

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

STATE FARM FIRE AND CASUALTY
COMPANY and STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY

PLAINTIFFS

v.

CIVIL ACTION NO. 2:07CV188 KS-MTP

JIM HOOD, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE STATE
OF MISSISSIPPI

DEFENDANT

**MEMORANDUM OF AUTHORITIES IN SUPPORT OF
STATE FARM'S MOTION FOR A TEMPORARY RESTRAINING ORDER
AND FOR A PRELIMINARY INJUNCTION**

Plaintiffs State Farm Fire and Casualty Company and State Farm Mutual Automobile Insurance Company (collectively "State Farm") submit this Memorandum of Authorities in Support of State Farm's Motion for a Temporary Restraining Order and for a Preliminary Injunction against Defendant Jim Hood, in his official capacity as Attorney General of the State of Mississippi ("Attorney General Hood").

Introduction

A. Summary of Argument

On August 23, 2007, Attorney General Jim Hood served State Farm with a grand jury subpoena duces tecum seeking the production of hundreds of thousands of pages of Hurricane Katrina claims-handling information. Production to the Grand Jury is due this coming Monday, on September 17, 2007.

Attorney General Hood's service of this grand jury subpoena, now the fourth grand jury subpoena duces tecum that Attorney General Hood has issued to State Farm, violates his prior written agreement with State Farm to terminate the State of Mississippi's investigation and

abandon any future prosecution of State Farm, its employees and agents, concerning matters related to the handling of Hurricane Katrina claims (the "Non-Prosecution Agreement"). Attorney General Hood's reopened investigation has also been undertaken in bad faith.

Attorney General Hood's violation of the Non-Prosecution Agreement "is per se a bad faith prosecution." *Rowe v. Griffin*, 676 F.2d 524, 525 (11th Cir. 1982).

Nonprosecution agreements, like plea bargains, are contractual in nature, and are therefore interpreted in accordance with general principles of contract law. Under these principles, if a defendant lives up to his end of the bargain, the government is bound to perform its promises When the government believes that a defendant has breached the terms of a nonprosecution agreement and wishes to be relieved of performing its part of the bargain . . . **due process prevents the government from making this determination and nullifying the agreement unilaterally.**

United States v. Casteneda, 162 F.3d 832, 835-36 (5th Cir. 1998) (citations and footnotes omitted; emphasis added).

Attorney General Hood's malicious prosecution violates State Farm's Fourteenth Amendment due process rights. State Farm has filed this action under 42 U.S.C. § 1983 against Attorney General Hood in his official capacity to remedy his violations of State Farm's federal constitutional rights. Because of the emergency nature of this matter and the irreparable harm to State Farm and its employees, State Farm seeks a temporary restraining order and a preliminary injunction requiring Attorney General Hood to withdraw the Fourth Grand Jury Subpoena and to otherwise refrain from his unilateral violation of the Non-Prosecution Agreement.

B. Attorney General Hood's Bad-Faith Breach of the Non-Prosecution Agreement

On March 16, 2006, Attorney General Hood's office issued a Harrison County, Mississippi grand jury subpoena duces tecum (Complaint Exhibit A) on State Farm¹ in

¹ Plaintiff State Farm Mutual Automobile Insurance Company is a mutual insurance company, organized and existing under the insurance laws of the State of Illinois, and has its principal place of business in Illinois. State Farm Fire and Casualty Company is a stock insurance company organized and existing under the insurance laws of

connection with an investigation which, according to statements Attorney General Hood made to the media, centered on State Farm's claims-handling practices following Hurricane Katrina ("the investigation"). State Farm fully cooperated with Attorney General Hood's investigation and produced hundreds of thousands of pages of documents in response to the subpoena. Approximately eight months later, on December 14, 2006, Attorney General Hood issued a Jackson County, Mississippi grand jury subpoena duces tecum to State Farm seeking additional documents related to State Farm's handling of Katrina claims. (Complaint Exhibit B) A third grand jury subpoena was served on State Farm on December 18, 2006. (Complaint Exhibit C) State Farm also complied with the second and third grand jury subpoenas. In further cooperation with the investigation, in January 2007, State Farm voluntarily provided State Farm employees as witnesses to the Jackson County grand jury to answer Attorney General Hood's questions.

