

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

STATE FARM AND CASUALTY
COMPANY, ET AL.

Cause No. 3:08CV11
(3:08MC06)
Consolidated with:
3:08CV12
(3:08MC07)

Plaintiff

Oxford, Mississippi
February 1, 2008
2:00 p.m.

v.

JIM HOOD, IN HIS OFFICIAL
CAPACITY AS Attorney General
OF THE STATE OF MISSISSIPPI

Defendant

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HEARING - MOTION TO COMPEL / MOTION TO QUASH
BEFORE THE HONORABLE MICHAEL P. MILLS
U.S. CHIEF DISTRICT JUDGE

APPEARANCES:

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16 Proceedings recorded by mechanical stenography, transcript
 17 produced by computer.

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1 (CALL TO ORDER OF THE COURT)

2 THE COURT: Madam Clerk, would you call the docket,
 3 please.

4 THE CLERK: Court calls Cause No. 3:08MC06
 5 consolidated with 3:08MC07, State Farm Casualty Company, et al.
 6 v. Jim Hood, in his official capacity as the Attorney General
 7 with the state of Mississippi. This is a hearing on the motion
 8 to compel and motion to quash.

9 THE COURT: All right. Thank you. We have joint
 10 motions filed, I think; so I'll start by asking for the
 11 plaintiff, State Farm, Who do you have today?

12 MR. ROBINSON: Your Honor, Barney Robinson, good
 13 afternoon. And then I've got my partners, Jeff Walker and Ben
 14 Watson, with me. Mr. Galloway asked me to apologize to you.
 15 He was having dental work done today.

16 THE COURT: Okay.

17 MR. ROBINSON: He said to assure you he'd much rather
 18 be here.

19 THE COURT: All right. Well, thank you.
 20 And for the defendant, Hood?

21 MR. HESTER: Your Honor, I'm Lawson Hester. I
 22 represent Attorney General Hood. We actually have no motion
 23 before the Court. It's been filed by counsel for Mr. Scruggs,
 24 who is independently here today.

25 THE COURT: All right. And for Mr. Scruggs?

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1 MR. LEBLANC: Good afternoon, Your Honor, Travis
 2 LeBlanc for Mr. Scruggs, along with Chris Robertson.

3 THE COURT: All right. Well, glad to have you. Have
 4 you gentlemen talked about how you wanted to proceed?

5 MR. ROBINSON: We have not, Your Honor.

6 MR. LEBLANC: No, we have not, Your Honor.

7 THE COURT: Okay. Well, both of you asked for an
 8 expedited hearing and emergency argument; so it seems to me
 9 that it would make sense for State Farm to argue first as to
 10 why you're entitled to the relief you've requested; and,
 11 Mr. LeBlanc, if you want to respond and make your argument.
 12 Would that be agreeable?

13 MR. LEBLANC: That's fine with me, Your Honor.

14 THE COURT: And does the Attorney General wish to
 15 participate?

16 MR. HESTER: I may have additional comments relative
 17 to certain issues that arise, if it please the Court.

18 THE COURT: All right. Well, how much time do you
 19 need?

20 MR. ROBINSON: Your Honor, I would think under 20
 21 minutes and maybe under 15. I'm not exactly certain. I was
 22 going to propose to the Court, just to expedite this, I'm
 23 prepared to address both State Farm's motion to compel and the
 24 motion to quash at the same time because they're really just
 25 the flip side of one another.

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1 THE COURT: That's what it appears to me.
 2 Is that your understanding, Mr. LeBlanc?

3 MR. LEBLANC: Yes, it is, Your Honor.

4 THE COURT: All right.

5 MR. LEBLANC: The only thing I would say with respect
 6 to the motion to compel is that we would -- we didn't have
 7 time, unfortunately, to get a full brief to you; but we would
 8 object on the grounds that it's not ripe for a decision yet
 9 because Mr. Scruggs has not failed to appear for the
 10 deposition; that a motion to compel really applies to a
 11 subpoena duces tecum for documents; and that when it comes to a
 12 subpoena for testimony, until Mr. Scruggs doesn't appear,
 13 there's no remedy -- or no relief that they can seek from the
 14 Court. And at that time, if he doesn't appear, then they can
 15 seek a motion for contempt.

16 THE COURT: Well, I stayed his appearance, didn't I?

17 MR. LEBLANC: Yes, you have, Your Honor; so it would
 18 seem to us, then, that it would not be ripe for a decision at
 19 this time.

20 THE COURT: I see. Do you agree with that?

21 MR. ROBINSON: Well, let me tell the Court why we
 22 filed it. At time we filed it, the alias proceeding filed by
 23 Mr. Scruggs had not yet been filed; we filed first. And we did
 24 it, frankly, Your Honor, as a protective measure because the
 25 e-mail stream that I'd received from Mr. Keker left me with the

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1 impression -- that may have been a mistaken one -- but that
2 there was some possibility that Mr. Scruggs might just not show
3 up for his deposition. And we knew that the time frame here
4 was so tight, we couldn't risk that possibility. So we filed
5 it, really, as a prophylactic motion.
6 I think, because of local Rule 37.2's provision that says
7 that the deposition goes forward unless first stopped by a
8 court order that these procedural distinctions really don't
9 matter here because unless the motion to quash is granted it
10 seems to me the deposition goes forward regardless of whether
11 or not my motion was premature.
12 THE COURT: All right. Let's hear his argument,
13 Mr. LeBlanc.
14 MR. ROBINSON: Thank you, Your Honor.
15 THE COURT: All right, Mr. Robinson.
16 MR. ROBINSON: Famous first words, I'll try to be
17 short. Your Honor, our position is that there's really only
18 one issue today that you have to decide, and it's -- it can be
19 stated in one sentence; and that is, Does Mr. Scruggs have to
20 obey a valid subpoena and appear for a trial deposition -- and
21 I'll come back to why I'm calling it a trial deposition in a
22 moment -- that has been already authorized by a court order in
23 the Southern District in the underlying suit?
24 Now, I'd like to begin by telling the Court very briefly
25 why it is very important for my two clients, the two State Farm

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1 entities -- that I'm just going to call State Farm from now
2 on -- that we have this trial deposition. There is a temporary
3 restraining order pending that was issued originally by Judge
4 Starrett and then has been since extended either two or three
5 times -- I forget the exact number -- by Judge Bramlette in the
6 Southern District in the State Farm v. Attorney General Hood's
7 suit.
8 That TRO prohibits the Attorney General from continuing
9 what my clients contend is an unlawful criminal investigation
10 of State Farm and certain State Farm officials. When it was
11 last extended by Judge Bramlette, he put a provision in the TRO
12 that basically said, either side can give notice to the Court
13 that they wish to withdraw from this TRO or have it dissolved.
14 And within 13 days from that date of notice, I'm going to hold
15 a hearing over whether to go ahead and convert it to a
16 preliminary injunction or to allow it to dissolve.
17 Now, in the meanwhile, we have been told repeatedly by the
18 Attorney General -- in fact, as recently as last week, the
19 Attorney General's counsel made this representation to
20 Magistrate Judge Parker, so I'm confident that they won't
21 disagree with it -- that if they are successful in getting the
22 TRO dissolved that they plan, in very short order -- and I
23 should say he plans, the Attorney General plans, in very short
24 order, to resume a criminal investigation of State Farm and
25 perhaps to proceed forward with the prosecution.

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1 Now, the hearing that is scheduled for next Wednesday of
2 this coming week is set as a result of the fact that a little
3 more than a week ago Attorney General Hood filed such a notice
4 with Judge Bramlette and requested a dissolution hearing. And
5 Judge Bramlette then set the hearing for next Wednesday in
6 Natchez.
7 Now, I know the first amended complaint with 108-something
8 pages of exhibits is in the record; and I'm sure that the
9 Court's had time to look through at least, hopefully, the
10 textual part of it, if not some of the exhibits. So I'm not
11 going to go into detail about the suit, but I would like to say
12 this: I think in summary I can tell you that the underlying
13 suit involves three categories of allegations, however
14 denominated by claim.
15 The first is what I call money. And that is that State
16 Farm alleges that Mr. Scruggs and Attorney General Hood have
17 engaged in an unlawful extortion conspiracy to threaten
18 criminal prosecution of State Farm in order to leverage up Mr.
19 Scruggs' position in the Hurricane Katrina civil litigation
20 that he and the former Scruggs Katrina Group had against State
21 Farm.
22 Second category is what I call Renfroe. And that is,
23 State Farm alleges that Mr. Scruggs and Attorney General Hood
24 have engaged in an unlawful extortion conspiracy to threaten
25 criminal prosecution of State Farm and State Farm officials in

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1 order to pressure State Farm to pressure E.A. Renfroe &
2 Company, that is, the parties suing the two Rigsby sisters in
3 the Alabama proceeding before Judge Acker that has resulted in
4 the criminal contempt charge against Mr. Scruggs.
5 And, so, our second category of claims is that Attorney
6 General Hood and Mr. Scruggs are trying to backdoor pressure
7 Renfroe somehow to aid Mr. Scruggs in escaping the criminal
8 contempt prosecution that he's facing as a result of Judge
9 Acker making the referral in Alabama.
10 And then the third category of claim that's at issue in
11 the suit is what we call the noninvestigation agreement. There
12 is, in fact, a contract, an agreement between the Attorney
13 General and State Farm, that said that he would not investigate
14 or prosecute State Farm and, then, certain classes of State
15 Farm agents and affiliates for anything related to the handling
16 of Hurricane Katrina claims. And we contend that the
17 ongoing -- or was ongoing until enjoined -- new criminal
18 investigation is in fact barred by that agreement.
19 Now, there are several motions pending before Judge
20 Bramlette; but for purposes of today, Judge, there are really
21 only two that I think matter to this proceeding. And they are
22 this: The preliminary injunction motion of my two clients, the
23 two State Farm entities; and then it is General Hood's motion
24 to dismiss the proceeding on the basis of Younger abstention.
25 Now, when we first appeared on the initial TRO hearing

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1 before Judge Starrett, Judge Starrett basically reserved ruling
2 on the abstention motion and went ahead and entered the TRO.
3 Now, when we came back for the first PI day with Judge
4 Bramlette -- and we've had two different sets of those with him
5 so far, and next week will be the third, with recesses
6 intervening -- I explained to Judge Bramlette that under the
7 Montez v. Department of Navy, Fifth Circuit case, that a
8 district court has two alternatives when faced with an
9 abstention motion that challenges subject matter jurisdiction.
10 And one is it can adjudicate it on a Rule 12(b)(6)
11 standard; or if there's a substantial overlap between the
12 merits, facts, and the facts that are relevant to the
13 jurisdictional issue, then the Court has to allow -- has to, at
14 least temporarily, assume jurisdiction and allow the
15 presentation of the proof on the merits because of the two
16 overlapping.
17 Judge Bramlette looked at the case, agreed that there was
18 extensive overlap in this case of the issues relevant to
19 Younger abstention versus us being able to get the PI. And, in
20 particular, overlap on one issue, and that is a showing of bad
21 faith, which is a term of art in the Younger context, and also
22 is a term of art in the context of what it takes to authorize a
23 federal court to enjoin a state criminal prosecution.
24 Judge Bramlette found that bad faith was a fact issue
25 relevant to both inquiries, and that we should be allowed to

