

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,

v.

Case No.: 2:07-cr-325/RV

RICHARD F. SCRUGGS and
THE SCRUGGS LAW FIRM, P.A.,

ORDER

This is a most unusual case. Richard Scruggs and his law firm, The Scruggs Law Firm, P.A. (together, "Scruggs"), have been charged with criminal contempt arising out of a civil case pending in the United States District Court for the Northern District of Alabama, *E.A. Renfroe & Co., Inc. v. Rigsby*, 2:06-CV-1752. Scruggs is being prosecuted on this charge by special prosecutors appointed by the district judge presiding over the *Renfroe* case, Judge William M. Acker. There are several motions currently pending. However, this order deals only with Scruggs's motion to dismiss, which is contained within his response to the summons, notice, and order to show cause. Doc. 7.

I. BACKGROUND

The following facts are either undisputed, or set out by the Eleventh Circuit in its opinion in the *Renfroe* appeal. See Opinion, dated August 24, 2007, attached to Doc. 8, Ex. G ("11th Cir. Op.").¹

Scruggs is a Mississippi attorney who has represented hundreds of Hurricane Katrina victims in cases against their respective insurance companies. E.A. Renfroe & Company ("Renfroe") is a corporation headquartered in Birmingham, Alabama, whose business includes supplying insurance companies with claims adjusters in

¹ References to the docket in this case, as indicated above, are in the format "Doc. XX." References to the docket in the underlying civil case will be in the format "*Renfroe* Doc. YY."

the aftermath of natural disasters. Cori Rigsby Moran and Kerri Rigsby are sisters and former Renfroe insurance adjusters who began working for the company in 1998. In 2005, Renfroe deployed the sisters to the Mississippi Gulf Coast to assist one of its largest clients, State Farm Insurance Company (“State Farm”), in handling Hurricane Katrina-related insurance claims. While on this assignment, the Rigsbys came to believe that State Farm was engaged in fraudulent and illegal activities involving the claims. The sisters copied thousands of State Farm claim-related documents and shared them in “batches” with the following individuals and entities: (1) Scruggs, who had been retained by them as their attorney (for matters predating the *Renfroe* case) in February 2006; (2) the United States Attorney for the Southern District of Mississippi and the Federal Bureau of Investigation; (3) the ABC News show “20/20,” which in late August 2006 aired a segment highlighting the fraud allegations against State Farm; and (4) the Mississippi Attorney General, Jim Hood. It is undisputed that the sisters had transferred the documents to these other recipients and that the Rigsbys themselves no longer had the documents in their possession by the end of July 2006. *See* Doc. 11 at 5; *Renfroe* Doc. 145 at 3-4.

Nevertheless, on September 1, 2006, Renfroe filed suit against the Rigsbys, seeking to have the documents returned, damages, and injunctive relief. Scruggs was not named as a party in the *Renfroe* case. He had employed the sisters as insurance consultants beginning on July 1, 2006, and he represented them in a “whistleblower” case against State Farm and related litigation involving the documents, but he did not represent them, or make an appearance, in the *Renfroe* case. The Rigsbys were represented in the *Renfroe* case by attorneys from Washington, D.C., and Alabama.² After an evidentiary hearing in the *Renfroe* case,

² The special prosecutors contend that these attorneys were “presumably” paid by Scruggs. Even if true, this fact does not alter how the case must be decided.

Judge Acker entered, on December 8, 2006, a preliminary injunction providing, *inter alia*, that:

. . . [D]efendants, Cori Rigsby Moran and Kerri Rigsby, and their agents, servants, employees, attorneys, and other persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise (**with the express exception of law enforcement officials**) are hereby MANDATORILY ENJOINED to deliver forthwith to counsel for plaintiff all [documents at issue], whether originals or copies

Defendants and their agents, servants, employees, attorneys, and other persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are further ENJOINED not to further disclose, use or misappropriate any material described in the preceding paragraph unless to law enforcement officials at their request.

Renfroe Doc. 60 (emphasis in the original). Scruggs was not specifically named in the injunction, even though Renfroe was aware that he had the documents in his possession months before the injunction was entered. *See Renfroe* Doc. 14 at ¶ 22 (stating in their Answer filed more than two months before the injunction that the Rigsbys had “provided” the documents to Scruggs).³

In light of the criminal investigation into the fraud claims against State Farm, the district court exempted from the scope of the injunction any disclosure of the documents to, and the use by, law enforcement officials. The Eleventh Circuit referenced this “law enforcement exception” three times in its opinion in the *Renfroe* appeal. 11th Cir. Op. at 4, 10; *see also id.* at 12 (“As we have said twice,

³ It is possible that Scruggs was not added as a defendant in the case, or otherwise named in the injunction, because Renfroe believed that he would be bound thereby since the injunction applied to the Rigsbys and their “agents” and “attorneys.” Importantly, I again note that Scruggs represented the Rigsbys in other litigation, but not in the *Renfroe* case.

the injunction specifically allows disclosure of the documents to 'law enforcement officials.'"). The district court also entered a protective order that required counsel for Renfroe to keep the documents in their sole possession "under lock and key." *Renfroe* Doc. 60 at 14-15. They could not share or disclose the material to any person or entity, including their client Renfroe, "without first obtaining the express written approval of [the district] court." *Id.* at 15.

