

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

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

PLAINTIFFS

V.

CIVIL ACTION NO. 2:07CV188-KS-MTP

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

DEFENDANT

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

COMES NOW Defendant Jim Hood, in his official capacity as Attorney General of the State of Mississippi, and submits this Memorandum in Support of his Motion to Reconvene, to Dissolve the Temporary Restraining Order and to Resolve the Issue of Abstention.

**I. Defendant Requests to Reconvene As State Farm
Has Rejected the Proposed Subpoena Revisions.**

Following guidance from this Court, the Office of Attorney General, in good faith, proposed a revised subpoena to that which was placed at issue in this cause by the Plaintiffs. The proposed revisions were submitted to Plaintiffs for consideration. By letter dated December 13, 2007, State Farm rejected the proposed subpoena, asserting in essence blanket immunity from any criminal acts related to Hurricane Katrina, regardless of whether the crimes were reasonably contemplated within the scope of the January 23, 2007 letter which State Farm characterizes as the alleged non-prosecution agreement. (December 13, 2007 Letter, Attached hereto as Exhibit A).

In the letter rejecting the compromise subpoena, State Farm takes the position that all actions, including those involving non-policyholders, are an extension of “‘handling’ of a

homeowners claim”. Not only is this position without merit, but the legitimacy of this argument is properly addressed instead in the state courts on proper motion.

Respectfully, this Court should reconvene, address the pending abstention issue, and return these claims to the state courts.

II. Dissolve the Temporary Restraining Order.

On November 8, 2007, the Court continued the Temporary Restraining Order until such time as the Plaintiffs considered the scope of the proposed substituted subpoena and determined their willingness to provide documents requested therein. Because of the clear, unambiguous, and complete rejection of this proposed subpoena by the Plaintiffs with no proposed alternative language, the Defendant now requests that the Temporary Restraining Order be dissolved.

Pursuant to the Court’s November 8, 2007 Order (Document #78), either party may move to dissolve the T.R.O, and a hearing would be set within thirteen (13) days of the motion. (Exhibit B)

Pursuant to Federal Rule of Civil Procedure Rule 65(b), a temporary restraining order “... shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. ...”. F.R.C.P. 65(6). The Defendant requests that the Temporary Restraining Order be dissolved.

III. Sufficient Evidence Has Been Presented To Rule On the Threshold Issue of Abstention, and Find That A Bad Faith Exemption Does Not Apply.

As Plaintiffs’ counsel conceded, “I think because Mr. Hester and I would likely agree that the subject matter jurisdiction is a threshold issue for the Court, perhaps it would be best if the

Court took up the Defendant's motion to dismiss first ..." (Exhibit C, Transcript of November 1 2007 Hearing, Page 14.). The Court has since effectively undertaken examination and testimony on the merits of the issue of abstention. It is now reasonable to resolve this question to avoid continuing cost of litigating non-jurisdictional issues.

Presumptively, the Plaintiffs would agree that this is a threshold issue, as State Farm offered:

" I have handed the Court a copy of the Fifth Circuit's decision in *Montez versus Department of the Navy*. And at its essence, at least the portion that's relevant to what's on the table right now, what this cases says is that when there is an issue of the federal subject matter jurisdiction of the Court that it is improper for a Court to go ahead and summarily decide disputed factual issues if those same issues relate to both the subject matter jurisdiction and the merits of the case.

And in that case, the Fifth Circuit has said the Court essentially has two options. One is it can adjudicate the motion on a 12(b)(6) standard, which is what the defendant has moved pursuant to. Or two is the Court can accept jurisdiction pending a ruling on the same merits issues that relate back to the issues." (Exhibit C, page 19)

Having taken testimony on the question of abstention, this Court has now received sufficient information to rule on the Defendant's abstention-based motion to dismiss.

The Court has already indicated that the *Younger* abstention doctrine will determine the scope of this federal suit. (citing *Younger v. Harris*, 401 U.S. 37, 1971). On November 1, 2007, and continuing through November 8, 2007, the Court considered testimony in regard to the issue of abstention. Specifically, the court found that the *Younger* abstention elements were satisfied, but that testimony would be considered on the alleged "bad faith" exception. As decided:

" I think I might be able to save you some time on that, counsel. Let's talk about the factors under *Younger* and the *Younger* abstention doctrine, and let me tell you what the Court finds about that. First of all, the dispute must involve, as you know, an ongoing state judicial proceeding, which it does....