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1 present proof. Next Wednesday, we are going to resume, once
2 again, with the Court considering two things simultaneously,
3 Attorney General Hood's request that there be a Younger-based
4 abstention dismissal and our request that we, of course, have
5 that motion denied and a preliminary injunction issued.
6 Our ability -- our being my two State Farm clients'
7 ability -- to demonstrate bad faith is going to be a central
8 issue to plaintiff's ability to prevail on either of those two
9 motions. Mr. Scruggs' testimony is very important to my
10 client's ability to demonstrate bad faith to Judge Bramlette
11 next week.
12 Now, I think I've already explained to the Court that this
13 came up in the following context: Judge Parker and Judge
14 Bramlette, who have been basically attending all proceedings in
15 tandem, have made it clear that they did not want any discovery
16 in this action beyond initial disclosures by either side until
17 the preliminary injunction issue was finally decided.
18 However, I asked Judge Parker if he would authorize a
19 trial deposition of Mr. Scruggs because, as you seen from the
20 first amended complaint, his role in the underlying acts for
21 which we have sued General Hood is central. And he's beyond
22 the subpoena power of Judge Bramlette.
23 Judge Parker asked me, in a telephonic conference, to
24 explain to the Court why I thought Mr. Scruggs' testimony was
25 relevant to the issues next week and to try to justify to the

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1 Court why he should allow a trial deposition. I did that in a
2 telephonic conference with counsel for all parties. He then
3 conferred with Judge Bramlette and subsequently authorized
4 State Farm to proceed with a trial deposition. We thus issued
5 a subpoena the very day that we learned we were authorized to
6 take this trial deposition.
7 THE COURT: What date was that?
8 MR. ROBINSON: I think it was the 24th.
9 MR. LEBLANC: The subpoena was issued on the 25th;
10 the order came out on the 24th.
11 MR. ROBINSON: Thank you, Mr. LeBlanc.
12 THE COURT: Okay. Thank you.
13 MR. HESTER: Your Honor, there are actually two
14 separate orders entered, one by Judge Parker and one by Judge
15 Bramlette. The first order, by Judge Parker, dealt with
16 allowing the trial deposition to be taken. The second order,
17 by Judge Bramlette, dealt with the request by the Attorney
18 General's Office that its motion to dismiss be heard first,
19 prior to any consideration on the merits of the preliminary
20 injunction.
21 THE COURT: All right. Thank you.
22 MR. ROBINSON: And, Your Honor, I'm not a
23 hundred percent confident, but I will find out before we leave
24 here. I thought that when Judge Parker's order came out on the
25 24th that it was that very evening that I went ahead and

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1 e-mailed the subpoena to Mr. LeBlanc, but it could have been
2 the next morning. And if so, I apologize if I've misspoken,
3 but I'll find out.
4 THE COURT: One reason I asked was I think one of the
5 issues raised by Mr. Scruggs is that they had not had enough
6 time, enough notice, of the deposition. And what is your
7 position on that?
8 MR. ROBINSON: Well, I guess our position -- we have
9 several positions on it which I think have to be considered in
10 tandem. First is, I do believe that either the very day or,
11 perhaps if Mr. LeBlanc is correct, the very next morning we
12 learned we had permission to do it. We did it as promptly as
13 we could. The date of the hearing next Wednesday is something
14 my clients have no control over, and it was set as a result of
15 General Hood's request.
16 Mr. Scruggs has had a full week's notice of this. Why did
17 we not subpoena it earlier, perhaps on the very day that we
18 learned there was going to be a dissolution request even though
19 we didn't have a hearing date yet? The reason is because Judge
20 Parker and Judge Bramlette had made it explicitly clear -- I
21 think Mr. Hester will agree with this -- that there wasn't
22 going to be any discovery, other than initial disclosures.
23 And I was concerned the Court would consider this to be
24 discovery; and in fact, Mr. Hester took the position, when I
25 asked for it, that it was. But Judge Parker found that it was

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1 really a method of trial presentation. And, so, until I had
2 that court order authorizing it, I felt like I was putting my
3 client and myself at jeopardy for just issuing a subpoena, if
4 that makes sense.

5 Let me go into, now, what Mr. Scruggs' arguments are
6 because I think at its core, especially because of Rule 37.2,
7 it's going to be Mr. Scruggs' burden to avoid this deposition.
8 And he makes five arguments, and I'm going to just briefly
9 touch on each one in order. The first one he makes is he
10 says -- he says, "Judge Mills, you can't allow this to go
11 forward because there's an ongoing, unresolved subject matter
12 jurisdictional dispute before Judge Bramlette; and the general
13 rule is we can't be doing third-party discovery until
14 jurisdiction is confirmed." Okay?

15 Well, he's right that there is an ongoing jurisdictional
16 dispute before Judge Bramlette, that's -- he's absolutely
17 right. And in fact, it's going to be heard next week. But
18 here's why that argument should not result in a quash of the
19 subpoena: First, Judge Bramlette has not resolved the
20 jurisdictional issue.

21 And, in fact, he has consolidated it so far -- and of
22 course, that doesn't mean he couldn't change his mind and at
23 some point, perhaps, with the parties' consent, go back to a
24 Rule 12(b)(6) analysis; but he hasn't indicated he's going to
25 do that. And he's taken Montez into account, and he's hearing

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1 the evidence on it.

2 Part of the evidence I need him to hear is either
3 Mr. Scruggs' truthful, substantive testimony or, should
4 Mr. Scruggs choose to invoke the Fifth as to some questions or
5 all questions, whatever negative inference I can convince Judge
6 Bramlette to impute to General Hood as a result of that.

7 And that's, of course, not an issue that's before you
8 today. That's something that we will have to convince Judge
9 Bramlette as appropriate and hope that I can. I do believe
10 it's appropriate. But that's certainly something we would try
11 to do if we don't get substantive, truthful testimony.

12 But either way, the testimony that's relevant to bad faith
13 is relevant to the very Younger abstention jurisdictional issue
14 that Judge Bramlette's got to decide. A Court always has
15 jurisdiction to determine its own jurisdiction.

16 And, in fact, we cited for the Court, in our brief, a U.S.
17 Supreme Court decision -- I think it's U.S. States Catholic
18 Conference -- that says that Courts have the inherent
19 authority, including to have subpoenas on nonparty witnesses,
20 for purposes of gathering evidence relevant to a subject matter
21 jurisdiction determination.

22 So I don't think there's any merit to this argument that,
23 because there's a Younger issue pending, we can't do this
24 discovery. And in fact, I told Judge Parker directly one of
25 the reasons I wanted to take this deposition was because we

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1 needed this proof to address the Younger analysis. And Judge
2 Bramlette apparently -- because Judge Parker told us he
3 conferred with him -- must have concurred with that because
4 they authorized this deposition.

5 Now, the hearing next week, to the best of my knowledge,
6 Judge, is going forward whether or not this deposition goes
7 forward. So if my clients are denied the ability to depose
8 Mr. Scruggs, they will suffer prejudice because they're going
9 to have to put on their case on the bad faith issue, both on
10 the merits and on the subject matter jurisdiction, without the
11 benefit of this testimony.

12 And as I've already mentioned to the Court, this is a high
13 stakes situation for my client. I know Mr. Scruggs says he's
14 potentially in jeopardy, and it's high stakes for him. But I
15 would ask the Court, with respect, to remember that just a week
16 ago General Hood told Judge Parker, again, if the injunction is
17 dissolved, I am forthwith going to move forward with the grand
18 jury subpoena on State Farm and implicitly suggested that there
19 could be some sort of criminal investigation or prosecution
20 that could follow. So my clients have a significant interest
21 in this as well, that I would ask the Court to consider.

22 Now, the second argument that Mr. Scruggs makes is he
23 says, "Well, making me be deposed at all will violate my Fifth
24 and Sixth Amendment rights." Well, Sixth Amendment, I think he
25 has five lawyers that have appeared of record for him; so I

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1 don't see how he's not going to have counsel there to defend
2 him.

3 And frankly -- it's in the record -- Mr. Keker actually
4 e-mailed me; and I call this the let's-don't-go-fussing e-mail.
5 He says, quote, Dick Scruggs will not answer State Farm's
6 questions at a deposition in the near future; and I'm sure you
7 understand why I won't let him. So why are we fussing about
8 it?"

9 Well, if he's not going to answer questions, I don't think
10 it's going to make much difference which of his five lawyers
11 show up to defend his deposition. So Mr. Keker may be out of
12 the country, as he's represented -- and I have no reason to
13 dispute that -- but that's not a reason that he can't be
14 deposed.

15 Now, Fifth Amendment -- Fifth Circuit has made it clear
16 that you cannot just blanket invoke the Fifth and say, "I'm not
17 even going to show up for a deposition"; or "I'm going to, one
18 time, at the beginning, say, 'I take the Fifth as to
19 everything, and I'm not opening my mouth again.'" You can't do
20 that. You have to listen to each individual question and reach
21 a decision. Is that question, if I answer it truthfully,
22 likely to incriminate me? And if it is, then you have the
23 right to take the Fifth.

24 Now, it's important to us -- even if it is the case that
25 he's going to take the Fifth on every question, it's important

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1 to us, Your Honor, that we be allowed to ask him the questions;
2 and here's why: If I can't have his truthful, substantive
3 testimony, which is what I really want, the next best thing for
4 my clients is to be able to attempt to argue to Judge Bramlette
5 next week that the negative inference against Mr. Scruggs can
6 be imputed against his coconspirator General Hood.
7 I can't impute a negative inference when there's no
8 question on the table to which the Fifth was asserted. I've
9 got to have a specific question in order to argue to the Court
10 why that question and the lack of an answer thereto is relevant
11 to the bad faith issue.
12 So it's very important, even if he says -- even if
13 Mr. LeBlanc sits up here and says -- stands up here and says,
14 "Your Honor, this is a waste of everybody's time. He's not
15 going to answer a single question except what his name is."
16 Even if that's true, my clients are going to be prejudiced if
17 they cannot ask the question.
18 Now, the third issue that Mr. Scruggs raised is what I
19 call the miscellaneous privileges argument; and he's got a
20 bunch of them. He says, "shouldn't be required to be deposed
21 at all because of attorney/client privilege, work product
22 doctrine, Rule 26(b)(3), common interest privilege, and law
23 enforcement privilege.
24 I am not going to waste the Court's time going into each
25 of those. We briefed the substance of each of those arguments.