Scruggs received notice of the injunction on the afternoon it was entered, Friday, December 8, 2006. Apparently believing that he was subject to the injunction, he called Mississippi Attorney General Hood that evening, and again over the weekend, to discuss what to do with the documents. Scruggs claims that he and Hood were concerned that if the documents were delivered to Renfroe's counsel, then they might, in turn, be disclosed to Renfroe and State Farm, which allegedly could then prejudice the grand jury investigation of State Farm. At some point during their discussions, Hood requested that the documents be sent to him (even though he already had copies in his possession) instead of being sent to Renfroe's attorney. It was agreed between them that the Attorney General's Office would later draft a letter formally requesting the documents.⁴

The injunction became effective on Monday, December 11, 2006, when Renfroe posted a bond with the court. Based on Hood's prior oral request and his assurance that he would confirm that request in writing, Scruggs sent the documents to the Attorney General the following day, December 12th. It was not until later that day that Hood's assistant, Courtney A. Schloemer, sent the expected request via e-mail to Scruggs. The e-mail stated that Hood's office was

⁴ It is unclear who initially suggested that the documents be sent to Hood. See *Renfroe* Doc. 130 at 197-98. I will assume for purposes of this order, as the special prosecutors have urged, and as Judge Acker had implied, that it was Scruggs's idea and that he, in effect, asked Hood to "request" the documents.

“not comfortable that the protective measures put in place by the Court will be effective in keeping these documents out of the grasp of State Farm.” *See Renfroe* Doc. 79, Ex. 2. As they had discussed on Friday and over the weekend, Hood asked Scruggs to provide the Attorney General’s Office “with your copy of the documents from Cori and Kerri, and we can return them to you at a time when our investigation is not in jeopardy by the possibility of disclosure of those documents to the wrong party.” *Id.* A few hours later, Schloemer sent a second e-mail, this one stating that perhaps her previous request was “hasty” and suggesting that Scruggs first obtain permission from Judge Acker before sending the documents. *See Renfroe* Doc. 130 at 204. Obviously, Scruggs did not do so because the documents had already been sent. Nor did he attempt to retrieve them from the Attorney General.

Significantly, neither the Rigsbys nor their counsel in the *Renfroe* case knew anything about the Scruggs-Hood conversation or agreement to send the documents to the Attorney General’s Office. Indeed, the special prosecutors now contend --- as Judge Acker previously intimated, *see Renfroe* Doc. 145 at 8, 23-24 --- that Scruggs had acted on his own and for his own purposes. Doc. 11, Ex. 1 at ¶ 14 (contending that Scruggs talked with the Rigsbys’s attorney, Greg Hawley, between December 8th [when the injunction was entered] and December 12th [when the documents were sent to Hood], but “Scruggs did not tell Hawley about his discussion with the Attorney General of Mississippi or the plan to ship the documents to that office”); Doc. 11 at 16 (contending that “the evidence shows Scruggs knew about [the injunction] before the Rigsbys themselves and having been entrusted with the documents, decided what would be done with them without first advising his clients”); *see id.* at 2-3, 6, 9 n.3 (contending, *inter alia*, that “the documents were of value to [Scruggs];” he believed that “compliance with the injunction would be contrary to *his* economic interests;” he acted in order

to “further *his* interests;” he “put *self*-interest above compliance with the court;” and he acted to further “[*his*] commercial business endeavors”) (emphasis added). The Rigsbys, in other words, did not have anything to do with Scruggs sending the documents to Attorney General Hood. Cori Rigsby testified at a hearing before Judge Acker that Scruggs “had free range to do whatever he wanted to do with [the documents.] I considered those his documents at that point.” *See Renfroe* Doc. 130 at 115; *id.* at 118 (again stating that after she gave the documents to Scruggs “I considered those his documents”). Even though she may have believed that the documents belonged to Scruggs, Cori also felt that she had an obligation under the injunction to get the documents back and send them to counsel for Renfroe. Thus, she testified --- and Judge Acker found, *see Renfroe* Doc. 145 at 8-9, 24 --- that she and her sister made attempts to retrieve the documents from Scruggs and Hood in order to comply with the injunction, but to no avail. *See, e.g., Renfroe* Doc. 130 at 74-75, 79-81. Their attorney in the *Renfroe* case made similar unsuccessful attempts. *See id.* at 262-64.

The next month, on January 5, 2007, Renfroe filed a motion for an order to show cause for contempt of court, arguing that Scruggs had violated the terms of the injunction by sending the documents to Attorney General Hood. *Renfroe* Doc. 68. The district court granted the motion and ordered Scruggs to show cause why he should not be held in contempt. *Renfroe* Doc. 88. Later that month, on January 23, 2007, Scruggs announced that he reached a global settlement agreement with State Farm in a large Hurricane Katrina-related class action in Mississippi, *Woullard, et al. v. State Farm*, 1:06-CV-1057. Ten days later, Attorney General Hood returned the subject documents to Renfroe’s attorney. *Renfroe* Doc. 92 at 3 n.2.

The district court held a hearing on the possibility of a contempt charge on March 19-20, 2007. By Memorandum Opinion and Order, dated June 15, 2007 (“the June 15th Order”), Judge Acker recognized that the State Farm documents

were no longer in the possession of either Scruggs or Hood, and he declined to impose civil contempt against the Rigsbys and Scruggs. *See Renfroe* Doc. 145. He also declined to refer the Rigsbys for criminal contempt prosecution. In declining to refer the Rigsbys for criminal prosecution, Judge Acker stated that the sisters “certainly were not the brains of the injunction-avoidance schemes” and, moreover, “[a]fter they gave the documents to Scruggs they were, in effect, controlled by him.” *Id.* at 23-24. Therefore, the Rigsbys could be held in criminal contempt “only if held vicariously liable as agents or confederates of Scruggs.” *Id.* at 23. Judge Acker ultimately concluded that “the court does not believe that there is evidence to prove that either of [the sisters] engaged in conduct that constitutes a basis for punitive or criminal sanctions” because they “did not have possession of the documents on or after December 8, 2006, and this should preclude a jury finding that they knowingly or willfully violated the terms of the preliminary injunction.” *Id.* at 23-24.