On January 23, 2007, after more than ten months of investigation, State Farm and Attorney General Hood reached a Non-Prosecution Agreement resolving Attorney General Hood's investigation into State Farm's handling of Hurricane Katrina claims. A press release issued that day by the Attorney General's Office stated that "[t]he criminal investigation of State Farm's claims handling practices is now complete. 'Although their activities warranted criminal investigation, our career prosecutors found that the matter would be better handled in civil court and in the United States Congress,' said Attorney General Hood." The agreement to conclude the investigation of State Farm's handling of Hurricane Katrina claims was memorialized in a letter dated January 23, 2007 (Complaint Exhibit D) that Attorney General Hood wrote to State Farm's attorneys:

the State of Illinois, is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company, and has its principal place of business in Illinois. State Farm Mutual Automobile Insurance Company is a Plaintiff because it is also a party to the non-prosecution agreement. Plaintiffs are jointly referred to as "State Farm."

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

January 23, 2007

James Tucker, Esq.
Butler Snow O'Mara Stevens & Cannada
210 E Capitol Street Suite 1700
Jackson, MS 39225
HAND DELIVERY

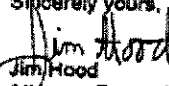
Dear Mr. Tucker:

Pursuant to the settlement of this case, I hereby agree as follows:

In light of the cooperation by State Farm Fire and Casualty Company and State Farm Mutual Automobile Insurance Company (jointly, "State Farm") in the criminal investigation being conducted by the Mississippi Attorney General's Office into State Farm's handling of Hurricane Katrina claims (hereinafter "Investigation"), and based on the facts developed and State Farm's willingness to enter into a settlement agreement requiring them to pay a substantial penalty to the victims, the Mississippi Attorney General and the State of Mississippi (a) will conclude the investigation as to State Farm, any of its current or former employees, directors, engineers, agents, counsel or adjusters, and (b) will not bring criminal charges against State Farm or any of its current or former employees, directors, engineers, agents, counsel or adjusters in connection with the investigation.

State Farm will pay costs of investigation as agreed to in the Settlement Agreement. All outstanding grand jury subpoenas issued from the Attorney General of Mississippi's Office to State Farm or its current or former employees, engineers, agents or adjusters are deemed withdrawn. State Farm may inform the recipients of these grand jury subpoenas that they need take no further action or appear as otherwise stated therein.

If you have any questions, please contact me.

Sincerely yours,

Jim Hood
Attorney General

CARROLL GARTIN JUSTICE BUILDING • POST OFFICE BOX 220 • JACKSON, MISSISSIPPI 39201-0220
TELEPHONE (601) 359-3680 • TELEFAX (601) 359-3441

The January 23, 2007 Non-Prosecution Agreement concluding Attorney General Hood's investigation of State Farm's handling of Hurricane Katrina claims is a valid and enforceable contract between Attorney General Hood and State Farm. *See, e.g., Moody v. State*, 716 So. 2d 592, 595 (Miss. 1998) ("We have squarely held that agreements between the State and defendants must be upheld by the trial court where a criminal defendant has detrimentally relied upon the agreement."). In reliance on the representations and agreements by Attorney General

Hood in the agreement concluding the investigation, State Farm has performed all of its obligations under the agreement, including, but not limited to, providing extensive information in the investigation and paying to Attorney General Hood's office the sum of \$5,000,000.00 on January 24, 2007, which he demanded and accepted to cover the costs of his office's investigation.

On August 23, 2007, exactly seven months after Attorney General Hood agreed not to further investigate or prosecute State Farm for its handling of Hurricane Katrina claims, Attorney General Hood issued on State Farm a fourth grand jury subpoena duces tecum (Complaint Exhibit D) seeking a massive number of documents, the production of which unquestionably is directed to State Farm's handling of Hurricane Katrina claims ("the Fourth Grand Jury Subpoena"). This action evidences that Attorney General Hood has reinstated his investigation of State Farm's Hurricane Katrina claims handling activities. The Fourth Grand Jury Subpoena is reproduced below:

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

SUBPOENA DUCES TECUM—GRAND JURY NO.