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1 But what I can say is, we don't need to go into them, for a
2 couple of reasons. One, it is premature. Mr. Scruggs doesn't
3 know what my clients' attorney wants to ask him. So he's
4 asking you for a pre-emptive advisory opinion when there's not
5 even a question on the table.
6 Second, blanket assertions of privilege -- Fifth Circuit
7 in the Finley case has said that that is, per se,
8 inappropriate. So I guess what I say on all of these myriad of
9 privilege objections is this, At the time the question is
10 asked, if Mr. Scruggs wants to assert an objection of any kind
11 and he in good faith, or his counsel in good faith, thinks it's
12 legitimate, assert it.
13 We'll continue on with the deposition; and at an
14 appropriate time and in an appropriate forum, if we believe the
15 objection was not made in good faith or not well-taken, we'll
16 have the appropriate Court address it. It is not a reason to
17 pre-emptively quash a subpoena and say that I'm not allowed to
18 ask him a single question.
19 Fourth issue, he says, "This is a deposition of opposing
20 counsel; and, presumptively, you shouldn't be allowed to depose
21 opposing counsel. Well, the first problem with that is it's
22 not true. Mr. Scruggs is not opposing counsel. He's not
23 co-counsel; he's not opposing counsel; he's not counsel of any
24 character of record in State Farm v. Hood. And he never has
25 been, ever. What he is -- he's not named as a defendant

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1 either. But he is pled extensively throughout the complaint as
2 a coconspirator with General Hood.
3 Okay. Now, Mr. LeBlanc will say, probably, "Well,
4 Mr. Robinson's technically right. He's not counsel in this
5 case that we're here about today. But he's been opposing
6 counsel in Katrina litigation. And that's true. He has been.
7 He is no longer except, to the best of my knowledge, in one
8 suit. He has withdrawn from every other single piece of
9 Katrina litigation against State Farm he was in except for one
10 suit, and I think that is the qui tam action on the coast.
11 And the Fifth Circuit's made it clear in the Shelton case,
12 which Mr. LeBlanc so eloquently argues in his brief, that the
13 general prohibition, which is never absolute in any event,
14 against opposing counsel opposite doesn't apply at all when
15 it's former counsel. So what do we have here? He's not
16 counsel and never has been counsel in the suit we're here about
17 today; and even in the suits that we're not here about today,
18 he's not even counsel anymore. So we don't think that's a
19 reason he can't be deposed at all.
20 An aside on that, Mr. Scruggs suggests, "Well, Judge, you
21 know, they can put General Hood on the stand." And in fact,
22 we've already gotten a court order requiring General Hood to
23 appear and testify. And, "Why can't they ask General Hood the
24 same thing they could ask me?" Well, we intend to. But what I
25 predict to you is that we're going to get two different

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1 answers.
2 If we get substantive answers -- substantive, truthful
3 answers from Mr. Scruggs, I predict to you they will not be the
4 same answers we would have gotten from General Hood. We want
5 to use Scruggs' testimony to impeach General Hood's testimony.
6 Or if he wants to take the Fifth, then I will argue to Judge
7 Bramlette the negative inference, and that it should be imputed
8 and use that to impeach General Hood's testimony. So it's not
9 a substitute. We want it to attack General Hood's testimony.
10 Timing and Mr. Kecker being away, you've already asked me
11 that. I think I've addressed it. That was the Fifth issue
12 they raised. Essentially, it's beyond our control, Your Honor.
13 It's critical proof for my client on the multiple issues we've
14 already discussed. I did notice it -- I believe the same night
15 but certainly by the next morning, which was as quickly as we
16 knew about it.
17 As I mentioned earlier, the what I call the
18 why-are-we-fussing-e-mail -- in light of what Mr. Kecker has
19 said, I don't know whether it would matter if it was two days'
20 notice or 20 days' notice. If he truly is going to take the
21 Fifth on every question, why does he need preparation time?
22 And he's had a full week.
23 Last issue, Your Honor -- and then I promise to sit
24 down -- Mr. Scruggs, as an alternative, has said, "Well, Judge,
25 if you're going to let it go forward on any basis, for

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1 goodness' sakes, please seal the transcript. Don't let anybody
2 hear it. Don't let anybody read it; don't let anybody see the
3 videotape."
4 Well, I would just point out that this is substantive
5 evidence that we intend to put on in a preliminary injunction
6 hearing. This proceeding -- I don't know if you know this,
7 Your Honor -- it started out as under seal, the entire
8 proceeding. My clients did that. State Farm did it. We filed
9 it under seal.
10 And we did that because we had to make out allegations
11 about an ongoing grand jury proceeding in the complaint, and
12 General Hood has taken the position in the past -- a position
13 we disagree with -- that it could be wrongful, perhaps
14 criminal, if we revealed that, revealed something about an
15 ongoing grand jury proceeding. So we filed it under seal. And
16 then once General Hood had been served and appeared, we
17 promptly moved to dissolve the seal.
18 The parties had a vigorous, well-fought battle over that
19 motion to unseal; and General Hood wanted it to remain under
20 seal, everything. State Farm wanted it unsealed, everything.
21 Ultimately, Judges Barbour -- excuse me -- Bramlette and
22 Parker, who were sitting in tandem up on the bench in Natchez
23 when we were arguing this -- I presume they must have
24 conferred, but Judge Parker ruled from the bench. And we have
25 a published court order now -- I say published, published in

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1 the record. I think it is the November 2, 2007, order; and
2 it's actually an opinion.
3 And Judge Parker analyzed the case, found there was not
4 justification to seal the testimony and proceedings therein and
5 went further and said that this is a case involving alleged
6 corruption of a high-ranking, statewide elected public
7 official. If there ever was a case that ought to be unsealed
8 and subject to full public scrutiny and view, this is it.
9 Mr. Scruggs -- it is public knowledge now that his lawyer
10 has said that he's going to take the Fifth at least in part, if
11 not to every question. Okay, we've got documents and records,
12 his motion to quash; the e-mails are of record. What harm
13 could come to him at this point from having a transcript where
14 he takes the Fifth in response to a question?
15 His already -- his lawyer's already told the world he's
16 going to do that. So I think when you take that into joint
17 consideration with the fact that we have had a vigorous fight
18 over this very issue before Judges Bramlette and Parker with
19 extensive briefing and multiple argument and they made the
20 decision that this proceeding ought to be public, I think to go
21 backwards at this point would not serve the public's interest.
22 Does Your Honor have any questions?
23 THE COURT: No. Thank you.
24 MR. ROBINSON: Thank you very much.
25 THE COURT: Counsel?

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1 MR. LEBLANC: Good afternoon, Your Honor. I'm
2 prepared at this time, Your Honor, to give you a full factual
3 background. I realize that this case just came to your desk
4 yesterday morning, and that there was quite a bit of briefing
5 on this. And there was quite a large set of documents that
6 were attached. If Your Honor feels that it would be useful to
7 have the factual background that actually goes into this case
8 and that is underlying this case, then I'm prepared to give
9 that to you.
10 THE COURT: I've read both -- I've read all the
11 briefs, I believe, and have looked at the other documents. I
12 think if there's something you feel you should highlight, you
13 certainly are welcome to, or if you want to respond to
14 something that Mr. Robinson said. But otherwise, you handle it
15 however you feel best.
16 MR. LEBLANC: Okay. Your Honor, I will just
17 highlight one or two things at the very beginning; and then as
18 I go through the argument on the actual merits of each
19 argument, if there are any facts that I think you need -- that
20 might be useful to highlight there, I'll highlight them at that
21 time.
22 THE COURT: That'll be fine.
23 MR. LEBLANC: I'd like to start with the two orders
24 that have come out of the Southern District of Mississippi in
25 this case on January 24th. The first order was an order from

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1 Magistrate Judge Parker. And that order, if the Court is to
2 review it, shows that Magistrate Judge Parker was making
3 decisions about the preliminary injunction hearing only. In
4 fact, the order specifically says that the -- the only hearing
5 that the order discusses is the preliminary injunction hearing.
6 And it says the only purpose for taking any deposition of
7 Mr. Scruggs is for use at that preliminary injunction hearing.
8 The second order that I'd like to draw the Court's
9 attention to is the January 24th order from Judge Bramlette.
10 Judge Bramlette's order is interesting, because what he does is
11 he decides that the question of abstention and subject matter
12 jurisdiction will be decided in his court separately from the
13 question of the preliminary injunction on February 6th; and
14 that's quite apparent from his language. I'll just read it to
15 the Court to make it quite clear.
16 He says, and I quote, "At the hearing, the defendant's
17 motion to dismiss for lack of jurisdiction, including the
18 abstention issue, shall be heard first." And then he goes on
19 to say, "In the event that the defendant's motion to dismiss is
20 denied, then I will move on to the preliminary injunction
21 hearing."
22 Now, what's apparent about this is that Judge Bramlette
23 has seen that there is a difference between Attorney General
24 Hood's motion to dismiss and between State Farm's preliminary
25 injunction hearing, and he will consider them separately.

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1 There is no reason that the preliminary injunction hearing has
2 to proceed immediately after the motion to dismiss.
3 And in fact, counsel for Mr. Scruggs has urged State Farm
4 to seek a continuance of the hearing on the preliminary
5 injunction. As the Court knows, in September, a judge in the
6 Southern District of Mississippi issued a TRO. That TRO has
7 been in effect since September. It's been extended on, I
8 think, three or four times now. And each time, there's some --
9 there's some statement to the effect of, "This is extended
10 until such time as the preliminary injunction is decided."
11 And in Judge Bramlette's latest order, he extends it until
12 the motion to dismiss hearing is decided. So the fact is State
13 Farm very well could go seek a continuance of that; and then,
14 if their case is not dismissed on Wednesday -- on this coming
15 Wednesday, then -- then -- and they still need Mr. Scruggs'
16 testimony to proceed on the preliminary injunction, they are
17 very well entitled to come back and argue the merits of the
18 motion to quash with us at that point.
19 Your Honor, although we don't dispute that Judge Bramlette
20 is ideally situated to decide the question of abstention and
21 subject matter jurisdiction, the fact is that there's a Supreme
22 Court case, U.S. Catholic Conference Services, which says that
23 a recipient of a subpoena has a right to challenge the subject
24 matter jurisdiction of the underlying proceeding. And that's
25 what we intend to do, and that's what we've done.

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1 I think the second sort of practicality that is worth
2 considering is that the issues in this deposition are complex,
3 and the issues raised in the motions to quash and the motion to
4 compel are complex. And indeed, this Court's order staying it
5 from yesterday makes it quite clear that these issues are
6 complex. And I think that the reason they're complex is
7 because, number one, there are questions of scope that would be
8 raised in any deposition of Mr. Scruggs.
9 Is the scope limited to the determination of jurisdiction?
10 Is the scope limited to the issues at issue in the preliminary
11 injunction hearing, or is it a trial deposition where State
12 Farm can go wild and ask any question about the whole entire
13 case?
14 There are issues of privileges that -- that -- you know,
15 that have been raised and, in particular, five -- five ones
16 which I'll discuss shortly. There's also the Fifth Amendment
17 assertion that's in issue that's going to come up as to when
18 it's appropriate and whether Mr. Scruggs has a reasonable
19 belief as to which questions it's appropriate.
20 And then there's -- there's, finally, Your Honor -- there
21 is an issue that there's a strong possibility that this
22 deposition is not being used as anything other than to harass
23 Mr. Scruggs. And that's an issue which, in the middle of the
24 deposition, may come up as to what's going on with the
25 questioning; and that's yet another complication to this.

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1 THE COURT: Let me interrupt you. Did you say that
2 the Bramlette order said that he would decide the Younger
3 abstention doctrine before the preliminary injunction was
4 heard?
5 MR. LEBLANC: Yes, Your Honor. His order says -- and
6 I'll read it direct --
7 THE COURT: Why don't you get me, if you don't mind,
8 a copy of it? Do you have a copy?
9 MR. LEBLANC: I do have a copy right in front of me.
10 It's got my -- just underlining on it. But as long as
11 that's --
12 THE COURT: Give me, if you gentlemen would, one of
13 Parker's and Bramlette's. I don't have them before me right
14 now.
15 MR. LEBLANC: Okay. I'll just wait.
16 THE COURT: I know they're exhibits, but I don't have
17 all those documents. And I just wanted to look at those, if I
18 could.
19 MR. LEBLANC: Yes, Your Honor. I'm happy to wait.
20 It looks like --
21 THE COURT: Mr. Robinson, do you have those?
22 MR. LEBLANC: -- Mr. Robinson might have it.
23 MR. ROBINSON: I believe I do, Your Honor. I'm
24 looking right now; and if so -- if the Court will give me
25 permission to approach, I'm going to give them to you.

