

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-DCB-MTP

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

DEFENDANT

**PLAINTIFFS' RESPONSE MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO RECONVENE PROCEEDINGS,
DISSOLVE RESTRAINING ORDER, AND TO RESOLVE ISSUE OF ABSTENTION**

Plaintiffs State Farm Fire and Casualty Company and State Farm Mutual Automobile Insurance Company (collectively "State Farm"), submit this Response Memorandum in Opposition to Defendant's Motion [Dkt. 79] to Reconvene Proceedings, Dissolve Restraining Order, and to Resolve Issue of Abstention. For the reasons discussed below, State Farm agrees that the evidentiary hearing on its motion for preliminary injunction should be reconvened; however, it should be reconvened in the same posture as when adjourned, as required by established law.

INTRODUCTION

Following a status and settlement conference on November 7, 2007,¹ this Action was adjourned by agreement of the Parties. The Court extended the Temporary Restraining Order ("TRO"), with either party having the right to move to dissolve it and reconvene the evidentiary hearing on the interconnected issues of subject matter jurisdiction and the motion for preliminary injunction. (11/13/07 Order [Dkt. 78].)

State Farm agrees that the hearing on the preliminary injunction should be resumed; however, it should be resumed at the point where it was when it was adjourned. The Court had begun to hear testimony on State Farm's motion for preliminary injunction, but had heard from

¹ See November 5, 2007, Text Order.

only one witness out of the numerous witnesses the Parties identified. A substantial portion of Attorney General Hood's cross-examination of the only witness that has testified was conducted *ex parte* and in Chambers and State Farm was given no opportunity for re-direct. At the time these proceedings were adjourned, State Farm had made a Motion for Leave to Cross-Examine Representatives of the Attorney General's Office Regarding Contentions of "Different" Investigation. (Dkts. 68 & 69). That motion is still pending before this Court and has not yet been argued. In addition, at the time these proceedings were adjourned, this Court had ordered Attorney General Jim Hood to appear and testify at the preliminary injunction hearing. (11/06/07 Order [Dkt. 74].) State Farm has not yet had an opportunity to obtain testimony from Attorney General Hood, the Defendant in this Action.

Defendant's most recent motion does not raise any new issues that have not been thoroughly briefed for this Court. Further, these proceedings have moved beyond the stage where these issues can be decided on the basis of the pleadings alone. The Court has begun to hear testimony and both sides have submitted numerous exhibits during the preliminary hearing and with their motion papers. Indeed, the Attorney General is no longer urging the position taken in his original motion to dismiss that the issues be decided pursuant to Rule 12(b)(6), because to do so this Court would have to accept as true all of the allegations in the First Amended Complaint – including, for example, that Defendant is pursuing the current criminal investigation in bad faith for the purpose of coercing State Farm to forgo its First Amendment right of access to the courts by settling Hurricane Katrina cases brought by major contributors to Attorney General Hood's campaigns.

Just as Defendant made strenuous efforts to avoid having to testify in this Action prior to the November elections, his most recent motion should be seen for what it is: another gambit to avoid having to testify, especially given the current climate in Mississippi when three of the people (including Dickie Scruggs)² with whom he is alleged to have conspired in this case are

² The other members of the Scruggs Katrina Group under indictment are Zach Scruggs and Sid Backstrom.

under federal indictment for attempting to bribe a state court judge and three other of his affiliates – two of whom are former Special Assistant Attorneys General – have pleaded guilty to charges of attempting to bribe or corruptly influence state officials.³

While the Attorney General does not want his motion to dismiss to be decided on the pleadings, he also does not want it decided on a complete record. Instead, he wants the Court to cut off State Farm's right to present evidence in support of its motion for preliminary injunction and in support of the Court's jurisdiction and decide his motion based upon his one-sided *ex parte* presentation in Chambers that State Farm has never had the opportunity to challenge. Attorney General Hood's proposal is fundamentally unfair to State Farm and would result in a denial of State Farm's due process rights.

This Court's decision to hear evidence was appropriate and consistent with the Fifth Circuit's decision in *Montez v. Department of the Navy*, 392 F.3d 147 (5th Cir. 2004). As the Fifth Circuit held in that case, where the merits of the case are intertwined with the issue of jurisdiction, a court should accept jurisdiction and proceed to consider the merits. *See id.* at 150. That is clearly the case here, where the issue of bad faith and Attorney General Hood's attempts to use the threat of criminal prosecution to chill State Farm's constitutional rights are relevant both to this Court's jurisdiction and the merits of State Farm's claim under 42 U.S.C. § 1983. This Court should, therefore, reconvene the preliminary injunction hearing, and State Farm should be given a full opportunity to present its case. In addition, the temporary restraining order should be continued until the motion for preliminary injunction is decided.

³ Joey Langston, one of the persons who recently pled guilty to corruption charges, is one of Attorney General Hood's largest campaign contributors and was appointed by him to represent the State in litigation against MCI. Tim Balducci, who has also pled guilty, was also appointed by Attorney General Hood as a Special Assistant Attorney General in the MCI litigation. Steve Patterson, another contributor to Attorney General Hood's campaigns, has also pled guilty. Langston, Balducci and Patterson have stated that they were acting on behalf of Dickie Scruggs, one of the alleged co-conspirators in this case. (*See Exs. A through F, attached*).

PROCEEDINGS TO DATE

This Action was initiated on September 13, 2007, when State Farm filed its initial Complaint [Dkt. 4] and Motion for a TRO and Preliminary Injunction [Dkt. 5 & 6]. State Farm's Motion for a TRO was heard on September 14, 2007. That same day, Judge Starrett issued a TRO [Dkt. 10], finding that "State Farm has demonstrated a substantial likelihood of success on the merits. The Court also finds a substantial threat of irreparable harm that will result to State Farm in the absence of a temporary restraining order. Additionally, the harm to State Farm outweighs any harm to Attorney General Jim Hood . . . , and granting the requested temporary restraining order will not disserve the public interest." (TRO, Dkt. 10 at 2.) Accordingly, Judge Starrett ordered Defendant to

(1) tak[e] no action to require State Farm to comply with the Jackson County, Mississippi Grand Jury Subpoena issued to State Farm on or about August 23, 2007, and tak[e] no action to attempt to punish State Farm for any claimed failure to comply with this Grand Jury Subpoena; (2) refrain[] from initiating or prosecuting 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.

(*Id.* at 2.) The TRO has been extended by various orders and is still in effect.⁴

On September 18, 2007, State Farm filed its First Amended Complaint [Dkt. 11] in this Action. As with its original Complaint, State Farm alleged that by serving the grand jury subpoena, Defendant violated his January 23, 2007 Agreement (the "Agreement") with State Farm, pursuant to which he agreed to "conclude the investigation as to State Farm, any of its current or former employees, directors engineers, agents, counsel or adjusters," and further agreed that he "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." (Am. Compl., Dkt. 11, ¶ 18 & Ex. D.) "Investigation" was defined as "the criminal investigation being conducted by Mississippi Attorney General's Office into State

⁴ See Minute Entry and Text Order for September 24, 2007; 10/16/07 Order [Dkt. No. 36]; 11/3/07 Order [Dkt. 78]; 1/24/08 Order [Dkt. 82].