TO THE SHERIFF OF JACKSON COUNTY, MISSISSIPPI, OR TO ANY OTHER PERSON
AUTHORIZED TO SERVE PROCESS, GREETINGS:

You are hereby directed to summon the **Records Custodian for State Farm Fire and Casualty Company** whose agent for service of process, William E. Penna, located at 1080 River Oaks Drive, Suite B-100, Flowood, MS 39232 to be an appear before the Jackson County Grand Jury at 9:00 on Sept. 17th 2007 in the courthouse of Pascagoula, Mississippi, to testify on behalf of the State of Mississippi, and to then and there have and produce the following:

Definitions

- 1) The terms "documents" and "copies" as used herein apply to and include information stored, held or otherwise maintained electronically and/or in the computer system of State Farm Fire & Casualty Company.
- 2) The term "correspondence" as used herein applies to communications with State Farm initiated by or received by State Farm's employees, agents, vendors or subcontractors, including electronic correspondence;
- 3) The term "agreement" as used herein applies to contracts in their entirety or relevant portions thereof as well as correspondence, including electronic, within State Farm and between State Farm and its agents, vendors or subcontractors, that supplements, alters or confirms any written contractual agreement existing between the entities;
- 4) The term "claim file" as used herein applies to the contents of both electronic and hard copy files of a given claim;
- 5) The term "claim" as used herein applies to a submission for payment for Hurricane Katrina damage by the insured under a State Farm or National Flood Insurance policy or WYO policy, whether or not such submission is ultimately found to be excluded from coverage of that policy;
- 6) The term "policyholder" refers to any residential or commercial State Farm Fire and Casualty (hereinafter "State Farm") policyholder in Jackson, Harrison and Hancock counties who has sought payment under an existing and current policy for damage caused by Hurricane Katrina;
- 7) The term "National Flood Insurance Program" (hereinafter "NFIP") as used herein includes the Write Your Own (WYO) program administered by the NFIP;
- 8) The term "roster" as used herein refers to any spreadsheet, chart or other graphic representation in which lists of claimants is in some manner summarized and/or itemized for a particular purpose(s).

ITEMIZATION OF SUBPOENAED EVIDENCE

The following documents are sought in connection with the assessment and processing of claims filed by policyholders alleging damage from Hurricane Katrina in Jackson, Harrison and Hancock counties:

- 1) Any and all correspondence between State Farm and the National Flood Insurance Program (hereinafter "NFIP") relating to assessment of damage caused by Hurricane Katrina to residences located in Jackson, Harrison and Hancock counties;
- 2) Any and all documents evidencing the policy and procedures used by State Farm, its agents or vendors in submitting claims to the NFIP, including correspondence, standardized forms and training materials;
- 3) Copies of claim files for policyholders in which a portion of damage was submitted to the NFIP for payment and a portion of damage was paid by State Farm; including, but not necessarily limited to copies of any worksheets, estimates and/or calculations of repair costs, including those for labor and material, in such claim files;
- 4) Claims rosters for the following:
 - a) for claims in the aforementioned counties adjusted by E.A. Renfroe;

b) for claims in the aforementioned counties for which no independent adjuster or engineer was utilized;

c) for claims in the aforementioned counties referred to the Celebrity and High Profile claims division or any other specially designated claims area to which particular claims are routed by virtue of the policyholders' identity and/or for other than routine claims processing and the claim files for each such claim;

5) Copies of any worksheets and/or calculations in your custody, prepared by adjusters, including E.A. Renfroe, analyzing, summarizing and/or explaining the characterization of damage as being "wind," "water," or "a combination of wind and water;"

6) Copies of any agreements between State Farm and E.A. Renfroe concerning the custody of documents created in the assessment of policyholders' claims

7) Copies of all preliminary drafts, advance copies or otherwise unfinalized versions of opinions provided to State Farm by adjusters and engineers related to damages for which claims were made by State Farm policyholders;

8) Copy of the slab review agreement reached with the Mississippi Department of Insurance (hereinafter "MDOI") including, but not necessarily limited to, standards for review and eligible participants; and claims files for those participants covered by the slab review agreement reached with the MDOI;

Miss. Code Ann. §99-9-21 states that every witness subpoenaed in any criminal case shall attend, from day to day, and from term to term without further notice, until discharged by the court or by a party at whose instance he was subpoenaed.