However, Judge Acker did refer Scruggs for criminal contempt prosecution. In doing so, he was skeptical of the claim that Scruggs and Hood acted because they were concerned that compliance might thwart the criminal investigation of State Farm. Judge Acker suggested that Scruggs and Hood wanted to hold on to the documents in order to coerce State Farm into settling Hurricane Katrina cases that had been filed by Scruggs. *See id.* at 21-22 (“[T]he court does not understand how [disclosure of the documents to Renfroe or State Farm] would have jeopardized a criminal investigation of State Farm. Unless, as Renfroe has hinted at, Scruggs and Hood had teamed up to bully State Farm into civil and criminal settlements by telling State Farm that they had 15,000 inculpatory documents but not allowing State Farm to see them, the court does not see why it was worth it to Scruggs to risk contempt.”). Judge Acker referred the case for criminal prosecution to Alice H. Martin, the United States Attorney for the Northern District of Alabama.

While she was considering whether to take the case, Hood wrote a letter to Martin, claiming that Scruggs was his "confidential informant" and urging her not to prosecute. Shortly thereafter, Martin wrote to Judge Acker and stated that after taking a "dispassionate assessment" of the case, and after a "serious and thorough review of the facts surrounding this indirect criminal contempt, I respectfully decline to prosecute Mr. Scruggs or his firm." See *Renfroe* Doc. 147. She did not further offer any explanation for why she declined to prosecute.

That did not end the matter. Pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, Judge Acker then appointed two special prosecutors, and later a third, and directed that they prepare and file a charging document. On August 13, 2007, Judge Acker amended the June 15th Order insofar as it purported to exonerate the Rigsbys from criminal contempt. *Renfroe* Doc. 150. This was done after it was discovered that the Rigsbys and Scruggs had filed a *qui tam* case against State Farm in April 2006 (the *qui tam* case had, until August 1, 2007, been kept under seal). In light of this newly discovered fact, Judge Acker stated that he was not "sure of the exact relationship that existed between the Rigsbys, on the one hand, and Scruggs, on the other" when the documents were given to Scruggs or when the injunction was issued. *Id.* at 1-2. The court held that the question of criminal contempt "remains open" and "[f]urther exploration into the subject will be required before a final determination of whether or not probable cause for criminal contempt by the Rigsbys exists." *Id.* at 2.⁵

On August 21, 2007, Judge Acker and the three special prosecutors filed an instrument charging Scruggs with contempt of court. Doc. 1. Judge Acker and the

⁵ Now more than six months later, the Rigsby sisters have not been charged with criminal contempt, nor does it appear from the special prosecutors' arguments that they will be.

special prosecutors alleged that there was probable cause to believe that Scruggs and his firm “committed acts constituting a criminal contempt of this Court, that is, each wilfully violated and disobeyed [the injunction] by causing materials subject to the order and in their possession to be delivered to a third party with the specific intent of preventing said materials from being delivered to counsel for the plaintiff.”

II. DISCUSSION

There are several motions now pending before the court, the most significant of which is Scruggs’s motion to dismiss. Indeed, all the other motions will be moot if the case is dismissed, so this order will consider only the issue of dismissal. Scruggs advances four arguments in support of his motion. He argues first that he is innocent as a matter of law because giving the documents to Attorney General Hood fell within the “law enforcement exception” to the injunction. He argues second that he was not subject to the injunction, and, consequently, this court has no jurisdiction over him. He argues third and fourth that the appointment of the special prosecutors, and Judge Acker’s alleged supervision and continued control over the case, violates separation of powers principles and principles of disinterest. Because it appears the first two arguments are dispositive, I need not, and do not, consider the last two. I will address the first two arguments below, in reverse order. Before doing so, I must make some initial observations.⁶

⁶ Although it is not necessary that I reach Scruggs’s third and fourth arguments, I note that the Supreme Court has authorized the use of special prosecutors for criminal contempt. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987). Scruggs attempts to get mileage out of the fact that the U.S. Attorney declined to prosecute, but that is exactly what *Young* and Rule 42 contemplate. *See id.* at 801 (“[A] court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied.”); *see also* Fed. R. Crim. P. 42(a)(2) (“The court must request that the contempt be prosecuted by an attorney for the government. . . . If the government declines the request, the court must appoint another attorney to prosecute the contempt.”).

Judge Acker was faced with a very difficult and unusual situation, and I am sympathetic to what he attempted to do. He entered an order and binding injunction in the *Renfroe* case, only to have the defendants' attorney from separate (albeit related) litigation circumvent that order with help from an ally and friend in an important political law enforcement position. As will be discussed in Section II.B *infra*, there is a cloud of impropriety surrounding what Scruggs did and the nature of his eleventh hour agreement with Hood. It is certainly understandable that Judge Acker would attempt to hold him accountable. Perhaps there are ethical issues that should be examined. But, the question is not whether Scruggs acted ethically; the question is whether he can be held criminally responsible in a contempt proceeding.