Farm’s handling of Hurricane Katrina claims.” (*Id.*) State Farm sought a declaratory judgment that Defendant was in breach of the Agreement, as well as specific enforcement of the Agreement. (*Id.* ¶¶ 66-73.) State Farm further alleged that the Defendant’s breach of the Agreement was in violation of its Fourteenth Amendment rights and 42 U.S.C. § 1983, and sought an injunction requiring Attorney General Hood to comply with the Agreement. (*Id.* ¶¶ 74-80.)

Significantly, the claims asserted by State Farm in the Amended Complaint were not based solely on Defendant’s breach of the Agreement. In addition, State Farm alleged that Defendant was pursuing its criminal investigation in bad faith in an attempt to chill State Farm’s First Amendment right of access to the courts by conspiring with the Scruggs Katrina Group to coerce State Farm to settle civil litigation filed by the Scruggs Katrina Group arising out of Hurricane Katrina. (*Id.* ¶¶ 28-38, 81-83, 93.) State Farm also alleged that Defendant had conspired with the Scruggs Katrina Group to use the threat of criminal investigation and prosecution to compel State Farm to coerce E.A. Renfroe & Company (“Renfroe”) to dismiss its lawsuit against two of its former employees (the “Rigsby Sisters”) who stole State Farm documents. Significantly, a charge of criminal contempt for violation of the preliminary injunction order in the *Renfroe* litigation is being prosecuted against Dickie Scruggs, who has made significant campaign contributions to Defendant. (*Id.* ¶¶ 39-49, 84, 93.) State Farm also alleged that Defendant has conspired with the Scruggs Katrina Group to conduct unreasonable searches and seizure in violation of State Farm’s Fourth Amendment rights. (*Id.* ¶¶ 50-64, 87-91, 94.)

By Order dated October 10, 2007 [Dkt. 25], this case was reassigned to Your Honor. On or about October 25, 2007, Defendant filed his Motion to Dismiss this Action. On or about October 29, 2007, Defendant filed its Response to Motion for Preliminary Injunction. On October 31, 2007, State Farm filed its Response to the Defendant’s Motion to Dismiss [Dkt. 52] and its Memorandum in Opposition to Defendant’s Motion to Dismiss and in Further Support of Plaintiffs’ Motion for a Preliminary Injunction [Dkt. 53]. In addition to legal argument, the

response was supported by a 10-page factual statement [Dkt. 53 at 2-13] and 89 pages of exhibits [Dkt. 52-2 & 52-3]. By Order dated October 29, 2007 [Dkt. 43], this Court directed the Parties to be prepared to address the issues of abstention and subject matter jurisdiction at the preliminary injunction hearing scheduled for November 1, 2007. On November 1, 2007, State Farm filed its Rebuttal in Support of Motion for Preliminary Injunction [Dkt. 54-3.]

The preliminary injunction hearing commenced on November 1, 2007. On that day, the Court also heard oral argument *from Attorney General Hood's counsel* on Attorney General Hood's motion to dismiss. (Nov. 1, 2007 Tr. at 24:20-62:25.) Before State Farm's counsel could present his argument, the Court stated:

Your briefs are excellent from both sides in this case, and I have read them thoroughly. And I understand what your positions are. I think we probably should go on and hear some testimony and then let the Court decide whether we are in a position today to make a ruling or whether or not this hearing is going to have to be recessed for another day.

(*Id.* at 63:3-9.)

State Farm then called Assistant Attorney General Ed Snyder as its first witness. (*Id.* at 63:23.) When asked to agree that “[t]here is no provision in this document [the Agreement] that would provide for the contingency that if you found out new information later on, the investigation could be reopened, is there,” Snyder responded: “*The operative phrase is Hurricane Katrina claims.* If it’s unrelated to that and it’s new, it’s available to investigate.” (*Id.* at 104:11-15 (emphasis added).)

In response to questioning by the Court that the subpoenaed documents were “sought in connection with the accepting and processing of claims filed by policyholders alleging damage from Hurricane Katrina in Jackson, Harrison and Hancock counties,” Snyder responded, “the focus was not the claims of the policyholders in this new matter. The focus was on – I don’t know how I can tell you that without revealing” (*Id.* at 110:16-25.) The Court continued: “You have confirmed the agreement, and you have stated that if an investigation relates to these Hurricane Katrina claims, then it would violate the agreement. Does this language indicate to you that this subpoena goes beyond or is contrary to the January 23 letter agreement between the

Attorney General and State Farm?” (*Id.* at 111:3-12.)

Notwithstanding the fact that the information sought by the subpoena seemed to fall squarely within the scope of the Agreement, Snyder suggested that the subpoena may have resulted from some error in copying previous subpoenas, but that the focus of the investigation would not be on policyholder claims. (*Id.* at 111:16-23.) Further, after agreeing that there were substantial similarities between the Fourth Grand Jury Subpoena (“Fourth Subpoena”) and the December 18, 2006 subpoena (*Id.* at 112:11-114:24), Mr. Snyder continued to insist that the focus of the investigation was different, even though the new subpoena asked for the same information as prior subpoenas issued by the Attorney General’s office. (*Id.* at 114:25-116:1.) In fact, when asked, “You would admit that [language from the Fourth Subpoena] that sounds like the language of the January 23rd, 2006, agreement; does it not,” Snyder testified, “It probably does.” (*Id.* at 115:19-22.) Mr. Snyder further testified:

Q. But when you say in your letter that you sign that you are concluding the investigation and not bringing criminal charges, aren’t you making your deal then, whether you decide later it’s one you would have made if you had known certain information?

A. The gravamen of that agreement was Katrina claims, and that relates to the policyholders. If there is another victim, it’s not the same thing.

Q. Well, you would agree that he was agreeing to conclude the investigation as to anything State Farm had to do with Katrina related claims?

A. He was agreeing to conclude the investigation as to the policyholders of State Farm concerning their Katrina related claims.

Q. Does it say policyholders in the letter?

A. Beg your pardon?

Q. Does the letter say he was just concluding it as to the policyholders?

A. Well, it’s clear that everybody understood it, because that’s the term that Mr. Tucker wanted to use in the agreement. If he didn’t like the term “penalty” to the victims, and he wanted to substitute a substantial amount to the policyholders. We all knew what we were talking about.

(*Id.* at 125:5-126:1.)