You are not to disclose the existence of this subpoena. Any such disclosure could impede the investigation being conducted thereby interfere with the enforcement of the law.

In lieu of such appearance, the person named above, within six (6) calendar days from the day this subpoena is served, may deliver the described documents to Bert Wallace, an agent of the Office of the Mississippi Attorney General, or to any other properly identified agent of said office.

WITNESS my hand and seal, this the 23 day of August, 2007.

JOE W. MARTIN, JR.
CIRCUIT CLERK OF JACKSON COUNTY

By: Jinda Wiederma D.C.

Courtney A. Schloemer
Special Assistant Attorney General
P.O. Box 2
Jackson, MS 39205
(601)359.4250

In addition to Attorney General Hood's service of the Fourth Grand Jury Subpoena, State Farm recently has learned that Attorney General Hood wrote a letter, dated July 16, 2007, to

federal law enforcement officials in Alabama stating that he is engaged in "an ongoing investigation into what [Attorney General Hood] believes is State Farm's fraudulent conduct, not only toward their own policyholders, but also against the National Flood Insurance Program as well. Our investigation continues. . . ." (Complaint Exhibit F) Attorney General Hood's letter demonstrates his bad faith: he has reinstated an investigation of State Farm's handling of Hurricane Katrina claims notwithstanding his unequivocal affirmation in the Non-Prosecution Agreement that "based on the facts developed" in his investigation, the investigation was concluded and no criminal charges were brought.

ARGUMENT

I. STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

Pursuant to Fed. R. Civ. P. 65(a), a temporary restraining order and/or a preliminary injunction is appropriate when the moving party demonstrates:

- (1) a substantial likelihood of success on the merits;
- (2) a substantial threat that failure to grant the injunction will result in irreparable injury;
- (3) that the threatened injury to the Plaintiff outweighs the threatened injury to the Defendant; and
- (4) that granting the injunction will not disserve the public interest.

See generally Walgreen Co. v. Hood, 275 F.3d 475, 477 (5th Cir. 2001); *Sierra Club, Lone Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993). As demonstrated below, State Farm satisfies all four requirements for entry of a temporary restraining order and a preliminary injunction in this case.

II. STATE FARM WILL SUCCEED ON THE MERITS OF ITS CLAIMS BECAUSE ATTORNEY GENERAL HOOD HAS VIOLATED STATE FARM'S DUE PROCESS RIGHTS AND SETTLED LAW PROHIBITS HIM FROM UNILATERALLY BREACHING THE NON-PROSECUTION AGREEMENT WITH STATE FARM

Non-prosecution agreements are contractual in nature; therefore, they are interpreted in accordance with general principles of contract law. *United States v. Castaneda*, 162 F.3d 832,

835 (5th Cir. 1998); *United States v. Cantu*, 185 F.3d 298, 302 (5th Cir. 1999). Under these principles, “if a defendant lives up to his end of the bargain, the government is bound to perform its promises.” *Castaneda*, 162 F.3d at 835-36. The government is released from its commitments only if the citizen “materially breaches” its reciprocal obligations. *Id.* at 836.