The analysis must begin by recognizing that there are two different types of contempt: civil and criminal. Civil contempt is generally used for two purposes: "to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained.'" *Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C.*, 478 U.S. 421, 443, 106 S. Ct. 3019, 92 L. Ed. 2d 344 (1986) (citations omitted); *see also Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1304 (11th Cir. 1991) ("The court has the power to impose coercive and compensatory sanctions."). Renfroe originally sought both forms of civil sanctions, but, as previously noted, Judge Acker declined to hold the Rigsbys and Scruggs in civil contempt. He observed that "[i]n order for the court to impose **coercive** civil contempt sanctions, Renfroe must show by clear and convincing evidence that the December 8, 2006 preliminary injunction **currently** is being violated." *Renfroe* Doc. 145 at 13 (emphasis in the original; citing cases). At the time Judge Acker considered whether to impose contempt, the documents had already been returned to Renfroe's attorneys as required under the injunction. The court held that because the "defendants and Scruggs testified that they no longer have any Renfroe or State Farm documents, and Renfroe has not presented evidence that clearly and

convincingly refutes these assertions," coercive civil contempt was not warranted. *Id.* at 17. Judge Acker further held that the issue of compensatory civil contempt was premature because the validity of the injunction was at that time being challenged in the Eleventh Circuit. *See Renfro* Doc. 145 at 12-13. That appeal was later resolved and the motion for compensatory sanctions has been revived in the *Renfro* case. *Renfro* Doc. 188. The motion is still pending. To date, therefore, neither the Rigsbys nor Scruggs has been found in civil contempt.

In contrast to civil contempt, "[t]he role of criminal contempt is to protect the institutions of our government and enforce their mandates. A federal court may impose criminal sanctions pursuant to 18 U.S.C. § 401 (1982), to vindicate its authority and safeguard it [*sic*] own processes." *In re McDonald*, 819 F.2d 1020, 1023-24 (11th Cir. 1987); *see also Local 28 of Sheet Metal Workers' Intern. Ass'n, supra*, 478 U.S. at 443 ("Criminal contempt sanctions are punitive in nature and are imposed to vindicate the authority of the court."). "The essential elements of criminal contempt are that the court entered a lawful order of reasonable specificity, it was violated, and the violation was wilful. Whether the order is reasonably specific is a question of fact and 'must be evaluated in the context in which it is entered *and the audience to which it is addressed.*'" *McDonald, supra*, 819 F.2d at 1024 (citations omitted; emphasis added). The contempt may be either direct (*i.e.*, it takes place in the judge's presence), or indirect (*i.e.*, it takes place outside the judge's presence). *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 827 n.2, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994). Direct contempt may be adjudged and sanctioned by the court summarily, whereas indirect contempt can be imposed only after notice and an opportunity to be heard. *See id; Fed. R. Crim. P. 42*. This case involves indirect criminal contempt.

Scruggs has been charged under 18 U.S.C. § 401(3) and Rule 42 of the Federal Rules of Criminal Procedure. Rule 42 sets forth the procedures that apply to

criminal contempt, including the notice that must be given to the alleged contemnor, the court's authority to appoint a prosecutor, and the availability of a jury trial. Section 401(3) states that the court "shall have power to punish by fine or imprisonment, or both" contempt in the form of "disobedience or resistance to its lawful writ, process, order, rule, decree, or command." The injunction *sub judice* was issued under Rule 65 of the Federal Rules of Civil Procedure, which (although since amended) provided at that time:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Fed. R. Civ. P. 65(d). A criminal contempt proceeding is *sui generis*, and the court has the power and authority to order it dismissed when it is appropriate to do so. *See, e.g., United States v. Barnett*, 346 F.2d 99, 100 (5th Cir. 1965) (binding under *Bonner v. Prichard*, 661 F.2d 1206 (11th Cir. 1981)); *id.* at 102 (Tuttle, J.; Brown, J., dissenting but acknowledging same); *accord United States v. Kelsey-Hayes Co.*, 1971 WL 572, at *6 (E.D. Mich. Oct. 26, 1971) (courts have the inherent power to dismiss criminal contempt charge before trial if the undisputed facts "are such that it is manifest to the Court as a matter of law that there was no willful contumacious violation"). The special prosecutors have pointed out that there is no criminal procedure equivalent to the summary judgment of Rule 56 in the Federal Rules of Civil Procedure. However, the criminal rule applicable here is actually more demanding of the prosecution, because there must be a charge that in light of the undisputed facts (resolved in the prosecution's favor) would support

a finding of guilt beyond a reasonable doubt. For the special prosecutors, there are two major hurdles to overcome in order to survive dismissal in this case, neither of which is evidentiary. In fact, for purposes of this order, I will assume that the prosecution's underlying theory of the case is true, that is, Scruggs approached Hood and asked him to "request" the State Farm documents so that he could avoid complying with the injunction, and he did so for personal and commercial reasons.

A. This court has no personal jurisdiction over Scruggs

For jurisdictional purposes, the undisputed facts are that Scruggs was not a party, nor was he an attorney-of-record or at any time make an appearance in, the *Renfroe* case. Subject to exceptions discussed *infra*, it is axiomatic that courts only have power and jurisdiction to enjoin parties before the court. *See Scott v. Donald*, 165 U.S. 107, 117, 17 S. Ct. 262, 41 L. Ed. 648 (1897) ("The decree is also objectionable because it enjoins persons not parties to the suit."); *Infant Formula Antitrust Litigation, MDL 878 v. Abbott Laboratories*, 72 F.3d 842, 842-43 (11th Cir. 1995) (court lacks jurisdiction to issue preliminary or permanent injunction against non-party); *Doctor's Assocs., Inc. v. Reinert & Duree, P.C.*, 191 F.3d 297, 302 (2d Cir. 1999) ("[A] court's in personam order can bind only persons who have placed themselves or been brought within the court's power.") (citations omitted); *Additive Controls & Measurement Systems, Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1394 (Fed. Cir. 1996) ("Courts do not write legislation for members of the public at large; they frame decrees and judgments binding on the parties before them. For that reason, courts of equity have long observed the general rule that a court may not enter an injunction against a person who has not been made a party to the case before it.") (citing cases); *see also* 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2956, at 335 (2d ed. 1995). If one is not bound by an injunction, it naturally follows that he cannot be held in contempt for violating that injunction.

