

**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-

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

DEFENDANT

**DEFENDANT S MOTION TO STRIKE STATE FARM S
TRIAL BRIEF ON RIGHT TO HAVE FULL EVIDENTIARY HEARING**

COMES NOW, Jim Hood, Attorney General of the State of Mississippi, Defendant herein, by and through the undersigned counsel, and respectfully submits this Motion to Strike State Farm's Trial Brief on Right to Have Full Evidentiary Hearing in this cause, and in support thereof would show unto this Honorable Court the following:

1. In an attempt to circumvent this Court's Local Rules governing motion practice, State Farm has filed what it misleadingly styles as a "Trial Brief," that in reality is nothing more than a back-door surrebuttal in opposition to the Attorney General's Motion to Reconvene Proceedings, Dissolve Restraining Order, and to Resolve Issue of Abstention ("Motion to Reconvene") in this matter.

2. The Local Rules do not contemplate the use of a surrebuttal in opposition to any motion filed in this Court. Local Rule 7.2(D) allows for the filing of a motion, a reply, and a rebuttal. State Farm's surrebuttal, however labeled, is improper and should be stricken from the record. *See Norman v. Lipscomb Oil Co., Inc.*, 4:97cv00048, 1998 WL 378930, *5 (N.D. Miss. Apr. 3, 1998) ("[M]otion practice before this court allows for the filing of a motion, reply and

rebuttal. Thus, the plaintiff's surrebuttal is not permitted, and the defendant's motion to strike should be granted.").

3. Obviously aware of this Court's rules prohibiting the filing of its most recent pleading, State Farm does not even attempt to make an argument excusing its disregard for Local Rule 7.2(D) and cites no authority in support of the propriety of its surrebuttal. Instead, State Farm labels its surrebuttal as a "Trial Brief" in hopes that the Attorney General and this Court will not notice its subterfuge.

4. Moreover, State Farm's surrebuttal adds nothing to the legal issue before the Court and serves no other purpose than to needlessly detract the attention of the Attorney General's counsel from preparation for tomorrow's hearing before the Court, and to regurgitate State Farm's vitriolic arguments and baseless accusations already presented to the Court.

5. Contrary to State Farm's mischaracterization, the Attorney General did not change positions in his rebuttal memorandum. He has not waived any prior arguments, nor did he raise any new arguments. Instead, the Attorney General has focused on the one issue that this Court has rightfully indicated will be heard first in this case—the issue of *Younger* abstention and its bad faith exception.

6. Any reasonable person reading the Attorney General's rebuttal memorandum would understand that it clearly and succinctly asks this Court to dismiss this case on the basis of *Younger* abstention. No other issues are addressed in the rebuttal, because it is the Attorney General's position that no other issue should be considered in advance of this Court's resolution of the abstention argument. In asserting this position, the Attorney General reserves all other prior arguments made in his initial motion to dismiss, and specifically is not waiving any argument related to subject matter jurisdiction, an issue that State Farm well knows may be

addressed at any time. *See In re TXNB Internal Case*, 483 F.3d 292, 298 n.6 (5th 2007) (lack of subject matter jurisdiction cannot be waived); *Burks v. Texas Co.*, 211 F.2d 443 445 (5th 1954) (“A question of federal jurisdiction may be raised at any time either by the court *sua sponte* or by motion of any interested party.”).

7. State Farm either misunderstands the doctrine of *Younger* abstention or is intentionally attempting to mislead the Court regarding its import and application. Simply put, the *Younger* abstention doctrine stands for the premise that a district court should decline to accept jurisdiction over a case, *even if subject matter jurisdiction otherwise exists*, if it would interfere with an ongoing state court proceeding. It is a preliminary matter that must be resolved at the outset of litigation in deference to notions of comity and federalism. In fact, the Supreme Court has stated that it is proper for a district court to resolve *Younger* abstention before addressing subject-matter jurisdiction. *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005). As a result, the Attorney General has not and needs not argue any other issue, including subject matter jurisdiction, before the Court decides this preliminary matter.

8. Because abstention doctrines are “judicially created guidelines defining circumstances in which courts may decline to exercise jurisdiction,” the decision to abstain is routinely made in the context of a Rule 12(b)(1) motion to dismiss. *Amer. Bank & Trust Co. of Opelousas v. Dent*, 982 F.2d 917, 921 (5th Cir. 1993); *see also* 5B Fed. Prac. & Proc. Civ. 3d § 1350 at 96-100, C.A. Wright & A.R. Miller (motion for abstention is properly treated under the analytical framework of Rule 12(b)(1), not Rule 12(b)(6)). By insisting on a full hearing addressing the merits of its claims, State Farm completely ignores the federal judicial interference sought to be avoided by *Younger* abstention. *See Geotes v. Miss. Bd. of Veterinary Med.*, 986 F.Supp. 1028, 1031 (S.D. 1997) (“*Younger* abstention doctrine is based on notions of

comity and federalism, and prohibits federal judicial interference with pending state judicial and state administrative proceedings”).

9. In addition, although a district court may consider evidence, including testimony, in resolving the issue of *Younger* abstention, the Attorney General maintains, as is fully set forth in his rebuttal memorandum, that this Court already has before it sufficient evidence to conclude that it should abstain on the basis of *Younger*. To move forward with the full evidentiary hearing urged by State Farm would wholly defeat the comity and federalism concerns underpinning abstention, *see Tenet, supra*, and serve only to provide State Farm with the forum it so desperately desires to vent its unjust and unchecked wrath against the Attorney General.

10. As a result, the Attorney General respectfully requests that this Court strike State Farm’s “Trial Brief” from the record, and dismiss this case based on the *Younger* abstention doctrine.

11. Because the issues presented in this Motion to Strike State Farm’s Trial Brief on Right to Have Full Evidentiary Hearing are straightforward, the Attorney General also suggests that a separate memorandum of authorities would be unnecessary and respectfully asks the Court to waive the requirement of Local Rule 7.2(D).

WHEREFORE PREMISES CONSIDERED, the State of Mississippi, by and through Attorney General Jim Hood, Defendant herein, respectfully requests that this Court deny State

Farm's Trial Brief from the record, and grant the State's motion to remand this case to Chancery Court of Hinds County, Mississippi, First Judicial District.

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

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CERTIFICATE OF SERVICE

I, J. Lawson Hester, Counsel for Attorney General Jim Hood, 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:

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This the 5th day of February, 2008.

/s J. Lawson Hester
J. LAWSON HESTER