The January 23, 2007 Non-Prosecution Agreement between Attorney General Hood and State Farm was based both on State Farm’s cooperation in the investigation and the company’s payment of the \$5,000,000.00 costs of Attorney General Hood's investigation. Constrained by due process requirements, Attorney General Hood may not unilaterally make a determination that a breach of the Non-Prosecution Agreement has occurred. *E.g.*, *Castaneda*, 162 F.3d at 835-36. Instead, to nullify a Non-Prosecution Agreement, the government must prove to a court by a preponderance of the evidence that: (1) the citizen breached the agreement; and (2) the citizen's breach is sufficiently material to warrant rescission. *Id.*

Furthermore, specific performance is the only appropriate contract remedy for the breached agreement in the present case. Because Non-Prosecution Agreements, like plea agreements, are contractual in nature, the equitable remedy of specific performance is available where the remedy at law is inadequate. *See, e.g.*, *United States v. Munoz*, 408 F.3d 222, 226 (5th Cir. 2005) (“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”); *Hovey v. Superior Court In and For County of Maricopa*, 798 P.2d 416, 420 (Ariz. Ct. App. 1990) (thoroughly explaining the logic behind the proper use of specific performance in plea agreements).

A contractual remedy is adequate only where it places the performing party in as good a legal position as that party would have enjoyed had the contract been performed. *Hovey*, 798

P.2d at 420. When a defendant has upheld its end of a Non-Prosecution Agreement and there is no basis for a court to conclude that the government could not adhere to its promise, essential fairness mandates specific performance of the agreement. *Spence v. Superintendent, Great Meadow Correctional Facility*, 219 F.3d 162, 174-75 (2d Cir. 2000) (Where the government's breach "touches the essence of the plea agreement, specific performance . . . is appropriate."). Rescinding the plea agreement or merely vacating the plea will often expose the citizen to the charges previously filed (or contemplated) against him, and, as such, will deprive him of the benefit of his plea bargain by exposing him once again to criminal charges, perhaps even additional or more serious charges. *Hovey*, 798 P.2d at 420. Therefore, returning the citizen to his position prior to the agreement is thus no relief at all, and specific performance provides the only appropriate relief. *Munoz*, 408 F.3d at 226; *see also Frierson v. Delta Outdoor, Inc.* 794 So. 2d 220, 225-26 (Miss. 2001) (evaluating non-criminal contract breach, and observing that, "Judicial discretion notwithstanding, where a contracting party can feasibly be given what he bargained for, specific performance is the preferred remedy").

Attorney General Hood's violation of the Non-Prosecution Agreement "is per se a bad faith" act. *Rowe v. Griffin*, 676 F.2d 524, 525 (11th Cir. 1982); *accord United States v. Casteneda*, 162 F.3d 832, 835-36 (5th Cir. 1998). Attorney General Hood unilaterally breached the Non-Prosecution Agreement without securing a final judgment from a court of competent jurisdiction that he has grounds to do so. These acts are in violation of State Farm's right to due process under the Fourteenth Amendment. Accordingly, State Farm has a substantial likelihood of prevailing on the merits of this claim.

III. IRREPARABLE HARM RESULTS TO STATE FARM FROM ATTORNEY GENERAL HOOD'S VIOLATION OF STATE FARM'S CONSTITUTIONAL RIGHTS

As a matter of law, "federal courts at all levels have recognized repeatedly that constitutional rights violations constitute irreparable harm." *Maxey v. Smith*, 823 F.Supp. 1321, 1328 (N.D. Miss. 1993)(citing *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976)); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir.1981); *Cohen v. Coahoma County*, 805 F.Supp. 398, 406 (N.D. Miss.1992). In *Wilson v. Thompson*, 593 F.2d 1375, 1382 (5th Cir. 1979), the Fifth Circuit held that a bad faith prosecution, in itself, constitutes an irreparable injury. See also *Bishop v. State Bar of Texas*, 736 F.2d 292, 294 (5th Cir. 1984). As set forth above, Attorney General Hood's breach of his agreement and bad-faith investigation of State Farm violate State Farm's Fourteenth Amendment rights. Because the loss of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), State Farm has established the necessary injury in support of its request for preliminary injunction.

