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

DENNIS R. and S. IMANI WOULLARD
individually and on behalf of those
similarly situated **PLAINTIFFS**

VS. **CIVIL ACTION NO. 1:06-CV-1057-LTS-RHW**

STATE FARM FIRE AND CASUALTY
COMPANY **DEFENDANT**

REBUTTAL MEMORANDUM IN SUPPORT OF ATTORNEY GENERAL'S MOTION TO INTERVENE TO ENFORCE STATE COURT SETTLEMENT AGREEMENT

COMES NOW, Jim Hood, Attorney General for the State of Mississippi, *ex rel.* the State of Mississippi, pursuant to Fed. R. Civ. P. 24, and files this Rebuttal Memorandum in Support of Attorney General's Motion to Intervene and would show unto this Honorable Court the following:

INTRODUCTION

Pursuant to Fed. R. Civ. P. 24, the Attorney General seeks to intervene in this action in order to protect the interests of the State of Mississippi in accordance with a settlement agreement executed by the Attorney General and State Farm Fire and Casualty Company, ("State Farm"), Defendant herein. The Attorney General's state court settlement agreement with State Farm speaks for itself. It simply requires State Farm "to establish an administrative procedure to reevaluate claims of State Farm policyholders in Hancock, Harrison, and Jackson Counties who had residential or commercial policies in effect on August 29, 2005, . . . [that] will establish an orderly, fair, and prompt resolution of claims . . . based upon criteria and guidelines approved by the United States District Court for the Southern District of Mississippi." Settlement Agreement

at p. 3, Section III. It is obvious from this Court's Order of January 26, 2007, that the obligation assumed by State Farm has not yet been met. This lack of compliance and the desire of the Attorney General to enforce that obligation is the basis for the Attorney General's motion to intervene which is now pending before the Court.

Plaintiffs Dennis R. and S. Imani Woullard do not object to the Attorney General's motion to intervene in this matter. State Farm, however, has filed a response in opposition consisting of a little over ten pages, five of which are devoted to an irrelevant recitation of distorted facts in an attempt to discredit the Attorney General's statement that he is not a party to and did not negotiate the terms of the proposed class action settlement agreement in this case. The salient issue before this Court, however, is whether the Attorney General has a sufficient interest that is not adequately protected by the parties to this action, such that he should be allowed to intervene. For the reasons set forth in his initial memorandum and below, the Attorney General should be allowed to intervene in this action.

ARGUMENT

I. The Attorney General Is Entitled to Intervention as of Right.

There are four requirements that must be met to qualify for intervention as a matter of right:

> (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Ford v. City of Huntsville, 242 F.3d 235, 239 (5th Cir. 2001). State Farm does not dispute that the Attorney General's application is timely. Moreover, based on the following arguments and

those already presented in the Attorney General's memorandum of authorities in support of his motion to intervene, the remaining three factors for intervention as a matter of right are satisfied in this matter.

A. The Attorney General's Interests Are Not Adequately Protected.

State Farm takes the position that the Attorney General's interests in this matter are adequately protected because the proposed class representatives are represented by able counsel, and because this Court is charged with deciding if the proposed class action settlement is fair and adequate. The Attorney General does not dispute the competence of proposed class counsel in this case. Nor does he question this Court's ability and willingness to conduct a thorough fairness review of any proposed class resolution. In fact, it was only in recognition of this promise of a prompt and fair reevaluation of claims in this Court that the Attorney General agreed to settle his state court action with State Farm. The sentient criticisms of the proposed class settlement in this Court's January 26 Order clearly demonstrate, however, that State Farm has not met its obligations under the terms of the state court settlement agreement, despite the diligent work of proposed class counsel and vigilant oversight by this Court.

As this Court noted in its Order setting the February 28 hearing, and reiterated during the hearing, it is not the Court's role to undertake negotiations with or on behalf of any party. It is nonsensical for State Farm to assert that the Attorney General's interests in requiring State Farm to comply with the terms of its agreement are adequately represented by the Court in its fairness review; if that reasoning were sound, no party would ever be allowed to intervene in a class action. The cases cited by State Farm for this premise do not address Rule 24 and offer no support for its position. *See Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)

(addressing district court's discretion in approving class settlement); *Carrabba v. Randalls Food Markets, Inc.*, 191 F.Supp.2d 815, 823 (N.D. Tex. 2002) (addressing district court's role as fiduciary over disbursement of class counsel fees).