During his cross-examination of the witness, Defendant’s counsel asked to make an *in*

camera presentation to the Court regarding the subject of the current investigation. (*Id.* at 143:22-25.) The Court allowed Defendant to do so, over State Farm’s objection. (*Id.* at 144:1-145:21.) Upon reconvening in open court, the Court advised the Parties that the information needed by the Court was not available through the witnesses present that day. The Court continued the TRO for another 10 days, until November 20, 2007, and continued the proceedings until November 7, 2007. (*Id.* at 145:22-146:20, 152:10-12.) On November 7, 2007, instead of resuming testimony, the Parties met with Magistrate Judge Parker in Chambers. The proceedings were thereafter adjourned with the agreement of the Parties.

ARGUMENT

I. STATE FARM’S MOTION FOR A PRELIMINARY INJUNCTION AND THE ATTORNEY GENERAL HOOD’S MOTION TO DISMISS SHOULD BE DECIDED ON A FULL EVIDENTIARY RECORD

A. The Court Should Continue to Hear Evidence on State Farm’s Motion for Preliminary Injunction

In *Montez v. Department of the Navy*, 392 F.3d 147 (5th Cir. 2004), the Fifth Circuit explained that where fact-dependent issues of jurisdiction and merits are inextricably intertwined, a court *must* accept jurisdiction and proceed to consider the merits. *See id.* at 150.

As the Court explained:

[W]here issues of fact are central both to subject matter jurisdiction and the claim on the merits, we have held that the trial court must assume jurisdiction and proceed to the merits. In circumstances where “the defendant’s challenge to the court’s jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff’s case” under either Rule 12(b)(6) or Rule 56.

Id. (alteration in original) (citation omitted);⁵ *see also United States v. One 1998 Mercury Sable*, 122 F. App’x 760, 763 (5th Cir. 2004); *In re Katrina Canal Breaches Consol. Litig.*, 471

⁵ Attorney General Hood has not made a motion for summary judgment. If he had, State Farm would have been entitled to move for a continuance of the motion, pursuant to Rule 56(f), so that it could conduct discovery and obtain evidence to respond to the motion. Instead, as directed by the Court, State Farm had begun to put on evidence in support of its motion for preliminary injunction and the Court’s jurisdiction, without the benefit of discovery.

F. Supp. 2d 684, 688-90 (E.D. La. 2007). The rule in *Montez* also extends to those situations where, as here, it is appropriate for a court to resolve disputed issues of fact by an evidentiary hearing. See *Crosslink Orthopaedics, LLC v. Synthes Spine Co.*, No. 7:07-cv-59, 2007 WL 3333342, at *1 (M.D. Ga. Nov. 9, 2007); *Larsen v. Airtran Airways, Inc.*, No. 8:07-cv-00442-T-17-TBM, 2007 WL 2320592, at *2 (M.D. Fla. Aug. 10, 2007).

Were this Court to resolve Attorney General Hood's objection to jurisdiction pursuant to Rule 12(b)(6), the facts of the Amended Complaint would have to be assumed true and construed in the light most favorable to State Farm. See *Arias-Benn v. State Farm Fire & Cas. Co.*, 495 F.3d 228, 230 (5th Cir. 2007). As a practical matter, the Court has already begun to accept evidence and, therefore, the proceedings have moved beyond any Rule 12(b)(6) analysis. In fact, in support of his current motion, Attorney General Hood relies extensively on materials outside the pleadings, including *ex parte*, in Chambers testimony.

Indeed, this Court has already ruled that State Farm is entitled to present evidence in support of its motion for preliminary injunction. First, in lieu of hearing argument on the motion to dismiss from State Farm, the Court stated that it would like to hear evidence. (Nov. 1, 2007 Tr. at 63:3-9.) Second, it ordered Attorney General Hood to appear and give testimony in this Action. (11/06/07 Order [Dkt. 74].) This Court should also reject Attorney General Hood's argument that the Court does not need to hear from any additional witnesses. As the Fifth Circuit has explained:

There can be no doubt that where the facts are clear that a court, in the exercise of its discretion, may grant or deny an injunction on the basis of *ex parte* affidavits. However, where as here the affidavits relate to controverted factual issues, we feel the District Court should have required the facts to be tested in the crucible of oral and cross-examination. Accordingly, the case is remanded to the District Court for further findings of fact after a full hearing consistent with the views herein expressed.

Scott v. Davis, 404 F.2d 1373, 1375 (5th Cir. 1968). Thus, the presentation of evidence in this case should proceed. In addition, this Court should extend the TRO until such time as the Court decides State Farm's motion for preliminary injunction. See *Jones v. Belhaven Coll.*, 98

F. App'x 283, 284, 2004 WL 759539, at *1 (5th Cir. 2004) (holding that a district court had “the inherent authority to preserve the status quo [by extending a TRO] until the question of its jurisdiction could be resolved”); accord *United States v. United Mine Workers*, 330 U.S. 258, 292-93 (1947); *United States v. Hall*, 472 F.2d 261, 265 (5th Cir. 1972)).

B. State Farm Should Be Allowed to Cross-Examine Representatives of the Attorney General's Office Regarding Defendant's Contention that the Current Investigation Is Not Prohibited by the January 23, 2007 Agreement

Before these proceedings were adjourned, State Farm had made a Motion for Leave to Cross-Examine Representatives of the Attorney General's Office Regarding Contention of “Different” Investigations [Dkt. 68]. As discussed therein, and in State Farm's supporting Memorandum [Dkt. 69], there is no absolute privilege afforded to law enforcement investigations. Here, State Farm's right to cross-examine the witnesses substantially outweighs any interest sought to be protected by the privileges asserted by Attorney General Hood. Furthermore, the privileges asserted by Attorney General Hood can be waived, which is clearly the case here.

A party cannot invoke privilege selectively. See *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). More specifically, a party cannot place a privileged communication or transaction at issue in defense of litigation, and then refuse to be cross-examined about that defense based on privilege. “A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes. Thus, the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications.” *Id.* at 1292 (citation omitted). Partial disclosure also waives any privilege. See *Nguyen v. Excel Corp.*, 197 F.3d 200, 207-08 (5th Cir. 1999). That has certainly occurred here.

First, the Defendant, without requesting that any portion of his Motion to Reconvene [Dkt. 79] be sealed, attached a letter from State Farm as Exhibit A to his motion, which he has paraphrased inaccurately. State Farm has never asserted that it has “blanket immunity” based upon the January 23, 2007 Agreement. Those words do not appear in any of State Farm's

communications with the Defendant. Instead, they appear in a letter written by Defendant's counsel. (Ex. G.)⁶ State Farm did not accede to the Defendant's characterization and instead noted only that the Defendant had not responded to any of State Farm's arguments for why National Flood Insurance Program ("NFIP") claims are within the scope of the Agreement. State Farm declined to respond to an irrelevant hypothetical. (Ex. H.)