IV. THE THREATENED INJURY TO STATE FARM, WHICH IS NOW SUBJECT TO CRIMINAL PROSECUTION IN VIOLATION OF ITS CONSTITUTIONAL RIGHTS, SIGNIFICANTLY OUTWEIGHS ATTORNEY GENERAL HOOD'S BURDEN OF COMPLYING WITH THE NON-PROSECUTION AGREEMENT AND REFRAINING FROM HIS BAD-FAITH INVESTIGATION OF STATE FARM

As Circuit Judge Homer Thornberry observed in the context of enjoining a state prosecutor's breach of a Non-Prosecution Agreement, "the need for federal equitable relief to avoid irreparable injury is extraordinarily pressing The real injury to [the defendant] lies in the future. It would be the loss of the benefit of his bargain - his right not to be prosecuted." *Rowe*, 676 F.2d at 530 (Thornberry, J., concurring). Attorney General Hood shall not be harmed in any way by this Court's preliminary injunction requiring him to cease his bad faith investigation and abide by the Non-Prosecution Agreement with State Farm – an agreement that

Attorney General Hood drafted himself. As recognized by the Mississippi Supreme Court, "[t]he integrity of the state's law enforcement and prosecutorial powers is seriously impugned by any lack of good faith in complying with [non-prosecution] agreements." *Edwards v. State*, 465 So. 2d 1085, 1086 (Miss. 1985).

On the other hand, State Farm and its employees are being subjected to a criminal process undertaken in bad faith, a proceeding that Attorney General Hood had agreed, and State Farm had understood, was over and would not be reopened. As noted in Attorney General Hood's letter agreement, State Farm has fully cooperated with the government, including paying \$5,000,000.00 to Attorney General Hood's office to cover the costs of his investigation. Attorney General Hood has received the benefit of his bargain; State Farm is now legally entitled to the benefit for which it bargained. Thus, a weighing of the interests clearly supports issuance of a temporary restraining order and a preliminary injunction.

V. THE PUBLIC INTEREST IS ADVANCED BY REQUIRING ATTORNEY GENERAL HOOD TO HONOR HIS NON-PROSECUTION AGREEMENT WITH STATE FARM AND REFRAIN FROM BAD-FAITH INVESTIGATIONS

"[I]f a defendant lives up to his end of the bargain, the government is bound to perform its promises." *United States v. Castenada*, 162 F.3d 832, 835-36 (5th Cir. 1998). "Because a government that lives up to its commitments is the essence of liberty under law, the harm generated by allowing the government to forego its [non-prosecution agreement] obligations is one which cannot be tolerated." *United States v. Peglera*, 33 F.3d 412, 414 (4th Cir. 1994). "The Government's failure to fulfill its promise affects the fairness, integrity, and public reputation of judicial proceedings . . ." *United States v. Munoz*, 408 F.3d 222, 226 (5th Cir. 2005). The public interest would not only be disserved, but would also be severely undermined by allowing Attorney General Hood to unilaterally breach contracts at his whim and to dishonor his Non-Prosecution Agreements. *Cf. Munoz*, 408 F.3d at 226 (although the Government has a

duty to provide the sentencing court with relevant factual information and to correct misstatements, "it may not hide behind this duty to advocate a position that contradicts its promises in a plea agreement").

The public interest in the integrity of non-prosecution agreements is demonstrated further by the fact that federal courts view a citizen's efforts to enjoin prosecutions in breach of those agreements as one of the extraordinary circumstances calling for a federal court to enjoin a bad faith state court prosecution. *E.g., Younger v. Harris*, 401 U.S. 37, 46 (1971). For example, in *Rowe v. Griffin*, 676 F.2d 524, 525 (11th Cir. 1982), a district attorney obtained an indictment against a former informant, Rowe, who had years before been granted prosecutorial immunity in return for cooperating in a murder investigation and subsequent trial. Rowe filed a section 1983 action in federal court and obtained a permanent injunction prohibiting the district attorney and his successors in office from further prosecuting the indictment. *Id.*

On appeal, the Eleventh Circuit affirmed the injunction, finding the bad faith exception recognized in *Younger* applied:

Ordinarily a federal court should refrain from interfering with a pending state criminal prosecution, either by injunction or declaratory judgment. Equitable intervention is appropriate only when there exist special circumstances which create a threat of great, immediate, and irreparable injury. Prosecutions taken in bad faith or for the purpose of harassment fall within this exception. We find that . . . the prosecution of Rowe after Rowe was assured of immunity from prosecution by state prosecutors, is per se a bad faith prosecution.