...This court is satisfied that his case does indeed involve an ongoing

judicial proceeding. The Fifth Circuit has said that a grand jury subpoena is an ongoing state judicial proceeding.

Secondly, the issue is whether or not there is an important state interest in the subject matter of the proceeding. There is here. This court believes that this element is met, given the fact that the State of Mississippi's prosecution of criminal activity associated with Katrina claims is a substantial state interest.

And thirdly, the state proceedings must afford an adequate opportunity for State Farm to address these constitutional challenges, an opportunity for the Court, I should say, to address them. The Court is aware – well, let me say it another way. The Court is unaware of any legitimate reason why either party would be foreclosed from receiving a complete and fair review of these issues by the State Court. And so rather than have you go into all of that, the Court is satisfied in regard to these three factors.” (Exhibit C, November 1, 2007 Hearing Transcript pages 57 and 59.)

The Court has indicated that it was interested in the exception to the *Younger* abstention doctrine, and stated: “What this Court is concerned about here is the bad faith exception. And that goes to the gravamen of this case on this particular issue.” (Exhibit C, November 1, 2007, Hearing Transcript Page 58, Lines 15 to 17.)

The parties have offered testimony, in open court and *in camera*, that the subject of the investigation which resulted in the fourth subpoena being issued was unrelated to prior investigations and had a genesis which post-dated the January 23, 2007 letter upon which State Farm has rested this case. State Farm argues that the bad faith prosecution exception to the *Younger* doctrine is applicable, because they claim that that the January 23, 2007 letter must provide a blanket defense from any and all criminal acts relating to Katrina. Plaintiffs have urged that the proposed fourth grand jury subpoena is a Katrina-related prosecutorial act, and therefore, is brought in bad faith. However, this argument does not properly reflect the language of the January 23, 2007 letter which Plaintiffs rely upon as a purported non-prosecution agreement. The Plaintiffs have not satisfied the core question on the issue of abstention, which is whether issuing a subpoena to further a new and separate investigation evidences bad faith within the exception to *Younger*. As a matter of law, it does not.

**a. The Extremely Rare “Bad Faith” Exception To The
Younger Abstention is Inapplicable In This Action**

In *Younger v. Harris*, the Court declared that federal restraint of state prosecutions is permissible only if the state defendant establishes "great and immediate" irreparable injury, beyond "that incidental to every criminal proceeding brought lawfully and in good faith." 401 U.S., at 46, 47 (internal quotation marks omitted). *Younger* recognized, however, the prospect of extraordinary circumstances in which immediate federal injunctive relief might be obtained. The Court referred, initially, to bad faith, harassing police and prosecutorial actions pursued without "any expectation of securing valid convictions." *Id.*, at 48.

In *Younger*, it is significant to note that after two days of hearings, the District Court found no evidence of bad faith to justify an exception to the *Younger* abstention doctrine, and dismissed the federal court complaint.

The rare application of the “bad faith” exception has resulted in little, if any, guidance from the United States Supreme Court. Perhaps the strongest effort at defining this exception comes from Chief Justice Burger’s concurring opinion in *Allee v. Medrano* 416 US 802 (1973) where he is joined by Justices White and Rehnquist, stating in part:

“The next step in the analysis is to define the burdens imposed by *Younger v. Harris*. There we held that before a federal court can interfere with state criminal proceedings great and immediate irreparable injury must be shown ‘above and beyond that associated with the defense of a single prosecution brought in good faith.’ 401 U.S., at 48, 91 S.Ct., at 752. The injury must include, except in extremely rare cases, ‘the usual prerequisites of bad faith and harassment.’ *Id.*, at 53, 91 S.Ct., at 755...

...

Younger principles not only mandate federal court abstention in the case of good faith-enforcement of facially unconstitutional statutes, but also require that claims of unconstitutionality, other than facial invalidity, be presented, in the first instance, to the state

court in which the criminal prosecution involving the claimed constitutional deprivation is pending. ...