As noted in State Farm's December 13, 2007, letter:

The proposed grand jury subpoena constitutes or contemplates an investigation of State Farm's handling of Hurricane Katrina claims in specific relation to payments or reimbursement requests by State Farm to the National Flood Insurance Program ("NFIP"). In particular, the subpoena seeks production of information concerning "building material costs for water damage caused by Hurricane Katrina," "policies and procedures used by State Farm . . . in submitting requests for payment to the NFIP," and "all claim files for policyholders in which some or all of the damage was submitted to the NFIP."

(Def. Ex. A [Dkt. 79-2] at 1.) By publicly filing State Farm's letter, the Attorney General has waived any claims of confidentiality regarding the subject matter of the current investigation.

Further, in a letter dated July 16, 2007, to U.S. Attorney Alice Martin (Hr'g Ex. 40),⁷ Attorney General Hood described his current investigation as follows:

By way of background, you are probably aware that Mr. Scruggs represents Cori and Kerri Moran, two sisters employed by Renfroe who were working as contractors for State Farm on the Mississippi Gulf Coast following Hurricane Katrina. The sisters became concerned with the apparently fraudulent practices they witnessed *in the handling of Katrina claims* and, in the spring of 2006, removed incriminating documents from State Farm's catastrophe office. Renfroe has sued the sisters for violating their employment contract and has demanded the return of the documents.

. . . .

Our investigation into the conduct of State Farm necessarily implicates Renfroe,

⁶ State Farm has not attached the actual letter as an exhibit because it included a request that it be kept confidential. State Farm reserves the right to introduce the exhibit into evidence at the upcoming continuation of the preliminary injunction hearing. For the reasons discussed in the text above, State Farm maintains that any claims of confidentiality have been waived.

⁷ Attorney General Hood wrote to the U.S. Attorney for the Northern District of Alabama to intercede on behalf of Dickie Scruggs, who was facing charges for criminal contempt of court.

because Renfro is the preferred adjusting services provider used by State Farm *and the direct link to the National Flood Insurance Program*, the point at which we believe the fraudulent claim assessments were passed on to the taxpayers for payment. . . .

. . . .

Mr. Scruggs has functioned as a confidential informant for our investigation and is protected by state law as a whistle blower.⁸ Using those documents, my office here has conducted an ongoing investigation into what we believe 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

(Hr'g Ex. 40 (emphasis added.)) Although it is convenient for Attorney General Hood to now claim that the investigation is not directed toward policyholder claims (in spite of the plain language of the Fourth Subpoena and his statement to Ms. Martin), he clearly disclosed in a public document that the subject of the investigation involves NFIP claims.

II. NFIP CLAIMS ARE CLEARLY WITHIN THE SCOPE OF THE JANUARY 23, 2007 AGREEMENT

To the extent that Attorney General Hood contends that his current investigation is not barred by the Agreement because the focus is on alleged fraud against the federal government in connection with the National Flood Insurance Program ("NFIP") rather than against policyholders, his argument is both factually and legally insupportable. Initially, there is nothing "new" about Attorney General Hood's investigation of NFIP claims. The December 18, 2006, grand jury subpoena (Hr'g Ex. 17) specifically sought "documents evidencing the policy and procedures used by State Farm in submitting claims to the National Flood Insurance Program, including correspondence, standard forms and training materials." In fact, prior to the January 23, 2007 Agreement and in response to subpoenas issued by Attorney General Hood, State Farm had produced substantial materials related to its handling of NFIP claims. Further, Attorney General Hood's prior testimony before Congress makes clear that his prior investigation was

⁸ It should be noted that Mr. Snyder claimed to be unaware of Mr. Scruggs status as a confidential informant. (Nov. 1, 2007, Hr'g Tr. at 119:23-120:4.) It is also worth noting that, contrary to Attorney General Hood's representation to the U.S. Attorney, Mississippi's whistleblower statute applies only to public employees *See* Miss. Code Ann. §§ 25-9-171 to 177 (West 2003).

directed toward both policyholder claims and NFIP claims. (Ex. I at 4, 7.)

Attorney General Hood's position is unsupported for other reasons, as well. Most importantly, as discussed below, whether the alleged victim is a State Farm policyholder, the federal government, or any other entity that Attorney General Hood might identify is irrelevant. Attorney General Hood agreed to conclude his investigation of State Farm's *handling of Hurricane Katrina claims* and not to pursue any criminal prosecution based on State Farm's *handling of Hurricane Katrina claims*. Attorney General Hood cannot circumvent the plain language of the Agreement by pursuing an investigation of the same alleged wrongdoing simply because he has conceived some theory that the conduct resulted in an injury to someone other than a policyholder.

A. The Attorney General Has No Jurisdiction Over NFIP Claims

A further problem with the Attorney General's theory for why the Agreement permits him to investigate State Farm's handling of NFIP claims is that he has no jurisdiction over the handling of NFIP claims. As the Fifth Circuit has held, NFIP policies "and all disputes arising [from] the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, and National Flood Insurance Act of 1968, as amended, and Federal common law." *Wright v. Allstate Ins. Co.*, 500 F.3d 390, 393-94 (5th Cir. 2007) (citations omitted), *petition for cert. filed*, 76 U.S.L.W. 3324 (U.S. Dec. 10, 2007) (No. 07-777); *accord Gallup v. Omaha Prop. & Cas. Ins. Co.*, 434 F.3d 341, 343 (5th Cir. 2005); *see also Eaker v. State Farm Fire & Cas. Ins. Co.*, 216 F. Supp. 2d 606, 611 (S.D. Miss. 2001) ("Although FEMA uses the services of a private corporation as a fiscal servicing agent, the Federal Insurance Administration ("FIA"), acting under the authority of FEMA, is ultimately responsible for handling all National Flood Insurance Policies." (citation omitted)). Likewise, claims of fraud against the federal government are exclusively federal in nature and it is the responsibility of federal authorities, not the Attorney General of the State of Mississippi, to police such claims. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001).

In addition, "[i]t is well settled . . . that only the Attorney General of the United States . . .

may initiate a prosecution for violation of federal criminal laws.” *In re Haggert*, 981 F.2d 1245, text available at 1992 WL 37944, at *2 (1st Cir. 1992) (unpublished table decision) (per curiam). Section 547 of Title 28 states that “[e]xcept as otherwise provided by law, each United States attorney, within his district, shall . . . prosecute for *all offenses* against the United States . . . [and] prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned.” 28 U.S.C. § 547 (emphasis added); *see also Marshall v. Gibson's Prods., Inc. of Plano*, 584 F.2d 668, 676 n.11 (5th Cir. 1978) (“This provision is consonant with the firmly established policy that the [U.S.] Attorney General is the chief legal officer of the United States. In this capacity, and in the absence of an express congressional directive to the contrary, he is vested with plenary power over all litigation to which the United States or one of its agencies is a party.” (citing 28 U.S.C. §§ 516 & 519)); *ICC v. S. Ry. Comm’n*, 543 F.2d 534, 535-36 (5th Cir. 1976).⁹

Similarly, there is nothing in the powers granted to Attorney General Hood by the Mississippi Legislature that permits him to investigate or prosecute alleged fraud against the federal government. Rather, the Attorney General’s powers are limited to matters of statewide interest. *See Miss. Code Ann. § 7-5-1* (1972). The Attorney General is empowered to investigate and prosecute alleged fraud against state and local governments, but he has no similar grant of power with respect to the federal government. *See id.* § 7-5-59.

