



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. 2:07cv188KS-MTP

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

DEFENDANT

**MEMORANDUM IN SUPPORT OF STATE FARM'S MOTION  
TO EXTEND TEMPORARY RESTRAINING ORDER,  
FOR SCHEDULING CONFERENCE  
AND FOR EXPEDITED DISCOVERY**

**(Concerns Dispositive Relief – Addressed to District Judge)**

**\*\*\* Local Rule 7.2(h) Treatment Requested \*\*\***

**\*\*\* Urgent and Necessitous Motion Concerning Preliminary Injunction Hearing \*\*\***

Pursuant to Fed. R. Civ. P. 1, 16, 26(d) & (f) & 65, Miss. Unif. Dist. Ct. R. 7.2(h) & 26.1(A)(4) and other law, Plaintiffs State Farm Fire and Casualty Company and State Farm Mutual Automobile Insurance Company (collectively "State Farm"), submit this Memorandum in Support of their Motion to Extend Temporary Restraining Order, for Scheduling Order and for Expedited Discovery in Advance of Case Management Conference.

**Introduction**

On September 13, 2007, State Farm filed this Action under 42 U.S.C. §§ 1983 & 1985(2) against Jim Hood, in his official capacity as Attorney General of the State of Mississippi ("Attorney General Hood"). This Action seeks to enjoin Attorney General Hood's unconstitutional breach of an agreement to conclude and not reinstitute or reopen a criminal investigation of State Farm.

Concomitantly with filing suit, State Farm filed a Motion for Temporary Restraining

Order and for Preliminary Injunction (“TRO Motion”). On September 14, 2007, the Court granted that motion and entered a TRO against Attorney General Hood – one that expires by its own terms at 12:01 a.m. CDT on September 29, 2007, unless extended by agreement of the Parties or by further Order of the Court. (09/14/07 TRO.)

As explained in State Farm’s motion papers, the urgency of that motion was founded in large part upon a Mississippi grand jury subpoena duces tecum directed to State Farm that had a compliance date of Monday, September 17, 2007 -- just one business day from the date on which State Farm filed its TRO motion. (Cmpl.) That grand jury subpoena was issued out of an unlawful criminal investigation initiated by Attorney General Hood in breach of his agreement with State Farm and in gross violation of State Farm’s constitutional rights. See Arguments and Authorities in (SF TRO Mtn. & Mem.)

In light of the TRO’s September 29, 2007 expiration date, the Court will have to hold a preliminary injunction hearing in the very near future. In order to have a full and fair opportunity to present its case at that hearing, State Farm requires some limited – but extremely expedited discovery – discovery which the Rules authorize in unusual situations such as this.

Further, based on comments made by Attorney General Hood’s counsel during the TRO hearing, it appears likely that Attorney General Hood may file at least three motions: (1) to dismiss for either lack of subject matter jurisdiction and/or based on some abstention doctrine; (2) to transfer venue intra-district; and possibly, (3) to seek the recusal of the District Judge. As this Court noted during the TRO hearing when Attorney General Hood’s counsel declined to consent to the TRO being extended from 10 to 30-days:

I think you are being very aggressive saying you can have this properly briefed in ten days....

(09/14/07 Trans. at 36, lines 23-25.) State Farm agrees.

Simply put, under the existing TRO's September 29, 2007 expiration date, there is much to be done and very little time in which to do it. For example, the Parties need time to:

- (1) File any further dispositive or procedural motions;
- (2) Respond to all filings by the other Parties;
- (3) Conduct expedited discovery relevant to the upcoming preliminary injunction hearing; and
- (4) Prepare for the upcoming preliminary injunction hearing.

Further, State Farm has now filed a First Amended Complaint. That Complaint broadens the scope of the claims at issue in this Action.

For these reasons, State Farm moves this Court to extend the TRO from its current September 29, 2007 expiration date to the later of midnight on October 12, 2007 or the date on which this Court reaches final resolution of any jurisdictional issues, so as to afford the Parties adequate time to accomplish the necessary predicates to a full and fair preliminary injunction hearing. Attorney General Hood can claim no undue prejudice from such an extension. In fact, the extension would benefit all Parties, as well as the Court, by providing needed breathing space to move this matter forward in an orderly and considered fashion.