...

To meet the *Younger* test the federal plaintiff must show manifest bad faith and injury that is great, immediate, and irreparable, constituting harassment of the plaintiff in the exercise of his constitutional rights, and resulting in a deprivation of meaningful access to the state courts. The federal plaintiff must prove both bad faith and requisite injury. In judging whether a prosecution has been commenced in bad faith, the federal court is entitled to take into consideration the full range of circumstances surrounding the prosecutions which the federal plaintiff would have the district court interfere with. A federal court must be cautious, however, and recognize that our criminal justice system works only by according broad discretion to those charged to enforce laws. Cf. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). In this regard, prosecutors will often, in good faith, choose not to prosecute or to discontinue prosecutions for entirely legitimate reasons. An individual, once arrested, does not have a 'right' to proceed to trial in order to make constitutional claims respecting his arrest. Conversely, prosecutors may proceed to trial with less than an 'open and shut' case against the defendants. ...

...

...Even when police cross the line of legality as they enforce statutes they may not be acting willfully; the precise contours of probable cause, like the Fourth Amendment's stricture against unreasonable search and seizure, are far from clear. When a policeman willfully engages in patently illegal conduct in the course of an arrest there still should be clear and convincing proof, before bad faith can be found, that this was part of a common plan or scheme, in concert with the prosecutorial authorities, to deprive plaintiffs of their constitutional rights. Willful, random acts of brutality by police, although abhorrent in themselves, and subject to civil remedies, will not form a basis for a finding of bad faith. The police may, of course, embark on a campaign of harassment of an individual or a group of persons without the knowledge or assistance of the prosecutorial authorities. The remedy in such a case would not lie in enjoining state prosecutions, which would provide no real relief, but in reaching down through the State's criminal justice system to deal directly with the abuses at the primary law enforcement level. Cf. *Lankford v. Gelston*, 364 F.2d 197 (CA4 1966). See, infra.

Unless the injury confronting a state criminal defendant is great, immediate, and irreparable, and constitutes harassment, the prosecution cannot be interfered with under *Younger*. The severity

of the standard reflects the extreme reluctance of federal courts to interfere with pending state criminal prosecutions...”

The “bad faith” exception, is not merely a finding of bad faith, but rather bad faith joined with harassment, an absence of cause to prosecute, and great irreparable injury.

b. Analyzing This Rare Exception, Using the Plaintiffs’ Authority Demonstrates that It Does Not Apply

With the realization that this “bad faith” exception to *Younger* is rare, it is worthwhile to examine the Plaintiffs’ own authority offered in support of the application.

Consider the case which the Plaintiffs have so heavily relied upon, *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982), which held that an individual who had provided grand jury testimony after being assured of immunity from prosecutors was entitled to enforcement of that promise. The Plaintiffs have argued that this is “... a case analogous to the present one...” (Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss and in Further support of Plaintiff’s Motion for a Preliminary Injunction., page 24). The Plaintiffs have suggested that *Rowe* holds that it is *per se* bad faith to prosecute after a non-prosecution agreement is made, however, this is not entirely correct.

The case at bar is readily distinguishable from *Rowe*. In *Rowe*, an assistant attorney general had made a commitment not to prosecute a defendant in exchange for his willingness to provide information regarding a notorious murder. Thirteen years later, new information persuaded a local district attorney to present the case to a grand jury seeking indictment for the murder, the indictment was returned and Rowe secured an injunction from the federal court to halt the prosecution proceeding under the bad faith exception of the extension doctrine of *Younger v. Harris*. The *Rowe* court affirmed the district court’s injunction and in doing so observed that when the promise of immunity from prosecution induces a defendant to waive his

Fifth Amendment rights by testifying at trial, or otherwise cooperate, a due process right is implicated. *Rowe* held that once the criminal defendant performs in good faith compliance with the terms of the agreement, the state must perform on its side any attempt by the state to breach is bad faith. *Id.*

Significant in *Rowe* were the elemental findings that 1) an agreement was undoubtedly made, 2) the criminal defendant performed each obligation on his side of the agreement and 3) the prosecution is directly related to the offense under the agreement. *Id.* Also, *Rowe*, though not specifically using the terms ‘burden shift’, does require the party advocating a ‘bad faith’ theory, to present evidence of each of these elements. *Id.*

Even under the Plaintiffs’ best supporting case, *Rowe*, the “extreme circumstances” do not exist which justify ignoring *Younger* abstention in the matter at bar. Consider elementally, the requirements set forth in *Rowe*:

i) An Unquestionable Agreement. The Plaintiffs cannot show that the terms of the January 23, 2007 letter prohibited future investigations.