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1 THE COURT: Yeah. Do you object to the Court seeing
2 them?
3 MR. ROBINSON: I'm sorry, sir?
4 THE COURT: Do you object to the Court seeing them?
5 MR. ROBINSON: Absolutely not. I do object to what I
6 believe, though, was an inaccurate statement. He didn't say he
7 would decide it first; he said he would hear it first, which is
8 actually what he did last time. And then he decided to go
9 ahead and permit the proof.
10 THE COURT: Well, I'd like to see the documents.
11 MR. ROBINSON: I'll bring them to you just as soon as
12 I can find them.
13 THE COURT: All right. And you can go ahead,
14 Mr. LeBlanc. I think he's just going to hand me those
15 documents.
16 MR. LEBLANC: Oh, okay. I -- well, I --
17 THE COURT: I interrupted you.
18 MR. LEBLANC: Yeah. No, no. It's no problem. I was
19 going to move on to a totally different subject at this point,
20 right into subject matter jurisdiction. So if -- I'm happy to
21 wait or -- if they don't have it, I'm happy to read it to you.
22 The orders aren't long.
23 THE COURT: I'd rather just see it, if I could.
24 MR. LEBLANC: Yeah, I mean, you can see -- it's just
25 got underlining on it. But if they have no objection to

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1 looking at the underlining to see if there's a problem, I'm
2 happy to give you my copy.
3 THE COURT: Let me --
4 MR. ROBINSON: I think I can have you a clean copy,
5 Judge, in just a minute.
6 THE COURT: I'm going to ask my clerk, if he can hear
7 me, to bring them in here to me. We have them in the office.
8 MR. LEBLANC: Okay.
9 THE COURT: Don't worry about it, Mr. Robinson. I
10 assure both of you I'm going to look at those two orders.
11 MR. LEBLANC: Okay. The last thing I'll say is just
12 to respond to what Mr. Robinson said as a representation to the
13 Court, the Court -- Judge Bramlette did say he would hear the
14 motion to dismiss first; and then he says right after that, "In
15 the event that the defendant's motion to dismiss is denied, the
16 parties should be prepared to go forward with the hearing on
17 the plaintiff's motion for preliminary injunction."
18 Your Honor, I would like to turn to subject matter
19 jurisdiction, in particular the Younger abstention doctrine.
20 As I had mentioned a few minutes ago, the Catholic Conference
21 Services case from the -- is a U.S. Supreme Court case that
22 holds that a recipient of a subpoena may challenge subject
23 matter jurisdiction.
24 Judge Bramlette conducted hearings in November. And prior
25 to those hearings, he issued an order that says the Court, sua

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1 sponte, is going to consider the question of subject matter
2 jurisdiction and the abstention doctrine at those hearings.
3 And during those hearings in November, he made three
4 findings that are of special importance and that neither party,
5 I guess, really can dispute at this point which is, number one,
6 that the Younger test was presumptively -- he made the finding
7 that the Younger test was presumptively met.
8 And what did he mean by that? Well -- and this is quoted
9 in our motion to quash -- Judge Bramlette found that there was
10 an ongoing state judicial proceeding. The proceeding at issue
11 here was a grand jury investigation, and he concluded that a
12 grand jury investigation constituted an ongoing judicial
13 proceeding.
14 The second part of Younger that he said was met was that
15 there was an important State interest, that is, the Attorney
16 General and the State of Mississippi's interest in prosecuting
17 any crime that State Farm may have been involved in. And then
18 the third finding that he made was that Mississippi offers an
19 adequate opportunity to address the constitutional challenges.
20 Despite the argument that Mr. Robinson makes that he's
21 going to be prejudiced if somehow the TRO is dissolved, the
22 fact is, Your Honor, the grand jury investigation -- as the
23 Attorney General has promised -- will proceed. The grand jury
24 may not indict, Your Honor. If the grand jury indicts, State
25 Farm is free, and any of its employees that are -- that may be

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1 indicted are totally free, to go to the State of Mississippi
2 and to pursue those up through the courts in the great state of
3 Mississippi.
4 Furthermore, even before then, with respect to the grand
5 jury subpoena that's at issue here, State Farm's free to move
6 to quash in the great state of Mississippi. The prejudice to
7 them in making them go to the state courts is an interesting
8 question and goes right to the heart of Younger, because that's
9 the only prejudice that happens if the TRO is resolved, is they
10 go resolve this in the state of Mississippi.
11 Now, Judge Bramlette decided, therefore, that it was
12 presumptively found that Younger would apply. The question
13 then became whether or not there was an exception to the
14 Younger doctrine that might apply. And as Mr. Robinson
15 indicated, the exception that they seek to argue is that
16 there's a bad faith exception within Younger.
17 Now, bad faith really is a misnomer in this context
18 because Younger's bad faith exception is actually a heightened
19 bad faith exception. It requires for a Court to enjoin an
20 ongoing criminal prosecution in a state where there are
21 adequate protections for the rights of a potential defendant.
22 It requires that they demonstrate that there is manifest
23 bad faith, and that there will be great irreparable and
24 immediate harm to the federal constitutional rights of the
25 defendant, and that those rights will not be adequately

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1 protected in the state courts.
2 Now, I want to start with manifest bad faith, because
3 manifest bad faith does not mean you merely allege that there
4 is an alternative motive for the Attorney General or for any
5 state prosecutor. It requires a finding of no probable cause.
6 And that's the finding that has to be made for that.
7 Now, they have two theories, Your Honor, as to how bad
8 faith has been done. It's in their briefings, and I'll discuss
9 each of their two theories. The first theory that they have as
10 to how theirs manifests bad faith is that there is a binding
11 legal agreement that they have with the Attorney General that
12 he would not prosecute them; and that by issuing a new grand
13 jury subpoena, he has breached that binding legal agreement.
14 The second argument that they make as to how there is bad
15 faith is that there is a conspiracy between the Attorney
16 General and Mr. Scruggs and presumably, also, all the former
17 members of the Scruggs Katrina Group to chill the
18 constitutional rights of State Farm.
19 I'm going to discuss the binding legal agreement theory of
20 bad faith first, and then I'll move on to the one that's
21 directly related to Mr. Scruggs. The binding legal argument as
22 to bad faith has nothing to do with Mr. Scruggs. Mr. Scruggs
23 was not a party to any binding agreement. Mr. Scruggs -- I'm
24 sorry. The Court has determined that, you know, the binding
25 legal agreement has to be determined on the law. It's a

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1 contract.

2 And moreover, State Farm, in its briefings to Judge

3 Bramlette, has argued that no parole evidence should be

4 considered. So the idea that a subpoena -- that Judge --

5 Magistrate Judge Parker's order requiring Mr. Scruggs to

6 testify was somehow related to finding Younger abstention on

7 the basis of the theory of a binding legal agreement doesn't

8 quite stand to reason.

9 So then the second question becomes, "Okay. Well, if the

10 order was -- if the purpose of the order was to allow State

11 Farm to obtain information to establish that there was bad

12 faith, then the only other theory it could be based on is a

13 conspiracy to chill the constitutional rights.

14 Now, Your Honor, we would submit that at best the

15 complaint of State Farm establishes a malicious prosecution

16 argument, at best. However, that's largely irrelevant to the

17 question of whether there's bad faith. In *Arkansas v.*

18 *Sullivan*, which is a 2001 United States Supreme Court case, the

19 Court held that an improper police motive is irrelevant to the

20 determination of bad faith.

21 In *Wren v. United States*, another Supreme Court case, the

22 Supreme Court said the same thing. And moreover, the Fifth

23 Circuit, sitting en banc, in *Castellano v. Fragozo* held that

24 the defendant only has a constitutional right to be free from

25 prosecution without probable cause. Now, that's key, a right

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1 to be free from prosecution without probable cause.

2 Well, if that's the right that's here -- and moreover --

3 let me just say one other thing. That court went on to say in

4 *Castellano v. Fragozo* that there is no freestanding right to be

5 free from malicious prosecution. So the question is -- when

6 looking at bad faith and manifest bad faith -- not does the

7 Attorney General have an alternative motive to bring this case;

8 does the Attorney General have animus towards State Farm? The

9 question is, Is there probable cause for the Attorney General

10 to bring this prosecution?

11 And, Your Honor, I would submit to you that this is what

12 Judge Bramlette is doing. What Mr. Robinson didn't tell you is

13 that Judge Bramlette has been looking -- has been asking

14 questions of witnesses in camera. And in fact, State Farm has

15 objected to that and asked to cross-examine some of those

16 witnesses; and Judge Bramlette has said, "No."

17 Now, furthermore, Judge Bramlette is looking at evidence

18 in camera. And then the question becomes, "Well, why, if this

19 information is relevant and necessary to a preliminary

20 injunction hearing, is Judge Bramlette looking at this

21 information in camera, this testimony and this evidence?"

22 Your Honor, I would submit to you it's because Judge

23 Bramlette realizes that the question comes down to whether or

24 not the Attorney General has probable cause. Now, if this

25 deposition was being sought for the determination of

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1 jurisdiction, if that's what the purpose of this deposition is

2 for, and the determination of manifest bad faith, then the

3 question is, What does Mr. Scruggs have to say about probable

4 cause? That's the question.

5 If you read the entire first amended complaint, it's quite

6 clear that the only thing, even on their entire theory, that

7 Mr. Scruggs could offer, if he were to testify, is an

8 alternative motivation for bringing a prosecution.

9 He has nothing to say about this criminal investigation

10 that is being brought by the Attorney General. He has nothing

11 to say about what the evidence is before them. And moreover,

12 the person who's properly situated to answer that question is

13 indeed the Attorney General and the people in his office.

14 Your Honor, we would submit that that -- that that being

15 the case, it's unreasonable to take the position that the

16 deposition of Mr. Scruggs is sought for the abstention hearing,

17 for the motion to dismiss. In fact, as we understand it, the

18 Attorney General hasn't even been required to appear for the

19 motion to dismiss hearing.

20 If the case is not dismissed, then the Attorney General is

21 directed to appear at the preliminary injunction hearing, as

22 was ordered. The idea that they would need to take the

23 deposition of a nonparty witness beforehand to get that would

24 be -- would fly in the face that this information was

25 necessary. The person who's most necessary is the Attorney

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1 General.

2 Your Honor, we would also take the position that there is

3 no subject matter jurisdiction in this case on the merits. As

4 I indicated earlier, Judge Bramlette has already found that the

5 three prongs of Younger are met here. Abstention, Your

6 Honor -- it's about comity, as the Court -- I'm sure -- well

7 knows. It's about respect for the state courts. It's not, per

8 se, about protecting the defendant's rights.