### ARGUMENT

#### **I. THIS COURT SHOULD EXTEND THE TRO TO AT LEAST MIDNIGHT ON OCTOBER 12, 2007**

Fed. R. Civ. P. 65(b) provides in relevant part that a TRO "shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, *unless within the time so fixed the order, for good cause shown, is extended for a like period* or unless the party against whom the order is directed consents that it may be extended for a longer period...." *Id.* (emphasis added). As recently explained by a district court in Kansas:

A court may extend a TRO for an additional ten days "for good cause shown" and for longer periods upon the consent of the parties. Fed. R. Civ. P. 65(b). The rule does not define "good cause." There are few decisions meaningfully applying this standard. **A leading treatise offers "[a]lthough there does not seem to be any**

**case law on what constitutes ‘good cause’ for purposes of extending a Rule 65(b) order, a showing that the grounds for originally granting the temporary restraining order continue to exist should be sufficient.”** 11A Charles A. Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure*, § 2953 p. 279 (1995). In *S.E.C. v. Comcoa Ltd.*, 887 F.Supp. 1521, 1526 n. 7 (S.D. Fla. 1995), “good cause” was the court’s need for “time to fully consider the various arguments and motions of the parties.” In other contexts, the “good cause” standard focuses on the diligence of the party seeking the change who “must show that despite due diligence it could not have reasonably met the scheduled deadlines.” *Deghand v. Wal-Mart Stores, Inc.*, 904 F. Supp. 1218, 1221 (D. Kan. 1995) (the standard for modifying a pretrial scheduling order pursuant to Fed. R. Civ. P. 16(b)) (citation omitted). **Logically for Rule 65(b), “good cause” would include that a moving party despite its diligent efforts needs additional time to prepare and present its preliminary injunction, that the court’s calendar cannot reasonably accommodate an earlier setting for the preliminary injunction hearing, or that the pendency of discovery or related proceedings necessitates additional delay.**

*Flying Cross Check, L.L.C. v. Central Hockey League, Inc.*, 153 F.Supp.2d 1253, 1260-1261 (D. Kan. 2001)(emphasis added.)

Here, “the grounds for originally granting the temporary restraining order continue to exist[,]” and that alone “should be sufficient” to demonstrate good cause. 11A Charles A. Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure*, § 2953 at 279 (1995). Further, State Farm is acting diligently and needs the time sought to conduct expedited discovery and to adequately prepare for the upcoming preliminary injunction hearing.

Further, Attorney General Hood has indicated that he intends to file one or more motions challenging this Court’s subject matter jurisdiction. Assuming that is the case, the Fifth Circuit has held that a district court has “the inherent authority to preserve the status quo [by extending a TRO] until the question of its jurisdiction could be resolved.” *Jones v. Belhaven College*, 98 Fed. Appx. 283, 284, 2004 WL 759539 at \*1 (5<sup>th</sup> Cir. 2004)(citing *United States v. United Mine Workers of America*, 330 U.S. 258, 292-93 (1947) & *United States v. Hall*, 472 F.2d 261, 265 (5th Cir. 1972)). For this additional reason, this Court should extend the TRO until the later of midnight on October 12, 2007 or the date on which this Court reaches final resolution of any

jurisdictional issues.

**II. STATE FARM REQUESTS A TELEPHONIC SCHEDULING CONFERENCE WITH THE DISTRICT JUDGE THIS WEEK**

As described below in section III, State Farm needs limited, but expedited, discovery in order to be able to adequately prepare for the upcoming preliminary injunction hearing. Further, State Farm just yesterday filed an amended complaint – one which broadens the claims before this Court. Finally, based on Attorney General Hood's counsel's statements at the TRO hearing, State Farm anticipates a coming fusillade of motion filings by Attorney General Hood.

In light of the above, the Parties need not only a date certain setting for the preliminary injunction hearing, but date certain discovery, motion and briefing deadlines. In order to accomplish that, State Farm requests a telephonic scheduling conference with the Court in order to work through these issues.

