilty in open court and were sentenced in open court for their roles in connection with bribing a judge. *See, e.g.*, Ex. A, Mar. 14, 2008 Tr., at 2:24-3:2; Ex. B, June 27, 2008 Tr. at 20:20-24; Ex. C, Mar. 21, 2008 Tr. at 2:18-21; Ex. D, July 2, 2008 Tr., at 11:20-25. Moreover, in *Jones v. Scruggs*, Richard Scruggs asserted the Fifth Amendment dozens of times in open court, in response to every question asked of him except his name. *See* Ex. E, Apr. 15-16, 2008 Tr., at 20:5-25:6. Not only did those proceedings occur in open court, but they also received extensive media coverage. Whatever minimal embarrassment, if any, the Scruggses might possibly experience from not sealing depositions in which they acknowledge that they asserted the Fifth Amendment pales in comparison to what has already occurred in open court and on the public record. Further, the Scruggses are public figures who intentionally sought media coverage at every stage of the Katrina litigation and have put themselves well within the scope of the “strong public interest favoring the free dissemination of discovery materials” related to public figures. *See Flaherty*, 209 F.R.D. at 299. As the Scruggses further acknowledge, “[f]requent media reports in and out of Mississippi have provided public details of this civil litigation, and the allegations of criminal conduct that have been directed at the Scruggses.” Doc. 1232 at 3, ¶ 7.

Nor can the Scruggses properly rely on this Court’s August 9, 2007 Order, Doc. 343, sealing

other depositions. *See* Doc. 1232 at 3, ¶¶ 9-10. The factual circumstances warranting that protective order are absent. The State Farm employees whose depositions were sealed established that they were targets of ongoing state and federal criminal investigations into the subjects about which they would be deposed. *See* Doc. 342 at 1-2, ¶¶ 4-5. The Scruggses have made no such showing, either before their depositions or after it. The persons whose depositions were sealed – who, unlike the Scruggses, have not been indicted for or convicted of anything – established that if the transcripts in which they asserted the Fifth Amendment were released, then it would damage their reputations and interfere with selecting an impartial jury should they be charged. *Id.* at 2, ¶ 8. Again, the Scruggses have made no such showing, nor can they. The Scruggses are in a completely different situation. They cannot use that fact-specific determination, which was based on a showing made by others, as a substitute for meeting their own burden, which they have failed to do.

Nor is it without a high degree of irony that the Scruggses, who engaged in a course of conduct of disseminating sealed pleadings and evidentiary disclosures in the Rigsbys' *qui tam* litigation to the press up to a year before the statutory seal was lifted by an order of this Court, *see, e.g.*, Exs. F to I,² are asking this Court to seal documents that are unsealed and would presumptively be in the public domain once State Farm attached them as exhibits to its motions to compel the Scruggses (which are awaiting filing, *see* Doc. 1233). Stated otherwise, when the Scruggses were confronted with documents that were subject to a statutory seal that could not be lifted except by this Court's order, they evaded the seal; when they are confronted with documents that would presumptively be in the public domain (through the filing of State Farm's motions to compel the Scruggses, *see* Doc. 1233), they seek this Court's order to seal them. And they do so without making an adequate showing.

Finally, the Scruggses' testimony may also be significant to other proceedings that are currently pending before this Court, including the Rigsbys' *qui tam* litigation, and sealing the Scruggses'

² State Farm brings this information to the Court's attention so that it is aware of all the relevant facts. State Farm intends to brief the legal effect of this conduct more fully in papers that will be filed in the *qui tam* action.

deposition transcripts would needlessly impede State Farm's right to present those materials to the Court in such other matters.

For all the foregoing reasons, the Scruggses' motion to seal their depositions should be denied in its entirety.

Dated: July 29, 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 29th day of July, 2008.

/s/ John A. Banahan
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