Indeed, in sworn testimony before Congress, Attorney General Hood conceded that he had no jurisdiction over NFIP claims. (Ex. I at 7) (acknowledging that “[a]s our criminal investigation progressed, we realized that some of the documented conduct may not constitute a

⁹ *See also Stoll v. Martin*, No. 3:06CV180/LAL/EMT, 2006 WL 2024387, at *3 (N.D. Fla. July 17, 2006) (“[A]uthority to investigate and initiate [federal] criminal complaints rests exclusively with federal prosecutors.”); *Martinez v. Ensor*, 958 F. Supp. 515, 518 (D. Colo. 1997) (“Criminal statutes can be enforced only by the proper authorities of the United States government, such as United States attorneys.”); *Jefferies v. Primus*, No. 88-4284, 1988 WL 61722, at *1 (E.D. Pa. June 10, 1988) (“[T]he power to prosecute for all offenses against the United States is vested in the United States Attorney General and the United States Attorney.”); *United States ex rel. Savage v. Arnold*, 403 F. Supp. 172, 174 n.2 (E.D. Pa. 1975) (“It has been repeatedly held that the Executive Branch through the Justice Department and U.S. Attorneys is charged with enforcement of federal criminal law. . .”).

violation of Mississippi state law, but that federal criminal charges may be appropriate.”). Indeed, Attorney General Hood stated: “The [Mississippi Attorney General’s] Office is not empowered to bring criminal charges on behalf of the federal government.” (*Id.*) The fact that Attorney General Hood is expending State resources to pursue an investigation governed exclusively by *federal* law, where the alleged victim is the *federal* government and over which Attorney General Hood has no jurisdiction, supports State Farm’s allegations that this investigation is being pursued not for any legitimate State interest, but as part of a conspiracy with Dickie Scruggs and others solely to harass State Farm and to chill the exercise of its constitutional rights.

B. NFIP Claims Are Clearly Within the Scope of the Agreement

Agreements between private parties and the government related to the criminal prosecution of an individual are contractual in nature; therefore, they are interpreted in accordance with general principles of contract law. *See United States v. Castaneda*, 162 F.3d 832, 835 (5th Cir. 1998); *United States v. Cantu*, 185 F.3d 298, 302 (5th Cir. 1999). “The primary purpose of all contract construction principles and methods is to determine and record the intent of the contracting parties.” *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752 (Miss. 2003).

“Contracts are solemn obligations; it is the function of the court to give effect to them as written. Whenever possible the court should look to the four corners of the contract to determine its interpretation.” *Estate of Thomas v. United States Fid. & Guar. Ins. Co.*, No. 3:02 CV 1490 WS, 2006 WL 839540, at *2 (S.D. Miss. Mar. 30, 2006) (citations omitted); *see also HeartSouth, PLLC v. Boyd*, 865 So. 2d 1095, 1105 (Miss. 2003); *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352 (Miss. 1990). If the words of the contract are clear and explicit, the court ““must give effect to this contract unless it contravenes public policy.”” *HeartSouth*, 865 So. 2d at 1105 (quoting *Jones v. Miss. Farms Co.*, 76 So. 880, 884 (Miss. 1917)).

The language the parties choose to put in the contract is the best indicator of the their true intent. *See Royer Homes*, 857 So. 2d at 752 (“[T]he words employed are by far the best resource

for ascertaining the intent and assigning meaning with fairness and accuracy.”) When construing the words used, the courts will apply ““correct English definition and language usage.”” *Pursue Energy Corp.*, 558 So. 2d at 352 (quoting *Thornhill v. Sys. Fuels, Inc.*, 523 So. 2d 983, 1007 (Miss. 1988) (Robertson, J., concurring)).

In this case, the language of the Agreement is broad. It defines “investigation” as “the criminal investigation being conducted by the Mississippi Attorney General’s Office *into State Farm’s handling of Hurricane Katrina claims.*” (Hr’g Ex. 24 (emphasis added).) Indeed, Assistant Attorney General Snyder conceded in his testimony that “[t]he operative phrase is Hurricane Katrina claims.” (Nov. 1, 2007 Tr. at 104:14.) The Agreement required the Attorney General to conclude the investigation “as to Sate Farm, any of its current or former employees, directors[,] engineers, agents, counsel or adjusters.” (Hr’g Ex. 24.) The Attorney General also agreed not to “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.” (*Id.*)

The Attorney General argues that his current investigation is not barred by the Agreement because the focus is not the claims of the policyholders. First, such a contention is belied by the Attorney General’s July 16, 2007, letter to the U.S. Attorney, where he indicates that his ongoing investigation includes State Farm’s alleged fraudulent conduct against policyholders. Moreover, the Attorney General’s assertion finds no expression in the four corners of the Agreement. The Agreement defines the investigation only in terms of “State Farm’s handling of Hurricane Katrina claims.” There is no limitation based upon whether the alleged victim is a policyholder or the NFIP. Mr. Snyder testified that such a limitation was “intended,” but he cited to nothing in the Agreement that supported the distinction he attempted to make.

As the Mississippi Supreme Court recently explained, “[i]n order to determine and record *the intent* of the contracting parties, [courts] focus *upon the objective language* of the contract. . . . Our concern is not nearly so much with what the parties may have intended, *but with what they said.*” *One South, Inc. v. Hollowell*, 963 So. 2d 1156, 1162 (Miss. 2007)

(emphasis added); accord *McMurphy v. Three Rivers Planning and Development Dist., Inc.*, 966 So. 2d 192, 195, 2007 (Miss. Ct. App. 2007), *cert. denied*, 966 So. 2d 172 (Miss. 2007) (table decision). “[C]ourts are not at liberty to infer intent contrary to that emanating from the text at issue.” *One South, Inc.*, 963 So. 2d at 1162; accord *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 104 (Miss. 1998) (“[c]ourts must ascertain the meaning of the language actually used, and not ‘some possible but unexpressed intent of the parties.’”) (citation omitted). Accordingly, the Attorney General’s attempt to rely upon some purported, but unexpressed, intended limitation must be rejected. *Cf. McMurphy*, 966 So. 2d at 196 (“McMurphy has continuously stated that she did not intend to advance more than \$50,000 as collateral. That may very well be, but we cannot discern that intent from the agreement that she signed.”).