In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987), the Supreme Court of the United States explained that in punishing contempt, “the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties’ participation in judicial proceedings.” *Id.* at 800. Therefore, “[a] court’s authority is inherently limited . . . by the nature of the judicial power, for the court has jurisdiction in a contempt proceeding only over those particular persons whose legal obligations result from their earlier participation in proceedings before the court.” *Id.* at 800 n.10.⁷ Perhaps the seminal pronouncement on this subject is from Judge Learned Hand, who wrote almost 80 years ago:

[N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court.

Alemite Mfg. Corporation v. Staff, 42 F.2d 832, 832-33 (2d Cir. 1930) (emphasis added); see also *McKusick v. Melbourne*, 96 F.3d 478, 484 n.5 (11th Cir. 1996) (noting the “substantial case law to the effect that a court lacks equitable power to issue an injunction that binds the world at large”). Because he was not party to the *Renfro* case, the court is without jurisdiction over Scruggs (even if he did what the injunction forbade) unless there is reason to bind him to the injunction. See, e.g.,

⁷ Scruggs relies heavily on the above-quoted statements in *Young*, even though he seems to believe that they are not part of the majority opinion. See Doc. 7 at 20 n.10 (stating that the quoted language in *Young* “is contained in Part III-B of the court’s opinion, which failed to obtain a fifth vote. . .”). In fact, the above quotes are taken from *Part II-B*, which was the majority opinion joined by all five Justices.

Alemite, supra, 42 F.2d at 833 (an injunction cannot forbid “the act described . . . but only that act when the defendant does it”).

It is true that the injunction, by its express terms, applied to the Rigsbys and “their agents, servants, employees, attorneys, and other persons in active concert or participation with them.” This language almost exactly tracks Rule 65(d) of the Federal Rules of Civil Procedure, which, as quoted earlier, provides that an injunction is binding upon “the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them.” Rule 65(d) was derived from, and specifically intended to codify, the common law doctrine “that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.” *See Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14, 65 S. Ct. 478, 89 L. Ed. 661 (1945). Therefore, the broad language of Rule 65(d) is limited to those who fall within the “aider and abetter” ambit. The aider and abetter exception to the general rule against binding non-parties is well established, *see id.*; *see also United States v. Barnette*, 129 F.3d 1179, 1185 n.10 (11th Cir. 1997); *Waffenschmidt v. MacKay*, 763 F.2d 711, 714-17 (5th Cir. 1985); *G&C Merriam Co. v. Webster Dictionary Co., Inc.*, 639 F.2d 29, 35 (1st Cir. 1980); *Alemite, supra*, 42 F.2d at 833, and it was on this theory that Judge Acker appears to have based the contempt charge. *See generally Renfro* Doc. 87 at 6-7 (citing and quoting three aider and abetter cases).

But, upon careful and technical examination, I conclude that the exception does not apply on the facts of the case because there is no evidence or claim that the Rigsbys themselves violated the injunction. Indeed, Judge Acker held that they had not acted improperly with respect to the injunction; they had given all the documents to Scruggs more than five months *before* the injunction was entered. An injunction, of course, does not “reach backwards in time to action taken prior to

the time it was issued." See *Paramount Pictures Corp. v. Carol Pub. Group, Inc.*, 25 F. Supp. 2d 372, 375 (S.D.N.Y. 1998) (citing cases). "The basic principle of law is recognized that an aider and abettor may not be guilty in aiding or abetting a principal unless a principal did as a matter of fact commit a crime. The law requires a guilty principal before the aider and abettor can be punished." *Edwards v. United States*, 286 F.2d 681, 683 (5th Cir. 1960) (citations omitted) (binding under *Bonner, supra*, 661 F.2d at 1206).

Thus, in *Merriam, supra*, 639 F.2d at 29, the First Circuit held that a non-party "can be found to be in contempt only if in active concert or participation with a party in postinjunction activity. [A] key principle in cases binding a nonparty . . . is that a person properly named in the injunction must have had a material role in the subsequent violation of that injunction." *Id.* at 35. The court went on to hold on the facts of the case that "because no contumacious act of [any party] has been found, [the non-party] cannot be held on the basis of aiding or abetting them." *Id.* This principle is well settled law. See, e.g., *Herrlein v Kanakis*, 526 F.2d 252 (7th Cir. 1975); *Heyman v. Kline*, 444 F.2d 65 (2d Cir. 1971); *United Pharmacal Corp. v United States*, 306 F.2d 515 (1st Cir. 1962); *Alemite, supra*, 42 F.2d at 832; *Garrigan v. United States*, 163 F. 16 (7th Cir. 1908); see also *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 42 (1st Cir. 2000) (stating that if "the party prosecuting the contempt proceeding fails to show active concert or participation, a finding of contempt will not lie"); *Paramount Pictures Corp., supra*, 25 F. Supp. 2d at 374-75 ("A non-party in active concert cannot violate an injunction unless the enjoined party is also in contempt."); *Integrated Business Information Service (Proprietary) Ltd. v. Dun & Bradstreet Corp.*, 714 F. Supp. 296, 302 (N.D. Ill. 1989) ("[V]arious courts have held that unless a party violates the injunction, a non-party cannot be held under Rule 65(d), even though the non-party is doing what the injunction prohibits"); *O&L Assocs. v. Del Conte*, 601 F. Supp.