The Plaintiffs in reality assert that the January 23, 2007 letter serves as a bar to the issuance of the subsequent subpoena/investigation, contemplating blanket immunity from other crimes which Plaintiffs may have committed. The Defendants contend that the letter does not contemplate crimes against non-policyholders or other unrelated criminal investigations such as that which has been shown to the Court *in camera*.

The January 23, 2007 letter references the non-prosecution of crimes which were then being investigated and describes in part, “... the criminal investigation being conducted by the Mississippi Attorney General’s Office into State Farm’s handling of Hurricane Katrina claims (hereinafter “investigation”), and based on the facts developed...”. The letter further states the attorney general will not bring criminal charges “...in connection with the investigation.”

(Exhibit D) The January 23, 2007 letter relates only to the then existing investigation and facts as developed prior to January 23, 2007. A new investigation, with a new focus and new genesis, was not the subject of this item of correspondence.

The Plaintiffs have failed to demonstrate that the letter constituted a non-prosecution agreement that was unambiguous, at least in regard to the scope of future investigations, and therefore does not satisfy even the first prong of *Rowe's* test of bad faith.

ii) Performance of Each Obligation. The Plaintiffs have failed, among other things, to pay the “substantial penalty” or establish an orderly, fair, and prompt resolution procedure contemplated in the Agreement.

The January 23 letter twice references a Settlement Agreement (“Agreement”) between State Farm and the Attorney General also reached on January 23, 2007. (A true and correct copy of the Agreement is attached hereto as Exhibit E.) Two writings may be connected together by express reference to each other or internal evidence of their relation and thus incorporate by reference the terms of each document. *Hunt Oil Co. v. FERC*, 853 F.2d 1226, 1248 (5th Cir. 1988). Here, the terms of the Agreement are incorporated by reference into the alleged non-prosecution agreement.

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

in the settlement process.

In consideration of the contractual undertakings of State Farm, the Attorney General dismissed State Farm from the state court litigation with prejudice on January 23, 2007. (A true and correct copy of the Final Order of Dismissal as to State Farm Fire and Casualty Company is attached to Plaintiff's Motion as Exhibit F.) However, State Farm has yet to issue settlement offers to its policyholders based on criteria and guidelines approved by the district court, as required by the Agreement.

State Farm is in continuing breach of the Agreement, because it has not issued settlement offers based on criteria and guidelines approved by the district court, and has certainly not paid the substantial penalty of not less than fifty million dollars. In fact, State Farm's breach of the Agreement is the subject of ongoing litigation in the Circuit Court of Hinds County, Mississippi. State Farm, under such circumstances, cannot logically suggest that simply paying the \$5 million agreed costs of investigation gives them carte blanche to commit distinct crimes.

iii) Relation to the Original Agreement. The investigative subpoena is not directly related to the offenses contemplated under the agreement.

Incorporating the testimony taken *in camera* and under seal, the Defendants has made a *prima facie* showing that the subpoena issued by the grand jury, is unrelated to the offenses contemplated under the January 23, 2007 letter. This Court has indicated "Of course, one very material issue is this: Is the current investigation a continuation of the investigation which was the subject of the alleged January 23, 2007 agreement? Or is it a separate investigation unrelated to the first?" (Exhibit C, page 22 Line14-17).

This question of a separate investigation is significant insofar as the January 23, 2007 letter contemplates only the termination of the ongoing investigation, and in no way can be read to contemplate investigations based upon "facts developed" after January 23, 2007. (See Exhibit

D).

The limitation of the scope of the pre-January 23, 2007 investigation was highlighted in the testimony of Mr. Ed Snyder:

“Q. All right. And can you tell us in relation to the investigation itself who the Attorney General’s office was considering to be the victims in that particular investigation?