9 The fact is, State Farm has the ability to go to the

10 Mississippi state courts and to challenge any criminal

11 prosecution there. Proving manifest bad faith is hard; it's

12 difficult; and it's not been proven thus far. Moreover, the

13 determination of jurisdiction may be made by Judge Bramlette as

14 early as Wednesday.

15 This Court, we would submit, could consider the question

16 of jurisdiction and could, if it wanted to, determine whether

17 or not there was manifest bad faith. I suspect that before the

18 Court did that it would want to also speak with the Attorney

19 General or speak with people from his office to determine

20 whether or not there is probable cause.

21 Mr. Robinson presented another argument to you for

22 jurisdiction, and that was based on a case called *Montez*, about

23 the fact that there is an inextricably intertwined argument

24 between jurisdiction and the merits. Your Honor, I would

25 submit that State Farm has misread that opinion in a number of

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1 ways.

2 The first thing is that that opinion says that if there is

3 a -- if a question of jurisdiction is inextricably

4 intertwined -- and I quote -- with the federal cause of action,

5 then the Court should assume jurisdiction." Here, there's no

6 question about an inextricably intertwining between

7 jurisdiction and the federal cause of action.

8 The federal cause of action is a 1983 case. As long as

9 they can establish that a state actor, acting under color of

10 state law, violated their constitutional rights, they have

11 their federal cause of action; and that doesn't require a

12 determination about bad faith.

13 See, Younger comes in, and it says to the courts -- the

14 federal courts -- even though we recognize that there are --

15 that we may have jurisdiction over this case, we're going to

16 abstain out of respect and out of comity for -- out of respect

17 for the state courts unless one of the narrow exceptions are

18 met.

19 And those exceptions are high, unless a defendant can't

20 get protected in the state courts, unless it's clear that the

21 executive branch is misusing their authority so much that

22 there's no reasonable expectation of probable cause. That's

23 when they get into the federal courts. That hasn't been proven

24 here, Your Honor; and they haven't even made an effort to go to

25 those courts.

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1 But with respect to Montez, specifically, the first thing

2 I would say is that it doesn't apply. But the second thing is

3 Montez says that a Court must -- Your Honor -- makes it quite

4 clear; it says the court must assume jurisdiction if there is

5 inextricably intertwining between the two. And then, on a Rule

6 56 motion or on summary judgment, decide to keep the case.

7 However, it's quite clear that Judge Bramlette hasn't

8 bought this argument. Why hasn't Judge Bramlette bought this

9 argument? He's separated the hearing on the motion to dismiss,

10 and he's separated the hearing on the preliminary injunction.

11 This is evident from his order on January 24. It's also

12 evident from what he's done previously in the case.

13 Previously in the case, Judge Bramlette has taken in

14 camera testimony and evidence. If Judge Bramlette thought that

15 they were -- that jurisdiction was to be assumed and that they

16 weren't inextricably intertwined, there would be no basis for

17 him to look at in camera testimony.

18 Finally, Your Honor, I would submit that if the Court were

19 to think that -- were to consider Montez further, that Montez

20 has an exception in the case that's discussed in the case; and

21 that's a case that they cite there called Moran v. The Kingdom

22 of Saudi Arabia. And what Moran says, Your Honor -- I'm sorry.

23 What they say in the Montez case about Moran is that there

24 are -- let me give you just a little fact on the Montez case.

25 The Montez case was a Federal Tort Claims Act case,

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1 whereas the Moran case is yet another type case; but the

2 defendant there seeks to dismiss under the Foreign Sovereign

3 Immunities Act. And what the Court says is that in certain

4 situations -- and this is the Fifth Circuit -- in certain

5 situations when the defendant is claiming immunity, we have

6 principles of -- and it's a foreign country -- we have

7 principles of international comity -- and they say that in

8 there -- that require us to resolve this sooner rather than

9 later, not to wait till Rule 56, not to wait until summary

10 judgment, to resolve it sooner rather than later. And I would

11 submit that that would actually apply here. It's not an

12 international case we're bringing, but this is the Attorney

13 General of the state of Mississippi.

14 Moving past jurisdiction, Your Honor, I would turn to

15 undue burden next. Now, Mr. Robinson didn't mention the words

16 undue burden to you, but Rule 45 contains a provision that says

17 this Court may quash a motion -- I'm sorry -- this Court may

18 quash a subpoena for undue burden. Undue burden is also not

19 discussed in their opposition. However, it is prominently

20 discussed in our motion to quash.

21 The fact is that, irrespective of whether or not State

22 Farm didn't wait after the order on January 24th to issue a

23 subpoena, and they did it expeditiously, the prejudice to

24 Mr. Scruggs is also to be measured. Even if the circumstances

25 had nothing to do with State Farm's own doing, even if they had

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1 no dirty hands in this process, the fact is Mr. Scruggs has a

2 right -- and Rule 45 gives it to him -- to challenge the

3 subpoena for undue burden.

4 And this subpoena is unduly burdensome for the following

5 reasons: The first reason is this deposition and this

6 testimony is not necessary, Your Honor, now. That's the key.

7 It's not necessary now. If Judge Bramlette determines on

8 Wednesday that this case is to be dismissed, this deposition

9 would be useless, fruitless. It would have nothing to do with

10 anything.

11 Secondly, Your Honor, there's an extraordinary criminal

12 contempt case pending against Mr. Scruggs that covers conduct

13 for which they seek -- for which State Farm seeks to question

14 Mr. Scruggs. Now, I would normally think it would be somewhat

15 hard to prove that the two of these things were interrelated.

16 However, the fact that the first amended complaint from State

17 Farm continually refers to the criminal contempt case, the fact

18 that State Farm keeps attaching documents from the criminal

19 contempt case to their briefs strongly suggests to me that they

20 even realize the criminal contempt case has a clear bearing on

21 this. And Mr. Scruggs has a Fifth Amendment right not to

22 testify now because of what could happen to him in that case,

23 as well as other cases that he's bringing against State Farm.

24 Mr. Scruggs is also a nonparty. Courts have ruled that

25 the position of a nonparty is to be weighed when deciding the

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1 undue burden analysis. Mr. Scruggs, at this time -- his
2 counsel, Mr. Kecker, is out of the country. He only learned
3 about this deposition last week, and he had prior plans.
4 Another reason is that the Court should consider the
5 burden on Mr. Scruggs' current and former clients who have
6 pending cases against State Farm. What State Farm seeks to do
7 is interrogate Mr. Scruggs on anything that has arisen in the
8 first amended complaint.
9 We don't know their questions as of right now. What we do
10 know is the scope of the first amended complaint is the largest
11 scope that they have with which to ask him questions. And that
12 covers the last 2 1/2 years of Mr. Scruggs' life, representing
13 clients, probably 700, 800, 900 clients who've brought claims
14 against State Farm, many of whose cases are still pending, are
15 still pending.
16 Mr. Scruggs may not be the attorney of record in those
17 cases, but those cases are pending. And if they can inquire
18 into the trial strategy that he's had so far, that gives them a
19 huge advantage in their other cases. Finally, Your Honor,
20 Mr. Scruggs would submit that this is the fourth trial subpoena
21 that he's -- fourth subpoena that he's received from State Farm
22 in the last five months.
23 This is the second proceeding in which they're doing that,
24 and we suspect that it's not going to end here. Four times
25 they've tried and not yet have they been able because each time

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1 courts have stayed it or stopped it. And indeed, Your
2 Honorable Court has got a stay on a subpoena from Renfroe
3 that's trying to do the same thing.
4 The possibility of harassment of Mr. Scruggs is something
5 we raise. We suspect that it's more than a mere possibility,
6 but we raise it as yet another category -- another
7 qualification to undue burden. And finally, Your Honor, I'd
8 like -- well, not finally, there's still two issues left to
9 look at. I'm working down the list, Your Honor. I'm now to
10 privilege. And, Your Honor, I won't go into privilege on each
11 one of these because, No. 1, we think the jurisdiction is easy
12 enough to resolve.
13 Number 2, State Farm has yet to say anything about the
14 undue burden to Mr. Scruggs; and I suspect we may hear
15 something in the rebuttal. And No. 3, the privileges are
16 pretty clear. They ask -- there's a citation to a case -- I
17 think he said it was the Finnerty case or Finery case. I don't
18 remember what Mr. Robinson said. It starts with an F.
19 I submit that I reviewed the cases in their -- cited in
20 their opposition last night. And the cases that hold that
21 there's no blanket assertion of privilege have to do, usually,
22 with documents and not necessarily to do with testimony.
23 And moreover, Your Honor, this is a special case that's a
24 little bit different. Here is State Farm who's been litigating
25 against Mr. Scruggs for 2 1/2 years, trying to question him

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1 only on things that have happened in the last 2 1/2 years and
2 only on things that have to do with Katrina. And it's quite
3 clear that everything they seek is protected by numerous
4 doctrines, doctrines that are owned not by just Mr. Scruggs but
5 that are owned by his clients --
6 THE COURT: Let me ask you this: I think SEC v.
7 First Financial is one of the cases they've cited.
8 MR. LEBLANC: Yes, Your Honor.
9 THE COURT: And I don't think it just applies to
10 documents. It says "a blanket refusal to answer questions at
11 depositions on the grounds that they are privileged is an
12 improper invocation of the Fifth Amendment."
13 MR. LEBLANC: Right. An improper invocation of the
14 Fifth Amendment.
15 THE COURT: Okay.
16 MR. LEBLANC: We're talking about privilege with
17 respect to privilege --
18 THE COURT: I'm sorry. I misunderstood you.
19 MR. LEBLANC: Yes. No problem, Your Honor. But that
20 does segue into the Fifth Amendment discussion, as I get closer
21 to concluding, Your Honor. State Farm has taken the position
22 that they need Mr. Scruggs' deposition to obtain an adverse
23 inference at the preliminary injunction hearing.
24 Now, they may want to obtain an adverse interest at a
25 trial later on; but that's not why this deposition is coming.

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1 I mean, even on the broadest reading, the broadest reading of
2 Judge Parker's order, he says this is only useful at the
3 preliminary injunction hearing.
4 He's not ordering this -- they're not expediting discovery
5 here. And in fact, in October, Your Honor, State Farm went to
6 the Court, and they asked to get expedited discovery, and they
7 asked for Mr. Scruggs' testimony. And they were denied that
8 request.
9 The Fifth Amendment here is going to have little value at
10 the preliminary injunction hearing. You know, there's no jury
11 here. All the cases that they cite about the Fifth Amendment
12 are jury cases. Here we have a judge. Now, if State Farm were
13 to take a deposition and get seven hours or five hours of
14 Mr. Scruggs pleading the Fifth, I suspect that the Court isn't
15 going to listen to five hours of hearing questions and
16 Mr. Scruggs pleading the Fifth. At some point, it's going to
17 intervene.
18 But even if it didn't do that, the Attorney General, this
19 week, approached State Farm and said to State Farm, "We will
20 stipulate that Mr. Scruggs will plead the Fifth," offered them
21 a stipulation. State Farm rejected. The Attorney General came
22 back a second time -- State Farm rejected it because it was a
23 blanket stipulation that he would plead the Fifth.
24 The Attorney General came back a second time. The
25 Attorney General this time offered a question-by-question

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1 stipulation.