1. The Terms of the Agreement May Not Be Varied by Parol Evidence

It is a basic tenet of contract law that “when the language of a contract is clear and unambiguous, parol testimony is inadmissible to contradict the written language.” *Myers v. Guardian Life Ins. Co. of Am., Inc.*, 5 F. Supp. 2d 423, 430 n.7 (N.D. Miss. 1998) (internal quotation marks omitted). “This rule . . . is one of substantive law and not merely one of evidence; and it obtains in equity as well as at law.” *Lacey v. Hakimian*, No. Civ.A. 3:04CV646N, 2006 WL 328160, at *3 (S.D. Miss. Feb. 10, 2006) (citation omitted).

The Mississippi Supreme Court is, and always has been, loath to make exceptions to the parol evidence rule. *See Allen v. Allen*, 168 So. 658, 659 (Miss. 1936). It has steadfastly refused to admit parol evidence in response to ambiguity claims. *E.g.*, *One South, Inc.*, 963 So. 2d at 1162-63; *Facilities, Inc. v. Rogers-Usry Chevrolet, Inc.*, 908 So. 2d 107, 110 (Miss. 2005); *Rotenberry v. Hooker*, 864 So. 2d 266, 275 (Miss. 2003); *see also Royer*, 857 So. 2d at 752; *Pursue Energy Corp.*, 558 So. 2d at 351-53. The Mississippi Supreme Court has set out a three-tiered sequential approach to contract interpretation that narrowly limits the circumstances when a court may consider parol evidence. *See Royer*, 857 So. 2d at 752-753.

As discussed above, under the first tier, the court looks only to the “four corners” of the agreement. *See Royer*, 857 So. 2d at 752. Where a contract is clear and unambiguous, a court

cannot consider parol evidence. *See One South, Inc.*, 963 So. 2d at 1162-63. “[T]he mere fact that the parties disagree about the meaning of a contract does not make the contract ambiguous as a matter of law.” *Royer*, 857 So. 2d at 753 (alteration in original) (quoting *Turner v. Terry*, 799 So. 2d 25, 32 (Miss. 2001)). In this case, Judge Starrett has previously found that the Agreement is unambiguous. (Sept. 14, 2007 Tr. at 34:13-14 (“The agreement is simple and straightforward. It says no prosecution.”).) Indeed, the Attorney General asks this Court to consider parol evidence not to resolve an ambiguity, *but to add a term that is plainly missing from the Agreement*. To do so would violate the long-standing principles of contract construction discussed above.

2. State Farm’s Handling of NFIP Claims Is Factually Indistinguishable From Its Handling of Homeowners’ Claims

The Attorney General’s argument that his current investigation is a “different” investigation than the one concluded by the Agreement is also factually insupportable. *First of all, whether it is “different” or the same is irrelevant – the sole issue is whether it is within the scope of the Agreement, which covers all matters involving the handling of Hurricane Katrina claims*. In addition, the handling of claims under homeowners policies and NFIP policies, where issued by the same insurer, occurs simultaneously – in fact, concurrent adjustment of the claims is mandated by federal regulations. As a result, it is impossible to isolate decisions or actions taken by State Farm with respect to a homeowners policy from its decisions or actions regarding the NFIP policy on the same property.

Established by the National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001 *et seq.*, and administered by the Federal Emergency Management Agency (“FEMA”), the NFIP offers both subsidized and actuarially rated flood insurance policies to eligible residential and commercial property owners. *See* 42 U.S.C. § 4011(a); 44 C.F.R. §§ 62.23-24; National Flood Insurance Program; Assistance to Private Sector Property Owners, 48 Fed. Reg. 46789 (Oct. 14, 1983). Eligible property owners may purchase federal flood insurance policies either directly from FEMA or through private insurance companies, such as State Farm, that participate in the NFIP

as “Write Your Own” (“WYO”) companies. *See* 44 C.F.R. § 61.13(f); *C.E.R. 1988, Inc. v. Aetna Cas. & Sur. Co.*, 386 F.3d 263, 267 (3d Cir. 2004) (more than 90% of flood policies are written by WYO companies). WYO companies sell and market SFIPs and arrange for the adjustment, settlement, payment, and defense of all claims arising from the flood insurance policies they sell under the NFIP according to the terms and conditions of the SFIP and controlling federal laws, rules, and regulations. *See* 44 C.F.R. §§ 61.13(f), 62.23(d). In doing so, WYO companies act as fiscal agents of the federal government. *See* 42 U.S.C. § 4071(a)(1); 44 C.F.R. § 62.23(g). The federal government bears the risk of loss, and claims are paid with federal funds as a direct charge on the United States Treasury. *See* 42 U.S.C. § 4017(d)(1).

The homeowners policies and NFIP policies issued by State Farm provide for mutually exclusive coverages. State Farm’s homeowners policies clearly and unambiguously exclude coverage for any loss that would not have occurred in the absence of flood, surface water, waves, etc., whether driven by wind or not. *See Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 352-53 (5th Cir. 2007). Conversely, pursuant to FEMA regulations, an NFIP policy provides coverage for “direct physical loss by or from flood” and expressly excludes coverage for direct physical loss caused by wind or windstorm. *See* 44 C.F.R. Pt. 61, App. A(1), at Art. V.D.8.

Thus, the determination that a loss was caused by flood simultaneously implicates both the homeowners policy and the NFIP policy: the claim would be paid under the NFIP policy and denied under the homeowners policy. Significantly, regulations governing WYO carriers such as State Farm require that wind and water claims be adjusted by a single adjuster. *See* 44 C.F.R. § 62.23(i)(1).

To ensure the maximum responsiveness to the NFIP policy holders following a catastrophic event, e.g., a hurricane, involving insured wind and flood damage to policyholders, the Company shall agree to the adjustment of the combined flood and wind losses utilizing one adjuster under an NFIP-approved Single Adjuster Program using procedures issued by the Administrator.

44 C.F.R. Pt. 62, App. A, art. II.C.¹⁰

¹⁰ The single adjuster rule would not apply where different insurers issued the homeowners and flood policies. However, this would account for only a small percentage of the claims.

As a result, handling of the homeowners claim equals handling of the NFIP claims and both are covered by the Agreement.

III. DEFENDANT’S ARGUMENT REGARDING ALLEGED FAILURE TO PAY A PENALTY MUST BE REJECTED

Defendant’s argument that he is not in breach of the January 23, 2007 Agreement because State Farm has not paid a “substantial penalty” or “establish[ed] an orderly, fair and prompt resolution procedure” must also be rejected. Attorney General Hood argues that based upon a separate settlement agreement State Farm was required to

re-evaluate claims and make offers of settlements to policyholders in Jackson, Harrison and Hancock Counties based upon criteria and guidelines approved by the United State District Court for the Southern District of Mississippi. State Farm was required to make these offers by establishing an ‘orderly, fair, and prompt resolution’ procedure that would be submitted to said district court for approval. State Farm also agreed that initial offers on claims for foundation or pier-only sites (“slab” claims) would be no less than fifty percent (50%) of the structural policy limits. In addition, State Farm agree that it would pay a minimum aggregate of fifty million (\$50,000,000.00) to those participating in the settlement process.