By unilaterally withdrawing their motion for preliminary approval of the class action settlement, proposed class counsel have made clear that they have done all they can do to reach a fair, reasonable, and balanced settlement with State Farm. (*See* PACER Docket Entry 100, Plaintiffs' Notice of Withdrawal; PACER Docket Entry 91, letter from Scruggs Law Firm; comments of counsel during February 28 hearing). Accordingly, any argument that the interests of the Attorney General are adequately protected is now clearly without merit. Moreover, the Attorney General is charged with protecting the broader public interest. *See Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) (government must represent the broad public interest, not just economic concerns). Finally, no other party can adequately protect the interests of the Attorney General, as the only parties to the state court settlement agreement are the Attorney General and State Farm.

Although the Attorney General appreciated the opportunity to participate in the February 28 hearing before the Court, it is disingenuous of State Farm to insist that a five-minute presentation is adequate to protect the Attorney General's substantial interests in this case. The Attorney General, therefore, is compelled to seek intervention in this case to require specific performance by State Farm of its commitment to the State of Mississippi under the terms of the state court settlement to establish in this Court a reevaluation process subject to the Court's approval and oversight that will provide an orderly, fair and prompt resolution of claims. This interest is related to the subject of these proceedings, but is inadequately protected by the current

plaintiffs who seek only monetary relief. *See Espy, supra*; *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (interest of private industry may share common ground with public interest but will not necessarily coincide because government's interest is broader than industry's mere economic interest); *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 333 (5th Cir. 1982) (distinguishing between interest in seeking injunctive relief versus interest in seeking monetary damages).

B. The Attorney General Has a Direct, Substantial, and Legally Protectable Interest in the Proceedings and Will Be Impaired in Protecting That Interest If He Is Not Allowed to Intervene.

State Farm spends five pages of its response attempting to tie the Attorney General and his state court settlement agreement to the class action settlement proposed in this case, but then contradicts itself by asserting that the Attorney General's interest in enforcement of the state court settlement agreement is distinct from the current action. State Farm cannot have it both ways. The Attorney General did not negotiate the specific terms of the proposal presented to this Court,[1] and is not even privy to the terms of State Farm's separate settlement with the Scruggs Katrina Group on behalf of their individual clients. However, the Attorney General's state court settlement agreement with State Farm contemplates the use of a class action vehicle in this Court to bring about a global resolution of State Farm Katrina claims. It was obviously State Farm's

[1]None of the facts recited by State Farm support its conclusion that the Attorney General was involved in these separate negotiations. Being provided with draft copies of proposed term sheets for the class action settlement (PACER Docket Entry 94, State Farm's Response at p.3), or with the "current version" of the class action settlement documents on the afternoon following execution of the state court settlement agreement (*see* Exhibit A), hardly amounts to negotiating the specific terms of the proposed class action settlement agreement.

intent to satisfy that commitment through the proposed class action settlement in this case. Thus, the Attorney General has a direct and substantial interest in these proceedings.

The Attorney General does not dispute that he lacks third-party beneficiary status in the plaintiffs' insurance contract with State Farm. However, in *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452 (5th Cir. 1984) (cited by State Farm), the Fifth Circuit noted that a public entity with a non-economic interest is distinguishable from the typical would-be intervenor asserting a mere economic interest in a contract to which it is not a third-party beneficiary. *Id.* at 465-66, 470. Obviously, the Attorney General has no desire to litigate the merits of the plaintiffs' contract claim and seeks to intervene in this matter for a limited purpose only–to enforce his state court settlement agreement.

In *United States v. City of Jackson*, 519 F.2d 1147 (5th Cir. 1975), the Fifth Circuit held that the district court could have allowed the appellant city employee union and its members to intervene for the limited purpose of demonstrating a right to a higher back-pay award under a consent decree between the United States and the City of Jackson. *Id.* at 1152 n. 11. During desegregation, the Fifth Circuit promoted limited intervention of interested groups to encourage committee participation "to ensure that different points of view would be presented in the difficult and often emotional struggle to achieve the constitutionally mandated but highly elusive unitary school system." *Hines v. Rapides Parish School Bd.*, 479 F.2d 762, 765 (5th Cir. 1973). Similarly, as addressed in his letter to this Court dated March 6, 2007, the Attorney General seeks to intervene in this matter for the limited purpose of using State Farm's contractual obligation to the State of Mississippi as leverage to expand the negotiations and reach a global resolution of claims that will meet the approval of this Court. *See generally Beauregard v.*

Sword Services L.L.C., 107 F.3d 351, 352-53, 354 n. 9 (5th Cir. 1997) (district court may place limitations on participation by intervenor as of right).