2 THE COURT: Why would it matter to the Attorney
3 General?

4 MR. LEBLANC: Because the Attorney General believes
5 there's no adverse inference to be drawn. And if the adverse
6 inference -- as to what adverse -- I mean, this is my guess.
7 Of course, the Attorney General is here and can respond for
8 himself. But if I were the Attorney General, I would -- and I
9 were arguing for him, I would argue that there's no adverse
10 inference to be made from Mr. Scruggs taking the Fifth.

11 I mean, how Mr. Scruggs taking the Fifth has anything to
12 do with the finding of probable cause confuses me. The finding
13 of probable cause has to do with the evidence that's being
14 found in camera. It has to do with what Judge Bramlette thinks
15 when he reviews it. I'm confused as to how any taking of the
16 Fifth at a preliminary injunction -- you know, for use at a
17 preliminary injunction hearing is going to be of any use. But,
18 again, the Attorney General is represented here; and I, you
19 know, would offer him the opportunity to respond to that
20 question more directly.

21 Finally, Your Honor, the fact that the Attorney General
22 approached them with the stipulation, I think, resolves any
23 question about a dispute. At that point, there's no dispute.
24 If the Attorney General is saying that he's willing to
25 stipulate that Mr. Scruggs would plead the Fifth, State Farm is

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1 very well-aware of it.

2 So much aware of it that they took the Court's time to
3 file a motion to compel. It seems to me that there isn't much
4 of a dispute there. The only question is, What's Judge
5 Bramlette going to do? Is he going to admit this or not? Is
6 he going to find this useful to the determination of probable
7 cause or not?

8 The last issue -- and this, indeed, is the last issue,
9 Your Honor -- is that we have sought a protective order in this
10 case. And one of the issues that -- one of the reasons we
11 sought a seal as a condition -- as part of the protective order
12 is that there's already been in camera evidence taken of
13 potential grand jury witnesses by Judge Bramlette.

14 Judge Bramlette's clearly made the determination that
15 there are some things with respect to the investigation that
16 State Farm is not entitled to know. There's a letter from the
17 Attorney General to the U.S. Attorney for the Northern District
18 of Alabama in which he identifies Mr. Scruggs as a confidential
19 informant, says that Mr. Scruggs is protected by Mississippi's
20 Whistleblower Law.

21 He's made it quite clear that Mr. Scruggs is -- is -- has,
22 you know, worked in the past in connection with the Attorney
23 General's Office. That's quite clear. It's out there. That's
24 not a surprise to anyone. This information ought to be sealed,
25 likewise, for the same reasons.

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1 Secondly, Your Honor, is that there's a prejudice to
2 Mr. Scruggs. Bear in mind that if, on Wednesday, Judge
3 Bramlette decides to dismiss this case, there's a deposition
4 sitting out there that has no purpose; that is sitting out
5 there available for State Farm to use in all its other
6 litigation, available against Mr. Scruggs' clients, available
7 for the private attorneys that have been appointed in Alabama
8 to prosecute Mr. Scruggs, available to a court to -- to the
9 court here that's looking into the Section 666 violation --
10 potential crimes. There's a lot that's at stake here.

11 To put this out there and allow all of them to use it when
12 it's not a hundred percent necessary, when it's not needed, is
13 a huge burden to put on Mr. Scruggs and unfairly prejudices
14 him. We also ask, Your Honor, that even if Your Honor were to
15 find that there were subject matter jurisdiction here or that
16 the trial deposition of Mr. Scruggs was sought for the purpose
17 of obtaining jurisdiction, and that there was no valid basis to
18 quash this deposition for attorney/client privilege, work
19 product privilege, or a number of other privileges or the undue
20 burden to Mr. Scruggs, and ordered the deposition to proceed,
21 that the deposition could proceed by written questions.

22 There's no reason to haul a bunch of attorneys into one
23 place to hear someone take the Fifth. There's no reason to do
24 that. That could be written down, if we wanted to minimize
25 those efforts. The fact is, Your Honor, we think -- and we

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1 submit -- that there is no jurisdiction, first of all.

2 In conclusion, that the facts nor the law support State
3 Farm's position before this Court that this deposition is being
4 sought to help establish jurisdiction, an issue that, you know,
5 if Judge Bramlette thought was important, Judge Bramlette would
6 have ordered Mr. Scruggs to appear as early as November. And
7 he hasn't done that throughout this whole case.

8 This is from Magistrate Judge Parker with respect to the
9 preliminary injunction hearing, which is specifically stated in
10 there. So if the Court moves past jurisdiction, then the
11 question becomes whether or not to quash this subpoena. We
12 think that there are valid bases to quash it both for privilege
13 and undue burden, which I might remind the Court has not been
14 discussed by State Farm.

15 And if the Court decides then that this deposition is not
16 to be quashed, then we request, respectfully, a protective
17 order that would protect the rights of Mr. Scruggs, as well as
18 his clients, their interests, and considering those as well;
19 and that would minimize the burden upon him. And that would
20 stay it at least until Judge Bramlette has made the decision on
21 subject matter jurisdiction, which is Wednesday.

22 The fact is there's a TRO in this case. Nothing's going
23 to happen if State Farm goes to seek a continuance. And I
24 believe the Attorney General may represent to this Court that
25 they won't object to a continuance being sought by State Farm

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1 after Judge Bramlette has made the determination on subject
2 matter jurisdiction. For all these reasons, Your Honor, we
3 respectfully request that the Court quash the subpoena.
4 THE COURT: All right. Thank you, sir. Mr. Hester,
5 did you have something?
6 MR. HESTER: I might have a couple of comments that
7 would be beneficial for the Court, if I might, yes, sir.
8 THE COURT: Okay.
9 MR. ROBINSON: Your Honor, while he's coming up, I
10 found the orders if you'd like me to approach and give them to
11 the Court.
12 THE COURT: Man, we've already printed them out; and
13 they've already given them to me since we had --
14 MR. ROBINSON: Okay. Well, I apologize it took so
15 long.
16 MR. HESTER: Your Honor, again, Lawson Hester for the
17 Office of the Attorney General for the state of Mississippi.
18 Both the prior lawyers have represented to be brief. I assure
19 you that I will. I do not have the type of legal argument to
20 present to the Court that has been so eloquently --
21 THE COURT: Yours isn't as complicated, is it?
22 MR. HESTER: No, sir. My position is very simple. I
23 do want to clarify a couple of things if I may. You asked a
24 question of Mr. LeBlanc that I'd like to address, that is, Why
25 would the Attorney General care whether or not this goes

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1 forward?
2 THE COURT: It is interesting.
3 MR. HESTER: Yes, sir.
4 THE COURT: The Attorney General's a party; and if I
5 understand it, Mr. Scruggs is a witness. He's not a named
6 party, anyway.
7 MR. HESTER: He is not.
8 THE COURT: So how can the Attorney General guarantee
9 what he will say?
10 MR. HESTER: We have no idea what he will say.
11 THE COURT: Okay. I understood he said that he would
12 stipulate as to what he would say.
13 MR. HESTER: Well, what we did is this -- and one
14 reason I wanted to address the Court is this --
15 THE COURT: Okay.
16 MR. HESTER: -- because we basically have notified
17 Judge Parker, as soon as we became aware of the circumstances
18 involving Mr. Kecker's firm, Mr. Scruggs' position relative to
19 the deposition, as well as, now, State Farm's desire to move
20 forward with the deposition notwithstanding the position of
21 Mr. Kecker's firm and Mr. Scruggs and their legal arguments. We
22 basically found ourselves caught in the middle of a very
23 difficult situation with a very limited time frame left to
24 prepare for the remaining arguments to be presented on
25 February the 6th.

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1 And it, likewise, appeared inevitable that as to any
2 proposed deposition taking place prior to February 6th was not
3 going to be a realistic eventuality. I simply wrote a letter
4 to Magistrate Judge Parker in which I specifically stated that
5 we, being the Office of the Attorney General, were in no way
6 attempting to be obstructionists with regard to the taking of
7 the deposition.
8 However, it had become abundantly clear, because of the
9 written exchange and communication between the parties, that
10 the deposition as proposed -- neither side was going to reach
11 an amicable resolution of that. And as a result of that, that
12 we were going to waste everyone's time -- or at least take up
13 everyone's time in filing alias proceedings when everyone else
14 needed to be preparing for the proceeding to be next week.
15 Ours was a very simple position, we need the time to be
16 doing other things. As a result of that, we've had to move all
17 of our witness preparation -- or the bulk of that to next week
18 as a result -- instead of doing that today. So ours was a very
19 simple position: We don't think it's going to happen; so let's
20 look for an amicable resolution of that, short of having to go
21 through the slings and arrows of this hearing, slings and
22 arrows of taking a deposition that's going to be very
23 contentious, notwithstanding any party's position.
24 So what we proposed was very simple. We proposed, "Well,
25 if everyone insists or takes the position that he's going to --

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1 that Mr. Scruggs will indeed make a blanket assertion of the
2 Fifth Amendment, then we'll stipulate to that as a blanket
3 proposition.
4 Alternatively, you propose the questions you want to ask;
5 we'll propose the questions we would ask if you took the
6 deposition of Mr. Scruggs, because we would, likewise, have
7 questions of Mr. Scruggs to follow up; and we will stipulate
8 with you that those questions, if asked -- that Mr. Scruggs
9 would not answer those and would assert, indeed, his Fifth
10 Amendment privilege. And we would put those questions into the
11 record as an evidentiary stipulation representing State Farm's
12 questions and then representing the Attorney General's
13 questions.
14 That, I believe, would have given them what they
15 ultimately wanted. They flatly rejected that alternative. We
16 then requested that Magistrate Judge Parker intervene
17 informally in an effort to reach an amicable resolution of the
18 dispute that's now presented here to the Court. Judge Parker
19 held an informal telephonic conference with the parties.
20 Indeed, at that point in time, we suggested that there be a
21 deposition upon written questions. That, likewise, was
22 rejected.
23 So from the standpoint of the Attorney General, we're not
24 being obstructionists in the sense of trying to preclude a
25 deposition. We, if Mr. Scruggs is indeed deposed, would have

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1 questions for Mr. Scruggs as well. But our proposal was simply
2 to try to avoid all of this. It was unsuccessful in that
3 regard. And it's clear that State Farm's position is, We want
4 the deposition, and that's all we're going to take.
5 So in that regard, where my position, on behalf of the
6 Attorney General, now comes is that the position espoused by
7 Mr. Kecker -- Mr. Kecker's firm, through Mr. LeBlanc, is correct,
8 I believe, that the testimony -- and I don't know what
9 Mr. Scruggs may be asked by State Farm. But I do know what the
10 issues are that are relevant to the issue of abstention, and
11 the issue that's going to be decided by Judge Bramlette.
12 I was the one who made the argument in Natchez before
13 Judge Bramlette. I responded to his questions there. And one
14 of the cases that was cited -- in fact, the leading case --
15 excuse me -- cited by State Farm in support of its argument
16 that the bad faith exception should apply to Younger was the
17 Rowe v. Griffin decision out of the 11th Circuit in 1982.
18 And in summary -- and I'll give you the cite, which is 676
19 F.2d 524. And in paraphrase of that decision, Your Honor,
20 there are three things under Rowe which State Farm has very
21 heavily hung its procedural and substantive hat upon that State
22 Farm would be required to be able to establish. And I say that
23 now -- and I'll go through these three things because I don't
24 think Mr. Scruggs' deposition lends anything or could arguably
25 ever lend anything to these three points.