(Def. Mem. [Dkt. 80] at 9-10.) Defendant’s argument fails for several reasons, most of which have previously been briefed for this Court.

First, as noted in State Farm’s prior memoranda (incorporated herein by reference), it is a fundamental violation of State Farm’s First Amendment rights to attempt to coerce civil settlements through threats of criminal prosecution. Attorney General Hood’s assertion that he has resumed this criminal investigation *because of* State Farm’s alleged failure to enter into or fully perform certain civil settlements is a direct admission that State Farm is right in its claims that his investigation of State Farm has been pursued in bad faith and is patently unlawful. (Dkt. 53¹¹ at 18-21; Dkt. 54-3¹² at 6.)

Second, Attorney General Hood is attempting to rely upon prohibited parol evidence to

¹¹ Plaintiffs’ Memorandum in Opposition to Defendant’s Motion to Dismiss and in Further Support of Plaintiff’s Motion for a Preliminary Injunction.

¹² Plaintiffs’ Rebuttal in Support of Motion for Preliminary Injunction.

vary the terms of an unambiguous contract. (*See supra* at 15-18; *see also* Dkt. 54-3 at 6-8.)

Third, Attorney General Hood could not unilaterally decide that his performance under the Agreement was excused. Instead, he was required to petition a court and prove to such court by a preponderance of the evidence that State Farm had breached the Agreement and that the breach was sufficiently material to warrant rescission. (Dkt. 53 at 15; 54-3 at 8-9.)

Fourth, by taking inconsistent positions, Defendant is estopped from arguing that his performance under the Agreement has been excused. In his Hinds County lawsuit, Defendant seeks *enforcement* of the agreement to settle the civil litigation. He did not seek rescission and has retained the \$5 million paid to his office. It is hornbook law that a party cannot simultaneously seek to enforce a contract and repudiate a contract. That is, a party cannot seek to retain the benefits of a contract while repudiating its burdens. (Dkt. 54-3 at 9-10.)

For the reasons discussed above and previously briefed, this Court need not reach any issues raised by Attorney General Hood about State Farm's compliance with a separate settlement agreement of civil litigation. But, in any event, Attorney General Hood's position is factually insupportable. Attorney General Hood has consistently maintained that the "substantial penalty" identified under the Agreement means that State Farm had agreed to pay \$50 million to policyholders. (Nov. 1, 2007 Tr. at 26-27, 37.) In fact, State Farm has done so.

Consistent with its separate civil settlement with Attorney General Hood, State Farm submitted a proposed class action settlement (one that had been negotiated with the involvement of the Attorney General) to the United States District Court for the Southern District of Mississippi for approval. In addition to providing for a minimum payout to policyholders in the amount of \$50 million, State Farm agreed to pay at least \$10 million in class counsel fees to the Scruggs Katrina Group. While preliminary approval of that settlement was denied without prejudice by the Court, State Farm remained committed to addressing the court's concerns and seeking approval for the settlement, and so advised Attorney General Hood. (Ex. J.) However, on March 12, 2007, the Scruggs Katrina Group unilaterally withdrew their Motion to Certify Class and for Preliminary Approval of the Proposed Agreement of Compromise and Settlement.

(Ex. K.) Significantly, invoking Attorney General Hood’s name, such counsel had previously threatened to withdraw support for the settlement if State Farm did not coerce Renfroe into dismissing its litigation. (Exs. L, M & N.) Of course, that the Attorney General’s current investigation is being pursued to induce State Farm to coerce a dismissal of the Renfroe litigation is one of the facts relied upon by State Farm to show bad faith in this Action.

Following the Scruggs Katrina Group’s unilateral withdrawal of the proposed class action settlement, State Farm proposed a re-evaluation program to the Mississippi Insurance Department (“MID”). (Ex. O.) The program mirrored in all significant respects the re-evaluation program that had been agreed to with the Attorney General. For example, “State Farm agree[d] that on claims for foundation and pier only sites (“slab” claims), State Farm’s offer will be in an amount which, in total, would have a value equivalent to no less than fifty percent (50%) of the Coverage A limits, subject to policy limits and subject to deduction for prior payments (including flood payment).” (*Id.* at 2.) In addition, “[a]t a minimum, State Farm . . . commit[ed] to the same monetary payments to policyholders [*i.e.*, \$50 million] that were part of the proposed class action settlement” (*Id.* at 1.)

To date, pursuant to its agreement with the MID, State Farm has extended offers of settlement to Mississippi policyholders exceeding \$88.3 million and it has actually paid over \$76.5 million¹³ to policyholders. (Aff. of Eric Daly (attached as Ex. P).) Thus, to the extent that the “substantial penalty” contemplated by the Agreement was a \$50 million payment to policyholders, any such condition has been satisfied.¹⁴ The MID program may not have funneled class action fees into the pockets of plaintiffs’ attorneys who may have contributed to Defendant’s political campaign, but it certainly accomplished the goal of resolving policyholder

¹³ The re-evaluation program included claims in litigation or alternative dispute resolution (“ADR”) and this amount includes approximately \$11 million that was negotiated with the attorneys for litigants or ADR claimants who had been invited to participate in the program.

¹⁴ The only potentially relevant issue in this case is whether the substantial penalty referred to in the Agreement has been paid. Any other disputes arising out of the separate civil settlement are not before this Court and are not pertinent to these proceedings.

claims without litigation and on terms that would result in payments in excess of \$50 million to policyholders.

IV. ATTORNEY GENERAL HOOD'S REMAINING ARGUMENTS RAISE NO NEW ISSUES AND DO NOT SUPPORT SUSPENSION OF EVIDENCE

As discussed in Section I, *supra*, because the issues raised by State Farm's motion for preliminary injunction and the Attorney General's motion to dismiss are inherently intertwined, *Montez* requires that the Court assume jurisdiction and continue to hear evidence on the merits of State Farm's motion. The Attorney General's most recent motion, asking the Court "to resolve the issue of abstention" raises no new issues that were not thoroughly briefed for the Court before presentation of evidence began. For example, Attorney General Hood reiterates his prior arguments regarding *Younger* abstention (Def. Mem. [Dkt. 80] at 5-8.) These have been addressed in Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss and in Further Support of Plaintiffs' Motion for a Preliminary Injunction [Dkt. 53] and in Plaintiffs' Rebuttal in Support of Motion for Preliminary Injunction [Dkt. 54-3].