1463, 1464-65 (S.D.N.Y. 1985) (“Unless the defendants [in the underlying case] were involved in a violation of the Order, [the non-party] cannot be held in contempt as an abetter”); *accord* Annotation, *Who, Under Rule 65(d) of the Federal Rules of Civil Procedure, Are Persons “In Active Concert or Participation” With Parties to Action So As To Be Bound By Order Granting Injunction*, 61 A.L.R. Fed. 482, §§ 3-4 (citing cases and concluding that an aider and abetter may be liable for contempt only if he assists a party “who likewise engages in the enjoined act;” further explaining that “a person, other than a named party to an injunction, may be bound by the terms of the injunction only if the named party has also violated the terms of the injunction”). *Cf. Chase Nat’l Bank v. City of Norwalk*, 291 U.S. 431, 436-37, 54 S. Ct. 475, 78 L. Ed. 894 (1934) (non-party is enjoined from “knowingly aiding a defendant in performing a prohibited act” because the non-party in that situation is “privy to *his* contempt”) (emphasis added).

Moreover, Judge Acker found that the Rigsbys attempted (even if only half-heartedly) to comply with the injunction by seeking to get the documents back from Scruggs and Hood. Specifically, both sisters and their attorney, Greg Hawley, made several phone calls to Scruggs and the Attorney General’s Office and requested that the documents be delivered to counsel for Renfroe. This, too, precludes a finding that Scruggs aided and abetted any violation of the injunction. *See, e.g., Drywall Tapers of Greater New York Local 1974 of I.B.P.A.T., AFL-CIO v. Local 530 of Operative Plasterers and Cement Masons Int’l Assoc.*, 1987 WL 9682, at *6 (E.D.N.Y. Apr. 1, 1987) (explaining that where an enjoined party in another case attempted and was willing to comply with the injunction, the non-party charged with violating the injunction “was plainly not aiding and abetting him in any violation of the injunction”). Insofar as Judge Acker held in the June 15th Order (and the special prosecutors do not here dispute) that the Rigsbys did not violate the injunction, Scruggs cannot be held in contempt on the basis of aiding

and abetting. It is legally and logically impossible for Scruggs to have aided and abetted the contempt of parties who committed no contempt.⁸

The special prosecutors also argue that Scruggs was bound by the Renfroe injunction and subject to the personal jurisdiction of this court because he was “legally identified” with the Rigsbys. This argument is rooted in *Alemite, supra*, wherein Judge Hand stated in passing that a non-party may be in contempt if he aids and abets the defendant in violating an injunction, *or* if he is “legally identified” with him. 42 F.2d at 833. *Alemite* makes no attempt to define or explain what it means to be “legally identified” with an enjoined party. The Supreme Court has explained that a non-party must be “identified with [the enjoined party] in interest, in ‘privity’ with them, represented by them or subject to their control.” *See Regal Knitwear, supra*, 324 U.S. at 14. To bind such a person, however, it must be shown that the named party was *in some way* involved in the violation, or that at the very least he was aligned in purpose with the would-be contemnor. *See Zenith*

⁸ The primary case upon which the special prosecutors rely, *Waffenschmidt, supra*, 763 F.2d at 711, can be easily distinguished because the named defendant in the underlying case had been found in contempt and jailed for over two months, and the non-parties worked with him in a common scheme. The Rigsbys, by contrast, have so far been cleared of criminal contempt. I again recognize that Judge Acker amended his June 15th Order to the extent that it exonerated the Rigsby sisters from contempt. But, he amended the order only because he was unsure of the relationship between Scruggs and the Rigsbys when the *qui tam* case was filed and at the time of the injunction. He did not disclaim or vacate his factual findings that, *inter alia*, (i) Scruggs “controlled” the documents when the injunction was issued; (ii) Scruggs was the “brains” behind the injunction-avoidance scheme; (iii) the Rigsbys learned only after-the-fact that the documents had been shipped to Hood; and thus (iv) the evidence as developed “preclude[d] a jury finding that [the sisters] knowingly or willfully violated the terms of the preliminary injunction.” Even the special prosecutors now acknowledge and argue repeatedly that Scruggs acted in his own commercial interests and without the Rigsbys’ knowledge and input. The sisters have not been charged with criminal contempt, even though the issue has “remain[ed] open” for more than six months since Judge Acker amended his order.

Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 112, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969) (non-party “cannot be held in contempt until shown to be in concert or participation” with a party); *Chase, supra*, 291 U.S. at 436 (referring to persons “legally identified” with a defendant as those who assist the defendant in “performing a prohibited act” and are “privy to his contempt”); *Lynch v. Rank*, 639 F. Supp. 69, 72 (N.D. Cal. 1985) (the non-party and enjoined party must have a “commonality of incentives and motivations”). This conclusion finds support in the *Alemite* decision itself. There, almost immediately after explaining that a non-party may be in contempt if he is “legally identified” with the defendant, Judge Hand explained that “if the defendant is not involved in the contempt, the [non-party] cannot be; the decree has not been disobeyed.” See 42 F.2d at 833.; see also *id.* (holding that “the *only* occasion when a person not a party may be punished is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has the power to forbid, *an act of a party*”) (emphasis added).