**III. THIS COURT SHOULD PERMIT STATE FARM EXPEDITED DISCOVERY IN CONNECTION WITH ITS MOTION FOR PRELIMINARY INJUNCTION**

**A. The Rules Authorize Expedited Discovery in Situations Such as This**

In situations such as this, Fed. R. Civ. P. 26(d) & (f), Miss. Unif. Dist. Ct. R. 26.1(A)(4), allow a trial court to authorize expedited discovery that departs from the normal procedures and time schedule established by Rules 16 and 26. The Advisory Committee Notes explain that early discovery "will be appropriate in some cases, such as those involving requests for a preliminary injunction or motions challenging personal jurisdiction." Adv. Comm. Notes, 1993 Amends., subdiv. (d).

The Fifth Circuit has apparently not addressed expedited discovery in a published opinion. However, other courts have applied one of two tests. Some courts allow early discovery upon an evidentiary showing "akin to preliminary injunctive relief...." *E.g., Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 275 (N.D. Cal. 2002).

Most courts, however, apply a less stringent "good cause" or "reasonableness" standard, allowing expedited discovery when the movant: (1) is seeking preliminary injunctive relief; (2) alleges ongoing patent or copyright infringement and/or unfair competition; or (3) establishes that physical evidence over time will be consumed or lost. *See, e.g., Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y. 2005)(RICO claim against foreign defendants dissipating assets in question); *Ellsworth Assocs. Inc. v. U.S.*, 917 F. Supp. 841, 844 (D.D.C. 1996) ("Expedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings"); *Energetics Systems COFP. v. Advanced Cerametrics, Inc.*, No. CIV. A. 95-7956, 1996 WL 130991 at \*2 (E.D. Pa. Mar. 15, 1996) (infringement).

Here, because the Court has already granted a TRO in State Farm's favor and a preliminary injunction hearing is looming, State Farm meets either standard. Accordingly, this Court should permit State Farm limited discovery on an expedited basis, as described below.

**B. The Limited and Expedited Discovery State Farm Urgently Needs**

State Farm currently seeks only four categories of discovery prior to the preliminary injunction hearing. State Farm briefly discusses each below.

Initial Disclosures. First, State Farm requests the Court to Order all Parties to serve their Fed. R. Civ. P. 26(a)/Miss. Unif. Dist. Ct. R. 26.1(A) Initial Disclosures, as well as to produce all responsive documents, electronically stored information and things no later than Wednesday, September 26, 2007, or such other date as may be set in the telephonic scheduling conference.

Limited Written Discovery to Attorney General Hood. Second, State Farm seeks leave to

propound<sup>1</sup> written discovery on Attorney General Hood related to the issues on State Farm's motion for a preliminary injunction, as modified by its amended complaint. State Farm requests that Attorney General Hood be required to respond to that discovery and produce all responsive documents, electronically stored information and things no later than Wednesday, September 26, 2007, or such other date as may be set in the telephonic scheduling conference.

Nonparty Subpoenae Duces Tecum. Third, State Farm seeks leave to serve Subpoenae Duces Tecum on the following persons: The Scruggs Law Firm. P.A.; The Barrett Law Office, P.A.; The Lovelace Law Firm. P.A.; Nutt & McAlister; PLLC; Moore Law Firm, LLC; and/or Jones, Funderburg & Sessums PLLC, perhaps as well as the following individuals associated with the firms that comprise or comprised those firms: Richard Scruggs; Zach Scruggs; Don Barrett; Sid Backstrom; Marshall Smith, Jr.; David McMullan, Jr.; Dewitt Lovelace; David Nutt; Mary E. McAlister; Derek Wyatt; Mike Moore; John Jones; and Steven Funderberg, seeking a subset of the same materials sought from Attorney General Hood. As with the discovery to Attorney General Hood, State Farm requests that those persons be required to respond to those subpoenae no later than Wednesday, September 26, 2007, or such other date as may be set in the telephonic scheduling conference.