A. The victims were the policyholders of State Farm, and it related to their claims under their insurance policy with State Farm.”

Q. Are you referring to the investigation?

A. The investigation, yes.” (Exhibit C, Transcript Page 138)

Also, with regard to the scope of the second investigation, Mr. Snyder added:

“Q. You were asked questions earlier by counsel for State Farm as to your opinion and your interpretation as to whether or not if there was a different for of investigation or a different matter being pursued, whether or not this particular letter would prohibit that from being done at a later date.

A. The handling of Hurricane Katrina claims –

MR. TURNER: Same Objection

A. – that was so that if it related to something other than those claims, the investigation could be conducted.

By MR. HESTER:

Q. Okay. When you say other than those claims, what do you mean by that?

A. Well, other than where the policyholder was the victim.” (Exhibit C, Transcript Page 140).

The first investigation involved crimes against policyholders in State Farm’s handling of Katrina related claims. The post-January 23, 2007 investigation came about subsequently in time, was directed toward a distinct and separate subject, and arose from sources of information different from those of the first investigation. Sufficient facts have been offered to show a separate investigation as a matter of law; as such there can be no bad faith exception to the application of the *Younger* abstention principles.

Consider the impact of a second investigation in *Izen v. Catalina*, 398 F3d 363 (5th 2005), wherein a tax attorney appealed the decision to grant summary judgment in favor of IRS agents accused of engaging in malicious prosecution and retaliation in violation of the Fourth and First Amendments. In this case, a federal agent dropped an income tax investigation and then embarked on a money laundering investigation, against the plaintiff who had become an advocate for tax avoidance. In addition to affirming the *Castellano v. Fragoza*, 352 F3d 939, 942 (5th Cir. 2003) holding and the lack of a constitutional malicious prosecution claim, the court of appeals affirmed the dismissal of the retaliation claim, citing a test requiring the plaintiff to show “(1) they were engaged in constitutionally protected activity, (2) the defendants’ actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants’ adverse actions were substantially motivated against the plaintiffs’ exercise of constitutionally protected conduct.”(Id at 368, citing, *Keenan v. Tejada*, 290 F3d 252 (5th Cir. 2002). Additionally, the court further required the plaintiff to establish each of the common law malicious prosecution standards “in addition to those three derived from the First Amendment.” Id 368. “ ‘One of these standards is an absence of probable cause to prosecute.’ ” Id 369, citing *Keenan* supra. Though *Izen* does not address bad faith in an abstention analysis, it is significant insofar as it highlights the lack of a federal remedy for a second investigation which led to charges, regardless of the original motivation behind the decision to pursue the new investigation. The *Izen* court reiterated the statement “An individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government.” Id at 369, citing *Mozzochi v. Bordon*, 959 F2nd 1174, 1180 (2nd Cir 1992)).

The second *Izen* element, requiring a chilling of a constitutional activity, is also

noteworthy because central to State Farm's claim is its argument that its access to courts has been chilled. But, as demonstrated, the enormity of State Farm's litigation efforts in this and in the state courts and other federal courts, demonstrate that they have suffered no injury in this regard. State Farm's access to the courts is neither chilled nor even rendered lukewarm.

With regard to *Izen's* holding that the existence of probable cause will support a second investigation, this is also central to the question of abstention. After all, the very question of probable cause is best left to the state's criminal courts in the first instance – the very forum which State Farm has so blatantly ignored.

IV. Regardless of the January 23, 2007 Letter, The State Court Is The Proper Forum to Address the Question of Probable Cause.

Having gone through the above analysis, one inevitably comes to the conclusion that the need to consider probable cause highlights the need for this Court to abstain from further proceedings. Assuming, as is the case here, that the letter of January 23, 2007 does not prevent investigations of separate, subsequent, distinct investigations, initiated from sources not related to the first investigation, then the federal court should abstain and allow the state to consider the question of probable cause before any claim of "bad faith" could arguably be made.