Id. at 525-26 (citations omitted). The Fifth Circuit likewise holds that "[i]t is well established that a showing of bad faith prosecution presents a narrow exception to the doctrine of abstention which will justify federal interference in a pending state court criminal proceeding." *Fitzgerald v. Peek*, 636 F.2d 943, 944 (5th Cir. 1981).² Thus, it is well established that prohibiting ongoing

² The Anti-Injunction Act ordinarily prohibits a federal court from enjoining an ongoing state court proceeding. However, the Act does not so prohibit when "expressly authorized by Act of Congress...." 28 U.S.C. §

state actions that violate the federal constitutional rights of a party to a non-prosecution agreement manifestly serves the public interest, while allowing a continuing violation of those rights would fundamentally undermine the public's trust in the prosecutorial powers vested in our state law enforcement officials.

CONCLUSION


In order to avoid a continuing violation of State Farm's constitutional rights, this Court immediately should enjoin Attorney General Hood's bad faith investigation or prosecution of State Farm and its employees and agents as it is in violation of his January 23, 2007 Non-Prosecution Agreement. State Farm specifically requests:

- (1) A temporary restraining order and preliminary injunction of specific performance, pursuant to 28 U.S.C. §§ 1651 & 2283, as well as 42 U.S.C. § 1983 and other law, requiring Attorney General Hood, his agents, and any other person or persons purporting to act on behalf of the State of Mississippi and/or its political subdivisions, and their respective successors, to honor, abide by and perform in full the entirety of the January 23, 2007 Non-Prosecution Agreement with State Farm, by, including but not limited to, terminating the current criminal investigations of State Farm's handling of Hurricane Katrina claims and refraining from reopening, continuing, reinstating or launching any further criminal investigation of State Farm's handling of Hurricane Katrina claims, as well as seeking to initiate, bring or prosecute in any manner any criminal charges whatsoever against State Farm or any of its current or former employees, directors, engineers, agents, counsel or adjusters, related in any manner to the handling of Hurricane Katrina claims; and
- (2) Such further, supplemental, alternative, different or additional equitable relief as may be appropriate under the premises.

2283. The Supreme Court of the United States held in *Mitchum v. Foster*, 407 U.S. 225, 237 (1972), that actions under 42 U.S.C. § 1983 satisfy the requirements of the first exception to section 2283 as an express congressional authorization to intervene in state court proceedings in order to protect federal rights. Accordingly, when a "district court[] order ...entered pursuant to a claim under section 1983 involv[es] the deprivation of constitutional rights, section 2283 [does] not prohibit the issuance of [an] injunction" against a state proceeding. *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 300 (5th Cir. 1979).

Respectfully submitted, this the 13 day of September, 2007.

STATE FARM FIRE AND CASUALTY COMPANY and
STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY, Plaintiffs

BY: 
Robert C. Galloway, MB No. 4388
Jeffrey A. Walker, MB No. 6879

ATTORNEYS FOR STATE FARM FIRE AND
CASUALTY COMPANY and STATE FARM
MUTUAL AUTOMOBILE INSURANCE COMPANY

OF COUNSEL:

ROBERT C. GALLOWAY, MB No. 4388
BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
P. O. DRAWER 4248
GULFPORT, MS 39502
T: (228) 575-3019
F: (228) 868-1531
E-MAIL: bob.galloway@butlersnow.com

JEFFREY A. WALKER, MB No. 6879
BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
210 E. Capitol Street, Suite 1700 (39201)
P.O. BOX 22567
JACKSON, MS 39225-2567
T: (601) 985-4558
F: (601) 985-4500
E-MAIL: jeff.walker@butlersnow.com

CERTIFICATE OF SERVICE


I, Robert C. Galloway, one of the attorneys for Plaintiffs, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following, via the means indicated below:

Via Hand Delivery and E-mail

Attorney General Jim Hood
Office of the Attorney General
Walter Sillers Building
550 High Street, Suite 1200
Jackson, Mississippi 39201

DEFENDANT

THIS the 13 day of September, 2007.



Robert C. Galloway, MB No. 4388