Limited Depositions. Finally, State Farm seeks leave to depose: (1) Attorney General Hood, as well as a Rule 30(b)(6) deposition of his office; (2) Courtney Schloemer; (3) Lee Harrell; and (4) Richard F. Scruggs, as well as a Rule 30(b)(6) deposition of The Scruggs Law Firm, P.A.,<sup>2</sup> with respect to the issues at stake on the preliminary injunction motion, as modified

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<sup>1</sup> In an effort to provide Attorney General Hood as much time as practicable to respond to State Farm's discovery, State Farm is today serving same upon him; awaiting – of course – this Court's ruling validating the timing of that pre-CMC discovery.

<sup>2</sup> State Farm also requests leave to depose Mike Moore, as well as to take a Rule 30(b)(6) deposition of Moore Law Firm, LLC, should State Farm find such necessary.

by State Farm's amended complaint. State Farm requests that the Court authorize it to issue deposition notices and subpoenas commanding those persons' appearance for deposition, no later than Thursday, October 4, 2007, or such other date as may be set in the telephonic scheduling conference.

### **Conclusion**

WHEREFORE, PREMISES CONSIDERED, for the reasons set forth above, State Farm respectfully moves this Court:

- (1) To extend the TRO until the later of midnight on October 12, 2007 or the date on which this Court reaches final resolution of any jurisdictional issues;
- (2) To hold a telephonic scheduling conference on September 20 or 21, 2007;
- (3) To require Attorney General Hood to respond to this Motion no later than 2:00 p.m. on Thursday, September 20, 2007, should Attorney General Hood intend to oppose it;
- (4) To Order all Parties to serve their Fed. R. Civ. P. 26(a)/Miss. Unif. Dist. Ct. R. 26.1(A) Initial Disclosures, as well as to produce all responsive documents, electronically stored information and things no later than Wednesday, September 26, 2007, or such other date as may be set in the telephonic scheduling conference;
- (5) To authorize State Farm to propound the written discovery on Attorney General Hood related to the issues on State Farm's motion for a preliminary injunction and to Order Attorney General Hood to respond to that discovery and produce all responsive documents, electronically stored information and things no later than Wednesday, September 26, 2007, or such other date as may be set in the telephonic scheduling conference;
- (6) To authorize State Farm to serve Subpoenae Duces Tecum on the following persons: The Scruggs Law Firm, P.A.; The Barrett Law Office, P.A.; The Lovelace Law Firm, P.A.; Nutt & McAlister; PLLC; Moore Law Firm, LLC; and/or Jones, Funderburg & Sessums PLLC, perhaps as well as the following individuals associated with the firms that comprise or comprised those firms: Richard Scruggs; Zach Scruggs; Don Barrett; Sid Backstrom; Marshall Smith, Jr.; David McMullan, Jr.; Dewitt Lovelace; David Nutt; Mary E. McAlister; Derek Wyatt; Mike Moore; John Jones; and Steven Funderberg, seeking a subset of the same materials sought from Attorney General Hood and to Order that those persons be required to respond to those subpoenas no later than Wednesday, September 26, 2007, or such other date as may be set in the telephonic scheduling conference;

- (7) To authorize State Farm to depose: (1) Attorney General Hood, as well as a Rule 30(b)(6) deposition of his office; (2) Courtney Schloemer; (3) Lee Harrell; and (4) Richard F. Scruggs, as well as a Rule 30(b)(6) deposition of The Scruggs Law Firm, P.A.,<sup>3</sup> with respect to the issues at stake on the preliminary injunction hearing, as modified by State Farm's amended complaint and to authorize it to issue deposition notices and subpoenas commanding those persons' appearance for deposition, no later than Thursday, October 4, 2007, or such other date as may be set in the telephonic scheduling conference; and
- (8) To grant State Farm such further, supplemental, additional, alternative or different relief as to which it may be justly entitled under applicable law.

Respectfully submitted, this the 19<sup>th</sup> day of September, 2007.

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

BY:



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<sup>3</sup> State Farm also requests leave to depose Mike Moore, as well as to take a Rule 30(b)(6) deposition of Moore Law Firm, LLC, should State Farm find such necessary.

**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  
c/o  
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ATTORNEYS FOR DEFENDANT JIM HOOD, IN HIS OFFICIAL CAPACITY AS  
ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI

THIS the 19<sup>th</sup> day of September, 2007.

  
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Robert C. Galloway, MB No. 4388