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1 The first prong is that an agreement was undoubtedly made,
2 that being an agreement not to prosecute. There is no
3 allegation within the complaint that Mr. Scruggs in any way had
4 anything to do with any form of agreement not to prosecute
5 State Farm made -- purportedly made by the Office of the
6 Attorney General. Mr. Scruggs is in no way connected to that
7 issue.
8 Number two from Rowe is that State Farm, as the punitive
9 criminal defendant, would have to show that it performed each
10 obligation on its side of the purported nonprosecution
11 agreement. Here, there are a couple of significant conditions
12 which we contend were not satisfied by State Farm.
13 Mr. Scruggs, likewise, would not have substantive
14 testimony, in my wildest imagination, relative to whether or
15 not State Farm fulfilled its obligations, which is the second
16 prong of Rowe under the agreement between State Farm and the
17 Office of the Attorney General, as State Farm alleges.
18 We, for the record, don't agree that there was a binding
19 agreement; but notwithstanding, even if there were, that
20 dispute is between the Office of the Attorney General and State
21 Farm. Mr. Scruggs was not involved in that. He was not a
22 party to it. He was not the signatory to it. He was not
23 counsel in it. His testimony would have no bearing on that
24 issue.
25 And the third prong, likewise, Mr. Scruggs would have

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1 no -- his testimony, in my wildest dreams, would not have any
2 relevance to is that the new investigation is directly -- it
3 would be incumbent upon State Farm to show, rather, that the
4 new investigation is directly related to the offense under the
5 agreement.
6 In other words, that the current investigation that the
7 Attorney General of the state of Mississippi seeks to engage in
8 with reference to State Farm -- it would be State Farm's
9 obligation to show that that new investigation is directly
10 related to the offense for which they claim protection under
11 the nonprosecution letter, which they contend to be a
12 nonprosecution agreement.
13 None of those three prongs involve Mr. Scruggs. And that
14 is the reason we did not want to take up everyone's time going
15 into a deposition of Mr. Scruggs at this point in time.
16 Because if Judge Bramlette does in fact decide the motion in
17 our favor, which he has said he will take up as the very first
18 thing on February the 6th, then there is no probative value of
19 the deposition of Mr. Scruggs for purposes of what we intend to
20 be, respectfully and hopefully, a dispositive hearing on
21 February the 6th.
22 The only other thing I would add to the discussion,
23 because the Court did ask Counsel about the timeliness and
24 undue burden and so forth relative to the deposition, I would
25 simply point out -- because the Court, I know, has not been

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1 handling the underlying State Farm case, but that matter has
2 been pending since November of 2007.
3 It was not until January the 23rd -- excuse me -- the 22nd
4 of January of 2008 that State Farm first expressed any desire
5 to involve Richard Scruggs as a witness in this case. There
6 was no desire expressed in November at the first hearing nor
7 when the Court reconvened in Jackson for the second hearing.
8 And it's only now, some seven days before the hearing is
9 scheduled to potentially reconvene, if the motion to dismiss is
10 denied, that they bring this matter up for the very first time.
11 So from that perspective, Your Honor, I don't think it's
12 fair for State Farm to come to the Court and say, "We did it as
13 soon as we could," because they've had time since the filing of
14 the case in September, not only that, since the issue was
15 enjoined in November. If they wanted the testimony, it's only
16 now as an eleventh-hour tactic that they want it.
17 And it is now causing everyone to lose precious time in
18 preparation for the hearing; that we respectfully submit,
19 candidly, it's not necessary for what's going to be presented
20 to the Court.
21 And I guess in closing I should address the issue that was
22 raised by both parties relative to the issue of the continuance
23 of the preliminary injunction hearing. And I realize that
24 would take some form of communication between this Court and
25 Judge Bramlette's court because Judge Bramlette has indeed set

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1 the hearing for February the 6th on our motion. If that is
2 denied -- if that is denied -- there would be a follow-up
3 testimonial presentation relevant to the preliminary
4 injunction.
5 My argument as started, and as I showed as to the Rowe
6 three prongs, is that Mr. Scruggs' testimony has no relevance
7 to the legal argument on the motion to dismiss based upon
8 Younger abstention. He would only have relevance under the
9 arguments made by State Farm in the amended complaint to the
10 subject matter of the preliminary injunction hearing.
11 It doesn't pertain to the motion to dismiss; it pertains
12 to what they allege in the complaint. Respectfully, I think we
13 can move forward with our motion to dismiss. If Judge
14 Bramlette denies that motion, which I respectfully hope he does
15 not -- but if he does deny that motion and we do have to
16 reconvene for the preliminary hearing, then I think a remedy
17 could be fashioned either by this Court or in conjunction with
18 Judge Bramlette such that time could be allowed for an
19 appropriate taking of the deposition under the appropriate
20 terms and considerations so that neither party is prejudiced.
21 For example, if State Farm deposes Mr. Scruggs, we would
22 have questions as well. I don't foresee, because of the time
23 crunch the parties are now in, that there is a realistic means
24 by which that can be accomplished prior to February the 6th.
25 We would respectfully request the Court to consider all of

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1 those alternatives in making its ruling, Your Honor.
2 I'll be happy to answer any factual or procedural
3 questions the Court may have relative to the underlying
4 proceedings.
5 THE COURT: I appreciate that. We've gone an hour
6 and a half so far, and I don't know that I have any questions.
7 I appreciate your comments.
8 MR. LEBLANC: Thank you.
9 THE COURT: Can you do it in five minutes, Mr.
10 Robinson?
11 MR. ROBINSON: I'll do my absolute best, Your Honor.
12 THE COURT: All right. We'll try.
13 MR. ROBINSON: I can't talk as fast as Mr. LeBlanc,
14 but I'll try to speed up. Mr. LeBlanc, who put on a very good
15 argument for Your Honor, has one disability he's suffering
16 under, and he wasn't present. That's the disability, he wasn't
17 present for these proceedings that we -- Mr. Hester and I were
18 at.
19 And, so, he doesn't realize, apparently, that the Attorney
20 General has made all of the arguments that were just made to
21 you already in the lower case; and Magistrate Judge Parker,
22 after consulting with Judge Bramlette, rejected them and
23 allowed this deposition to be taken for presentation next week.
24 Now, the order does say the motion to dismiss will be heard
25 first; and it was the last time we came down there.

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1 And Mr. Hester put on a very good argument. And then I
2 stood up, and I came to the podium. And Judge Bramlette looked
3 at me; and he said, "Mr. Robinson," he said, "I've looked at
4 the case you've given me. Call your first witness." I wasn't
5 even allowed to get into argument because he wanted to hear the
6 proof. And I suggest to the Court that's what's going to
7 happen next week.
8 And the best evidence of that is the fact that we have a
9 court order authorizing us to take this trial testimony. So if
10 the order was intended to suggest that -- what Mr. Hester has
11 told Your Honor, that we don't need this until there's a
12 determination of whether or not that we're going to go forward,
13 then why has the Court already allowed it? He's already made
14 these arguments. This is an attempt to get a second bite at
15 the apple.
16 Now, subject matter jurisdiction, this is an improper
17 collateral attack. Under Montez, there are only two ways the
18 Court can look at that, one is 12(b)(6) and the other is
19 evidence. Mr. Scruggs has offered no evidence here to attack
20 subject matter jurisdiction, which would mean that even if this
21 Court could properly somehow rule on the issue, it would have
22 to accept everything that's been pled as true.
23 And I submit, respectfully, that if the Court looks at it
24 on that standard, there's no question there's subject matter
25 jurisdiction. But in any event, that issue is in the bosom of

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1 the Southern District. And in fact, we've already heard hours
2 of testimony and hours and hours of argument, and I don't know
3 how many docket filings there have been and briefs and evidence
4 and things submitted.
5 Judge Bramlette is already seized with that issue, and
6 it's going to be decided. This is not the appropriate forum to
7 collaterally attack subject matter jurisdiction. And we all
8 admit it has to be decided, and soon.
9 Now, if this is intended to harass Mr. Scruggs, why did
10 Judge Bramlette and Judge Parker authorize it? If it's not
11 necessary and if it's intended to harass, why did they
12 authorize it? We've already had all of these arguments in the
13 Southern District. They've been rejected.
14 Now, I was also asked with respect to -- or excuse me,
15 your Honor. An argument was made that, Well, perhaps Finley
16 doesn't stand for the proposition that a blanket objection to
17 privilege is inappropriate when it's something other than the
18 Fifth Amendment. I'll read it to you. It's just one sentence.
19 "Appellant has sought to invoke the attorney/client
20 privilege -- that's not the Fifth Amendment -- by means of a
21 blanket refusal to testify. The utilization of such a vehicle
22 for assertion of privileged matter is unacceptable and
23 improper, and that is clear beyond question."
24 Now, also, Your Honor, with respect to the stipulation,
25 let me address that very briefly. The first stipulation that

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1 Attorney General Hood offered was a general stipulation;
2 anything you ask him, he's going to plead the Fifth. Well,
3 first of all, that violates the law in the Fifth Circuit
4 because you can't have a general objection. It's not proper,
5 anyway.
6 And, second, it'd be worthless to us. What inference
7 would we have, an inference against what question? So then a
8 question-by-question stipulation is the alternative he
9 proposes. Well, how does General Hood know what Mr. Scruggs
10 would do in response to a particular question?
11 So even if I give him a list and General Hood stipulates
12 he'd take the Fifth on each of these, then when I start trying
13 to argue to Judge Bramlette a negative inference, all General
14 Hood has to say -- and he'd be right, by the way -- is, Well,
15 Mr. Robinson's client isn't entitled to negative inference.
16 How does he know that's what Mr. Scruggs would really say?
17 Well, I don't. Okay? So, I mean, that's worthless to me, too.
18 So then -- Your Honor asked a very telling question. In
19 fact, I smiled to myself when you asked it. You said, you
20 know, isn't it odd that the Attorney General of the state of
21 Mississippi is trying so hard to prevent the deposition of a
22 twice-indicted individual, whose lawyer just stood up here and
23 looked the Court in the face and admitted that he's been
24 working with the Attorney General in connection with the
25 criminal investigation of my client --

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1 THE COURT: I don't think I asked that question.
2 MR. ROBINSON: Well, I think that it's telling; and I
3 think it shows that the Attorney General's real motivation is
4 he doesn't want Mr. Scruggs to testify because he thinks that
5 either the truthful, substantive testimony or the implication
6 of the Fifth -- either way, it's going to hurt his position
7 next week.
8 Now, with respect to the Rowe case, we heard argument from
9 Mr. Hester that there's nothing Mr. Scruggs could say that's
10 relevant to the Rowe analysis. Well, two problems with that.
11 One, Rowe only relates to one of our three claims, which is
12 violation of the noninvestigation agreement. Okay?
13 Remember, there are two other central types of allegations
14 in the complaint, one relating to civil extortion of
15 Mr. Scruggs's position in his civil litigation by threat of
16 criminal prosecution and then, also, the Renfro litigation.
17 Those don't have anything to do with the Rowe case, and
18 Mr. Scruggs' testimony is clearly relevant to both. Both of
19 which also center on issues of bad faith, which is part of the
20 Younger analysis.
21 With respect to continuance -- this is the last point I
22 will make and then I will sit down, Your Honor -- Mr. Hester
23 explicitly proposed this to Judge Parker. And he said, "Judge,
24 why don't we bifurcate this, and we'll have a hearing, just
25 Mr. Robinson and I can come; we won't need witnesses; and we'll