As stated therein, State Farm has alleged, and the evidence will show, that Attorney General Hood's investigation is undertaken in bad faith, for constitutionally impermissible purposes. First, his investigation violates his Agreement not to investigate or prosecute State Farm for its handling of Hurricane Katrina claims and, therefore, constitutes *per se* bad faith. [Dkt. 53 at 14-18, 23-25.] For the reasons discussed above, Attorney General Hood's arguments that the current investigation is outside the scope of the Agreement or that State Farm has not performed find no basis in law or fact. As a result, Attorney General Hood's attempt to distinguish this case from *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982), also fails.

In addition, State Farm's claims are not based merely upon breach of the Agreement. State Farm has alleged and will prove that the Attorney General's pursuit of this investigation has been undertaken to coerce State Farm to settle civil settlements and to harass State Farm so that it will induce Renfroe to dismiss its lawsuit against the Rigsby Sisters. Thus, the Attorney General seeks to chill the exercise of State Farm's and Renfroe's exercise of the First

Amendment right of access to the courts. As such, his actions are also in violation of State Farm's Fourteenth Amendment right to be free from bad faith prosecutions. [Dkt. 53 at 18-21, 25-27.] As the Fifth Circuit has stated: “When a significant chilling effect on free speech is created by a bad faith prosecution, the prosecution will thus as a matter of law cause irreparable injury . . . , and the federal courts *cannot abstain* from issuing an injunction.” *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979) (emphasis added).

Since this Action was originally filed, additional facts have come to light that lend further support to State Farm's claims. For example, the Deputy Commissioner of Insurance has testified in deposition that at a meeting between Attorney General Jim Hood and the Commissioner of Insurance, Attorney General Hood was adamant that State Farm reach a settlement with the Scruggs Katrina Group, threatening that “[i]f they [State Farm] don't settle with us, I'm going to indict them all, from Ed Rust [State Farm's Chairman and CEO] down.”¹⁵ The close working relationship between the Attorney General's office and the Scruggs Katrina Group is further evidenced by documents recently obtained from a potential fact witness who was courted by the Scruggs Katrina Group. Such documents reveal that Special Assistant Attorney General Courtney Schloemer discussed this potential fact witness with a member of the Scruggs Katrina Group (Derek Wyatt). One document states: “[Special Assistant Attorney General] Courtney [Schloemer] talked to Derek [Wyatt] – they agree that a criminal conviction could help civil cases.” (Ex. R.)

Finally, State Farm has alleged significant facts showing that Attorney General Hood conspired with the Scruggs Katrina Group to violate State Farm's Fourth Amendment right to be free from unreasonable searches and seizure. (Dkt. 53 at 21-22.)

In addition, the Attorney General's arguments regarding probable cause, which rely upon *Castellano v. Fragazo*, 352 F.3d 939 (5th Cir. 2003) and its progeny, fail wholly to address the

¹⁵ Deposition of David Lee Harrell given in *McIntosh v. State Farm Fire & Casualty Co.*, Case No. 1:06-cv-01080-LTS-RHW (S.D. Miss) at 340:21-22 (attached as Ex. Q).

arguments previously made in Plaintiffs' Rebuttal in Support of Motion for Preliminary Injunction. (Dkt. 54-3.) *Castellano* and its progeny dealt with cases based upon the state law cause of action for "malicious prosecution." As State Farm has always made patent, its claims in this case are not premised upon state tort law. Rather, State Farm has alleged that the Attorney General's investigation has been undertaken in bad faith and for constitutionally impermissible purposes. Unlike a claim of state law "malicious prosecution," which requires a plaintiff to prove lack of probable cause and a favorable termination of the proceedings, bad faith prosecution as a matter of section 1983 law requires neither. In fact, in order to establish a bad faith prosecution, it is not "necessary for plaintiff to prove that the prosecution could not possibly result in a valid conviction." *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981) (per curiam). (See also Dkt. 54-3 at 3-5.)

Likewise, *Izen v. Catalina*, 398 F.3d 363 (5th Cir. 2005), is distinguishable on this basis. First, the January 23, 2007 Agreement makes the issue of probable cause irrelevant. Probable cause cannot justify the violation of an agreement not to investigate or prosecute a party. Second, *Izen* was an action to recover money damages following the termination of criminal proceedings. This is an action to *enjoin an ongoing* criminal investigation being pursued for purpose of harassment and to chill State Farm's First Amendment rights. In *Izen*, the Fifth Circuit expressly distinguished its prior decision in *Wilson* on this basis. See *Izen*, 398 F.3d at 367 n.6. This case is controlled not by *Izen*, but by *Wilson*.

Finally, the Attorney General's attempts to minimize the seriousness of the allegations in this Action are pure sophistry. State Farm has not alleged that Attorney General Hood is pursuing his investigation simply out of ill will or because he does not like State Farm. State Farm has alleged that Attorney General Hood has conspired with other actors, longstanding associates and political contributors of Attorney General Hood, to pursue a criminal investigation against State Farm in violation of the Agreement and for the express purpose of depriving State Farm of its constitutional rights. Thus, *Younger* abstention is not warranted in this case.

CONCLUSION

For all the foregoing reasons, the Court should resume hearing evidence in this case, deny the Attorney General's motion to resolve the issue of abstention, and grant State Farm's Motion for Leave to Cross-Examine Representatives of the Attorney General's Office Regarding Contention of "Different" Investigations.

Respectfully submitted, this the 25th day of January, 2008.

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

BY: /s/ E. Barney Robinson III
Robert C. Galloway, MB No. 4388
Jeffrey A. Walker, MB No. 6879
E. Barney Robinson III, MB No. 9432

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
E. BARNEY ROBINSON III, MB No. 9432
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
E-MAIL: barney.robinson@butlersnow.com

CERTIFICATE OF SERVICE

I, E. Barney Robinson III, 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 directed by the Court's Electronic Filing System to:

Harold E. Pizzetta III
Mary Jo Woods
Office of the Attorney General
Walter Sillers Building
550 High Street, Suite 1200
Jackson, Mississippi 39201
mwood@ago.state.ms.us
hpizz@ago.state.ms.us

J. Lawson Hester
Page, Kruger & Holland, P.A.
10 Canebrake Blvd., Suite 200
Jackson, MS 39232-2212
lhester@pkh.net

Crymes G. Pittman
Pittman, Germany, Roberts & Welsh, LLP
P. O. Box 22985
Jackson, MS 39225-2985
cgp@pgrwlaw.com

William H. Liston
Liston/Lancaster, PLLC
P. O. Box 645
Winona, MS 38967
bliston@listonlancaster.com

Danny E. Cupit
Law Offices of Danny E. Cupit, P.C.
P. O. Box 22929
Jackson, MS 39225
decupit@aol.com

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

THIS the 25th day of January, 2008.

/s/ E. Barney Robinson III
E. Barney Robinson III (MSB #9432)