Again, the special prosecutors do not argue that the Rigsbys were involved in the violation, nor does there appear to be any evidence that they were. Judge Acker acknowledged that, for all intents and purposes, Scruggs was the principal. As the Second Circuit observed in *Doctor’s Assocs., supra*:

It is one thing for an injunction against a principal also to bind the principal’s agents or servants. An order forbidding the principal to do an act on her own would normally be understood to bar the principal’s servants or agents from doing the act for the principal’s benefit. It is quite different for an injunction against an agent or servant also to bind the principal. By definition, the servant does not control the principal. If the court does not have jurisdiction over the principal, it is not easy to see why the court should have the power to bind her through an order directed against her servant.

191 F.3d at 304. The special prosecutors have not cited any case --- and my own research has uncovered none --- supporting the argument that a lawyer who represents a party in one case automatically becomes "legally identified" with that party for purposes of being bound by, and charged with violating, an injunction entered in another case, especially when that lawyer acts independent of his client and in his own interests. In fact, uniform case law would appear to hold to the contrary. *See, e.g., Regal Knitwear, supra*, 324 U.S. at 13 (court may not enforce injunction "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law"); *Chase, supra*, 291 U.S. at 437 (court may not punish "as a contempt the conduct of persons who act independently"); *Microsystems Software, Inc., supra*, 226 F.3d at 43 ("A nonparty who has acted independently of the enjoined defendant will not be bound by the injunction."); *Additive Controls, supra*, 96 F.3d at 1395 (non-party may be in contempt "only for assisting the enjoined party in violating the injunction;" he is not liable "for engaging in independent conduct with respect to the subject matter of [the underlying] suit"); *Waffenschmidt, supra*, 763 F.2d at 718 ("[I]f a nonparty asserts an independent interest in the subject property and is not merely acting on behalf of the defendant, then rule 65(d) does not authorize jurisdiction over the party") (explaining *Heyman, supra*, 444 F.2d at 65); *see also Matrix Essentials v. Quality King Distributors, Inc.*, 346 F. Supp. 2d 384, 392 (E.D.N.Y. 2004) (stating that a non-party may be held in contempt "only upon the 'predicate' finding that the enjoined party has violated the injunction" because contempt "will not lie against one who 'acts independently'"); *Paramount Pictures Corp., supra*, 25 F. Supp. 2d at 374-75 (no contempt jurisdiction over non-parties "who act independently"); *see also United States v. Hall*, 472 F.2d 261, 264 (5th Cir. 1972) (acknowledging the "common law rule that a nonparty who violates an injunction solely in pursuit of his own interests cannot be held in contempt")

(binding under *Bonner, supra*, 661 F.2d at 1206).⁹ It can thus be said that “Courts generally absolve contemnors who violate independently of the named party for their own benefit.” Doug Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 Tex. L. Rev. 873, 880 (1975).

For these reasons, I must conclude that the *Renfroe* court had no jurisdiction over Scruggs.¹⁰

B. Even if there is jurisdiction, Scruggs did not violate the injunction as worded

Assuming that Scruggs was bound by the injunction and, consequently, that there is jurisdiction over him, there is a “law enforcement exception” to the decree. The injunction stated that the documents could not be given to anyone “unless to law enforcement officials at their request.” It is undisputed that Hood, as the Mississippi Attorney General, is a law enforcement official. It is likewise undisputed that Hood requested the documents. Scruggs contends that the contempt charge should be dismissed because he complied with the plain language of the injunction, and he is, therefore, innocent as a matter of law. The special prosecutors advance

⁹ In *Hall*, the former Fifth Circuit went on to hold that this rule *did not* apply on the facts of the case, and it upheld a criminal contempt conviction against a non-party. *Hall* was a school desegregation case in which the district court held members of the general public in contempt for actions that “imperiled the court’s fundamental power to make a binding adjudication between parties properly before it.” 472 F.2d at 265. The decision, authored by Judge John Minor Wisdom, was justified in large part because of the “peculiar problems” posed by school desegregation cases --- cases that “required courts to exercise broad and flexible remedial powers.” *Id.* at 266. *Hall* can be distinguished and limited to its facts, as several of the above-cited cases have found. *Doctor’s Assocs., supra*, 191 F.3d at 303 n.4; *Herrlein, supra*, 526 F.2d at 255; *Lynch, supra*, 639 F. Supp. at 75-76.

¹⁰ Scruggs apparently *believed* he was subject to the injunction, and that is why he called Hood the night it was issued to discuss what to do. The special prosecutors referenced this fact during the hearing on this matter. But, as I indicated then, the fact that Scruggs may have *mistakenly* believed he was bound by the injunction is not, in itself, sufficient to create jurisdiction.

two arguments in response. First, they argue that Scruggs has misinterpreted the words of the injunction because it did not permit *post*-injunction disclosure to law enforcement. They next argue that, even if the injunction did permit disclosure to law enforcement, the disclosure here was a “sham.” They contend that Scruggs and Hood schemed to avoid compliance with the injunction for business purposes.