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1 argue the motion to dismiss. And if, and only if, it's denied,
2 then we'll reconvene at some later point and hear live
3 testimony." Judge Bramlette chose not to do that and allowed
4 this deposition to be authorized by court order.
5 So I guess all I would say, Your Honor, in summation is I
6 can't tell the Court how important it is to protecting my
7 client's rights that they be allowed to take this deposition.
8 If Mr. Kecker was telling the truth in his
9 let's-don't-go-fussing e-mail -- and I believe that he was --
10 Mr. Scruggs will probably take the Fifth in response to every
11 question, which means that he doesn't need any preparation
12 time; there are no undue burdens; we're not going to be running
13 over here fighting about it.
14 We will address that situation at the appropriate time if
15 we come to the conclusion it's inappropriate. And, so, we
16 would ask the Court, in light of the fact that the Court
17 overseeing the underlying litigation has already authorized
18 this, to please let the deposition go forward. Thank you, Your
19 Honor.
20 THE COURT: All right. Mr. LeBlanc, do you have
21 anything else?
22 MR. LEBLANC: Your Honor, I actually do have two
23 points I would like to make.
24 THE COURT: Okay.
25 MR. LEBLANC: And I assure you that I will keep them

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1 under five minutes. If I go to five minutes, you can stop me;
2 and I will sit down.
3 THE COURT: Okay. Sallie, will you do that?
4 THE CLERK: Yes, sir.
5 MR. LEBLANC: Your Honor, my only two points are,
6 first of all, Mr. Robinson has made a big deal about the fact
7 that he says there's no evidence before this Court on subject
8 matter jurisdiction. I would submit to Your Honor that we
9 presented to the Court the three findings of Judge Bramlette on
10 the question of subject matter jurisdiction in Younger.
11 He found that there's an ongoing judicial proceeding, that
12 it involves an important state interest, and that there's an
13 adequate state remedy. At that point, we've established a
14 prima facie case for Younger abstention. It's then up to State
15 Farm, Your Honor, to establish bad faith. And if you wanted to
16 look for evidence and the lack of evidence of bad faith, it's
17 State Farm that hasn't made the record on that point.
18 The second issue I'd like to discuss, Your Honor, is the
19 Rowe case that they just mentioned to you. And I would just
20 like to put this in a little perspective quickly. At the
21 beginning, remember I said they had two theories of bad faith?
22 One theory of bad faith has to do with the binding legal
23 contract. The second theory that they have of bad faith has to
24 do with the conspiracy to chill their constitutional rights.
25 The first issue is the Rowe case, right, that's the

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1 binding legal agreement. That's where if a state wants to move
2 away from a nonprosecution agreement it's got to meet those
3 three factors for Younger to not apply. Well, clearly,
4 everyone agrees Mr. Scruggs is not relevant to that; and
5 Mr. Robinson just stood up here and told you, "Don't worry
6 about that, that's just the binding legal agreement argument."
7 So the only one that's left is the second theory. And the
8 second theory is that -- is the chilling constitutional -- the
9 conspiracy to chill State Farm's constitutional rights. Now,
10 mind you, State Farm hasn't dropped out of a case yet. Mind
11 you, State Farm has not presented an argument to you yet that
12 it didn't make. State Farm has not even discussed -- gone
13 further.
14 But moreover -- and this is the clincher, the coup de
15 grace -- in Younger, the Supreme Court discussed whether a
16 chilling of constitutional rights could be the basis of
17 enjoining a state court prosecution; and the Supreme Court said
18 it's not sufficient; you can't do it. Younger was a first
19 amendment case, had to do with chilling; and the Supreme Court
20 said, "No. It can't be done."
21 So I raise this to go one step further and say, if their
22 theory is chilling, if their theory is really that Mr. Scruggs
23 and the Attorney General are collaborating to chill their
24 constitutional rights, then they have to prove manifest bad
25 faith, meaning the absence of probable cause.

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1 Mr. Scruggs can only, in their wildest imagination, in --
2 in Mr. Hester's wildest imagination, and in the first amendment
3 complaint -- if you take all their allegations in the first
4 amendment complaint as true, can only show an alternative
5 motive. The Supreme Court has said repeatedly, "Alternative
6 motives don't matter when it comes to manifest bad faith."
7 The fact is, State Farm can't commit a crime and get away
8 with it on the basis that the Attorney General may have animus
9 towards them. If he's got probable cause, a decision Judge
10 Bramlette is making, a decision which State Farm recognizes and
11 says that Judge Bramlette is appropriate to make, and if the
12 Supreme Court is correct that Mr. Scruggs has a right to
13 challenge subject matter jurisdiction, then this Court has two
14 options it seems.
15 One, it can quash automatically, that's a basis. We
16 presented two cases for that in our brief, that's U.S. Catholic
17 Conference Services and that's the Houston Business Journal
18 case. And then the second thing, it could do a stay at least
19 until Judge Bramlette decides, and then come back to the
20 question later on.
21 We submit that the Court should quash at this point; but
22 if the Court doesn't quash, that it should at least be on -- on
23 jurisdictional grounds, that it should be stayed. And if not
24 stayed, then that the Court -- stayed until such a time as the
25 Court can take up the other motion to quash objections that we

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1 have. And then if it still ordered it to proceed, that
2 appropriate protective orders be put in place. Thank you very
3 much, Your Honor.
4 THE COURT: All right. Mr. Hester?
5 MR. HESTER: Nothing further, Your Honor.
6 THE COURT: Thank you. All right. Is there anything
7 further to be argued in this matter?
8 MR. ROBINSON: Not on behalf of the plaintiffs, Your
9 Honor.
10 THE COURT: All right. Mr. LeBlanc?
11 MR. LEBLANC: Not on behalf of Mr. Scruggs.
12 MR. HESTER: No, sir.
13 THE COURT: All right. Well, I appreciate your
14 arguments and your briefs. You've done a very good job on
15 behalf of your clients. I think most of the issues that were
16 raised here today are going to have to be settled by Judge
17 Bramlette in the Southern District. This is his case, not
18 mine.
19 The sole issue that I'm concerned with is whether or not I
20 should quash the subpoena that has been issued in this case.
21 And it appears to me that the deposition requested in this case
22 at this time is probably in order for the purposes of allowing
23 Judge Bramlette to consider it. So that having been said, I'm
24 also respectful of the fact that the deponent should enjoy all
25 the protections that are necessary in this case at this time;

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1 and that being the Court's awareness of other proceedings going
2 on that I don't have -- I don't wish to affect.
3 So that having been said, it's my opinion that permitting
4 the Scruggs' deposition to go forward would best preserve Judge
5 Bramlette's ability to make an informed decision on the issues
6 that have been argued by the parties here today. And I'm going
7 to order that Scruggs submit a deposition by State Farm,
8 under seal, at some point prior to February the 6th, 2008.
9 And the parties are hereby directed to proceed with that
10 discovery in a manner consistent with the opinion that I will
11 release this afternoon. The discovery taken is to be filed
12 under seal with Judge Bramlette, and the contents are to be
13 made public only under his order. Do you gentlemen understand?
14 MR. ROBINSON: Yes, sir, Your Honor.
15 THE COURT: Mr. LeBlanc?
16 MR. LEBLANC: Yes, sir, Your Honor.
17 THE COURT: Mr. Hester?
18 MR. HESTER: Absolutely.
19 THE COURT: And I don't want any other public
20 reference -- I don't want anything in that deposition made
21 public until Judge Bramlette has seen it, and he will make the
22 decision as to whether or not -- what to do with it from there.
23 Is there anything further I need to do in these regards?
24 MR. ROBINSON: I guess the only thing I would ask,
25 Your Honor, is just a point of clarification. All the parties

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1 are here; the counsel is here. We would really like to go
 2 ahead and take the deposition. I know either -- if not this
 3 afternoon, first thing in the morning, because if we put it off
 4 till Monday or Tuesday -- our preliminary injunction trial
 5 starts Wednesday in Natchez, and we were planning on being down
 6 there in preparation Monday and Tuesday. It really is going to
 7 prejudice, I think, both sides if we don't just go on and get
 8 it done. I don't believe it'll take very long. Everybody's
 9 already here.

10 THE COURT: All right. Well, let me hear from
 11 counsel for Mr. Scruggs.

12 MR. LEBLANC: There are two things. First, Your
 13 Honor, we would just request whether or not the Court had made
 14 a decision as to whether it has to proceed by oral examination
 15 or by written questions?

16 THE COURT: Oral examination.

17 MR. LEBLANC: Okay. And then the second issue is we
 18 would prefer to have Mr. Kecker return. He'll be back on
 19 Sunday. We would prefer to have that option available.

20 THE COURT: On Sunday?

21 MR. LEBLANC: Yeah. He returns to the country on
 22 Sunday.

23 THE COURT: By country, you mean --

24 MR. LEBLANC: To the United States.

25 THE COURT: Okay.

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1 MR. ROBINSON: Well, Your Honor, if he's going to
 2 take the Fifth on every question, why does it matter --

3 THE COURT: Well, I don't know what he's going to
 4 say. It doesn't matter to me whether you do it Sunday
 5 afternoon or Monday. Would Monday morning be more --

6 MR. LEBLANC: I would just need to check. I'm not
 7 sure when --

8 THE COURT: Okay. I'm not going to worry about --
 9 I'm not concerned, really, about when you gentlemen take it. I
 10 would hope you could work that out. I've been in the situation
 11 where lawyers on the other side made me take depositions during
 12 the Super Bowl game, too. And that might be more important to
 13 me than some of the other issues you've raised.

14 But it would be my hope that you could do it by five
 15 o'clock p.m. Monday, regardless of any other circumstances.
 16 Now, to be helpful to one another, you might decide you could
 17 do it this afternoon; you might decide tomorrow; you might
 18 decide Sunday. I don't care. By 5 p.m. Monday. Okay? Is
 19 that clear?

20 MR. ROBINSON: Yes, sir, Your Honor.

21 MR. LEBLANC: Yes, sir.

22 MR. HESTER: Yes, sir.

23 THE COURT: All right. Is there anything else I need
 24 to take up?

25 MR. ROBINSON: Not on behalf of State Farm.

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1 THE COURT: All right. I appreciate your attendance.
 2 Court will be in recess.
 3 (THE HEARING ENDED AT 3:37 p.m.)
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1 C E R T I F I C A T E

2

3 I, Rita Davis Sisk, RPR, BCR, CSR #1626, Official Court
 4 Reporter for the United States District Court, Northern
 5 District of Mississippi, was present in court during the
 6 foregoing matter and reported said proceedings
 7 stenographically.

8 I further certify that thereafter, I, Rita Davis Sisk,
 9 RPR, BCR, CSR #1626, have caused said stenographic notes to be
 10 transcribed via computer, and that the foregoing pages are a
 11 true and accurate transcription to the best of my ability.

12 Witness my hand, this ____ day of _____, 2008.
 13
 14
 15

16 _____
 17 RITA DAVIS SISK, RPR, BCR, CSR #1626
 18 Official Court Reporter
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