Article 3, Section 27, of the Mississippi Constitution provides for indictments by grand jury. (*Williams v. State*, 708 So.2d 1358, 1364 (Miss. 1998)). The purpose of the grand jury is to evaluate the evidence provided by the prosecutor, and determine whether reasonable information exists to indict. Should the criminal defendant question the existence of probable cause after an indictment, then the matter may be brought before the trial court. The determination of probable cause is a question for the court. *Strong v. Nicholson*, 580 So.2d 1288, 1294 (Miss.1991),(citing W. Prosser & W. Keeton, *The Law of Torts*, § 119 (5th Ed.1984)). The trial court must determine whether a reasonable person would have initiated the prosecution. *Id.* The probable

cause determination is made from the facts apparent at the time the prosecution is initiated. *Croft v. Grand Casino Tunica, Inc.*, 910 So.2d 66, 74(¶ 25) (Miss.Ct.App. 2005).

Rather than allow the state court system to determine the existence of probable cause, an element necessary before the question of bad faith is addressed, State Farm is requesting that its own conduct be ignored, or at least never even considered by the state criminal courts. The method State Farm has selected to avoid having its conduct scrutinized in the proper forum was to file this action and then fight the fundamental theory of abstention.

**V. It Would Create a Dangerous Precedent to Question
The Motivation of the Investigator before Probable Cause
Was First Considered by the State Court.**

During these proceedings, the plaintiffs have theorized that “bad faith”, as vague as that term is, dictates federal intercession in, and injunction of, the state court proceedings.

State Farm’s arguments beg the simple question: Is a potential criminal actor allowed to seek a federal injunction from his criminal prosecution because the prosecutor allegedly (and subjectively) does not like him, and the victim’s family has filed a civil suit which the prosecutor allegedly somehow supports? Prosecutors do not have to pretend to like criminals, or pretend not to sympathize with the victims. This natural bias is accepted within the law and is not evidence of bad faith. It is the essence of the good faith exercise of the prosecutorial function.

It is well settled that the motivation of the investigating officer simply does not matter where the prosecution is supported by probable cause. In *Arkansas v. Sullivan*, 532 U.S. 769, 121 S.Ct. 1876 (2001), the United States Supreme Court reaffirmed the well settled principle that: (1) any improper subjective motivation of police officer for investigating a potential criminal defendant did not render the subsequent arrest supported by probable cause violative of Fourth Amendment, and (2) that the court could not inquire into arresting officer's subjective

motivation when considering probable cause. Id. (See also *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) holding that the ulterior motives of police officers were irrelevant so long as there is probable cause for detention; see also *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), for the proposition that an arrest will not be rendered invalid by the fact that it was a mere pretext for a narcotics search.).

The Attorney General does not concede that this second investigation is in fact motivated by ill will toward the plaintiff or a desire to see victims restored, because it is not. However, even if such motivation existed it would not support the Plaintiffs' contention that the federal court should act before the question of probable cause can be resolved in the state courts as a matter of law.

VI. The Process for Addressing Younger Abstention and the Bad Faith Exception Is Complete.

As the Court indicated, the primary issue at this point, is whether the issuance of the Fourth Subpoena, evidences the exceptional circumstances justifying federal intervention. The process, through which this decision can be made, is precisely the process which the court has already engaged. It appears, in light of the Plaintiffs' clear intent to seek a ruling of this Court that the January 23, 2007 letter provided blanket immunity, that the preliminary injunction hearing is likely to become little more than an extensive and expensive fishing expedition. To that end, it is respectfully submitted that the testimony as to the central question of whether or not the 'fourth subpoena' is brought in good faith, has been well and fully developed, and that the evidence and testimony regarding the scope of the new investigation has been fully addressed such that the issue of abstention is now ripe for disposition by the Court.

WHEREFORE, PREMISES CONSIDERED, the Defendant's request that a hearing on the issue of abstention be held promptly, that the Temporary Restraining Order be dissolved and

that this matter be dismissed in accordance with the doctrine of abstention.

Respectfully submitted, this 18th day of January, 2008.

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

BY: /s J. Lawson Hester
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CERTIFICATE OF SERVICE

I, J. Lawson Hester, Counsel for Attorney General Jim Hood, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following, via the means directed by the Court's Electronic Filing System:

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This the 18th day of January, 2008.

/s J. Lawson Hester
J. LAWSON HESTER