Injunctions must be read and interpreted objectively, like contracts. Indeed, there are “unbroken lines of authority that caution [courts] to read court decrees to mean rather precisely what they say. Decrees must be specific; they must describe in reasonable detail just what acts they forbid.” *NBA Properties, Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990) (Breyer, J.); *accord Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1244 (11th Cir. 2007) (injunction must be a “clear, definite, and unambiguous order requiring [or prohibiting] the action in question”) (brackets in original; citation omitted); *see also United States v. Saccoccia*, 433 F.3d 19, 28 (1st Cir. 2005); *Grace v. Center for Auto Safety*, 72 F.3d 1236, 1241 (6th Cir. 1996). These specificity requirements are not “merely technical,” but rather they are “designed to prevent uncertainty and confusion” and to avoid basing a contempt charge “on a decree too vague to be understood.” *NBA Properties, Inc.*, *supra*, 895 F.2d at 32. To the extent that there is any ambiguity or omission in the injunction, the order must be interpreted “to the benefit of the person charged with contempt.” *Id.* (citing cases); *see also Georgia Power Co. v. N.L.R.B.*, 484 F.3d 1288, 1291 (11th Cir. 2007) (“[W]e will construe any ambiguities or uncertainties in such a court order in a light favorable to the person charged with contempt.”). With the foregoing in mind, I turn to the precise terms of the injunction.

There are two operative paragraphs. The first provided that the Rigsbys were “MANDATORILY ENJOINED” to “deliver forthwith” the State Farm documents to counsel for Renfroe. *See Renfroe Doc. 60 at 13* (emphasis in the original). The second provided that the Rigsbys were “further ENJOINED not to further disclose,

use or misappropriate any material described in the preceding paragraph unless to law enforcement officials at their request." *See id.* (emphasis in the original). There is some ambiguity in the wording of the order because if the first paragraph was complied with (and the documents were given to counsel for Renfro), then as Judge Acker himself acknowledged at the March 2007 contempt hearing [see Doc. 130 at 187-88], the second paragraph would be superfluous (*i.e.*, the Rigsbys could not further disclose, use or misappropriate materials no longer in their possession). The special prosecutors attempt to resolve this ambiguity by arguing that the second paragraph meant only that the Rigsbys "could cooperate with law enforcement by discussing with law enforcement what they knew about the documents." *See* Doc. 11 at 5. This contention overlooks the nature of the object of the injunction. The second paragraph by its own terms applied to "any *material* described" in the first paragraph, which plainly consisted of the tangible documents themselves. Any attempt to limit the second paragraph to "mental impressions" or "recollections" must fail.

Resolving the ambiguity in a light most favorable to Scruggs, as the Eleventh Circuit has mandated, the injunction may be simply and reasonably read as follows. The first paragraph required the Rigsbys to deliver the documents "forthwith." That means "promptly; within a reasonable time under the circumstances." Black's Law Dictionary at 664 (7th ed.). If, however, a law enforcement official requested the documents *before* such delivery was accomplished, then under the terms of the injunction, the Rigsbys and Scruggs were authorized to comply with that request. The documents were voluminous (several thousand pages), and they were in Scruggs's possession. He learned of the injunction in the afternoon of Friday, December 8, 2006. It is perhaps not reasonable to expect on these facts that the documents would be delivered immediately, that is, Friday night. This is especially so considering that the injunction did not even become effective until Monday,

December 11th, when the bond was posted. During the intervening weekend, Hood requested the documents. This request fell within the law enforcement exception, which was an exception noted several times by the Eleventh Circuit on appeal in the *Renfroe* case. *See generally* 11th Cir. Op. at 4, 10, 12. Even though that ruling was entered in a different case involving different issues on appeal (and the Court of Appeals was not being called upon to decide whether the delivery to Hood was legitimate), the panel was nonetheless interpreting the *language* of the injunction, and I find that interpretation relevant here.

The special prosecutors next argue that, even if the injunction can be read to permit the shipment to law enforcement instead of Renfroe's counsel, Scruggs is still criminally liable because the transaction with Hood was a "sham." I agree that there is a cloud of suspicion surrounding the agreement between Scruggs and Hood. Scruggs claims that he and Hood believed the documents would be returned to Renfroe and State Farm in violation of the protective order, but he does not explain the basis for this concern. Moreover, even if the concern was well-founded in hindsight (as he now argues, *see* Doc. 7 at 7 n.3), he does not explain how that disclosure to Renfroe would have, or did, impede the criminal investigation. He also does not explain why he did not take his concerns to Judge Acker instead of making after-hour and weekend agreements with Hood. The timing of these events and of Scruggs's other cases involving State Farm (one of which was settled just 10 days before the Attorney General returned the documents to counsel for Renfroe) is another reason to be suspicious, as is Hood's unusual letter to United States Attorney Martin, suggesting that Scruggs not be prosecuted for contempt because he was a "confidential informant."

However, the fact remains that Scruggs did not violate the clear and express terms of the injunction. Again, as then-Judge (now Justice) Stephen Breyer has observed, courts must read injunctions "to mean rather precisely what they say."

NBA Properties, supra, 895 F.2d at 32. The injunction specifically and precisely said the documents could be given “to law enforcement officials at their request.” Regardless of the subjective intent that Hood may have had when he requested the documents, the undisputed fact is that he *did* make such a request. The objective language of the injunction expressly authorized the law enforcement exception, and it must be recognized here. Criminal contempt under such circumstances cannot be supported under the law.

III. CONCLUSION

For the above reasons, Scruggs’s motion to dismiss, Doc. 7, is GRANTED, and this case is DISMISSED, with prejudice. All other pending motions are DENIED as moot.

DONE AND ORDERED this 29th day of February, 2008.

/s/ Roger Vinson _____

ROGER VINSON

Senior United States District Judge