Contrary to State Farm's false representation to the Court, the Attorney General has fully complied with the requirement under the state court settlement agreement that he first confer with State Farm before seeking enforcement of the agreement. By letter dated February 1, 2007, the Attorney General advised State Farm Executive Vice President, Secretary, and General Counsel Kim M. Brunner that he considered State Farm's submission of a proposed class settlement agreement failing to meet this Court's fairness standard to be a breach of the state court settlement agreement. (*See* Exhibit B). In compliance with Section VI. C. of the state court settlement agreement, the Attorney General offered to meet and confer before seeking legal action. In response, Mr. Brunner indicated to the Attorney General by letter dated February 5, 2007, that State Farm and class counsel were continuing in their efforts to seek this Court's approval and would keep the Attorney General notified of developments. (*See* Exhibit C). The Attorney General heard nothing further from State Farm, and therefore has sought recourse in this Court, as required by Section VI. C. of the state court settlement agreement.

State Farm's insistence that the parties are still attempting to address the Court's concerns is belied by proposed class counsel's withdrawal of the motion for preliminary approval of the class settlement due to a "stalemate" in the proceedings, (Notice of Withdrawal at p. 1), by proposed class counsel's previous acknowledgment that their legal team has "played nearly all of its cards," (Scruggs Letter at p. 1), and by State Farm's ongoing failure to present to the Court a class action settlement that will meet the fairness standards. As a practical matter, the proposed class action settlement presented to this Court violates the terms of the state court settlement

agreement between the Attorney General and State Farm. If the Attorney General is not allowed to intervene for the purpose of enforcing that agreement, his ability to protect the state's interests will be impaired, whereas allowing the Attorney General to intervene will not prejudice the existing parties. *See Stallworth v. Monsanto Co.*, 558 F.2d 257, 268-70 (5th Cir. 1977) (intervention appropriate to protect contractual rights where separate proceeding would result in injunctive relief contrary to existing consent decree, and intervention would not prejudice litigants or strain the court's time).

Moreover, a separate action filed by the Attorney General in this Court would require unnecessary expense to the parties and of judicial resources. *Cf. Skinner v. Weslaco Indep. School Dist.*, 220 F.3d 584, *2 (5th Cir. 2000) (*per curiam*) (party seeking to intervene for limited purpose related to settlement, rather than to litigate any prejudgment issue, would be prejudiced if forced to institute separate action). If State Farm's objection to the Attorney General's intervention is sustained, then he will have no other choice than to seek enforcement of his state court settlement agreement in the Chancery Court of Hinds County, Mississippi–again an alternative that would unnecessarily waste the resources of the parties and the judicial system.

CONCLUSION

For all of the above and foregoing reasons, the Attorney General respectfully requests that this Court grant his motion to intervene as a matter of right, or alternatively to grant his permissive intervention in this action in order to protect the interests of the State of Mississippi.

Respectfully submitted, this the 14th day of March, 2007,

JIM HOOD, ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI, *EX REL.* THE STATE OF MISSISSIPPI

BY: /s Meredith Aldridge

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CERTIFICATE OF SERVICE

I, Meredith Aldridge, Special Assistant Attorney General of the State of Mississippi, do hereby certify that on March 14, 2007, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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From: "Armstrong, Katherine" <KARMSTRO@skadden.com>
To: <mwood@ago.state.ms.us>
Date: 1/23/07 12:50PM
Subject: Katrina/State Farm

Ms. Wood:

I am attorney working with Sheila Birnbaum. She asked me to send to you the current version of the proposed class action settlement agreement and the Guideline Tool. Both are attached.

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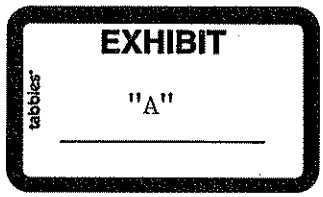

STATE OF MISSISSIPPI

JIM HOOD
ATTORNEY GENERAL

February 1, 2007

Kim M. Brunner
Executive Vice President, Secretary, and General Counsel
State Farm Mutual Insurance Companies
One State Farm Plaza, No. E05
Bloomington, Illinois 61710-0001
Fax: 309-766-1783

Dear Mr. Brunner:

It will be a week tomorrow that Judge Senter rejected the State Farm and Scruggs Group's proposed class settlement, yet I have not heard anything from State Farm about its intent to resolve the issues raised by the Court. Pursuant to Section VI. C. of our state court settlement agreement, we are to confer prior to initiating legal action to enforce a breach of the settlement agreement.

It is unfortunate that during our negotiations, I pointed out many of the fairness issues raised by Judge Senter, yet State Farm refused to heed my advice and submitted a proposed class settlement agreement that would not pass the fairness test. I consider this to be a breach of our state court settlement agreement and therefore intend to initiate legal action. If you wish to confer concerning this breach, please notify me no later than February 8, 2007.

Sincerely yours,

Jim Hood

Jim Hood
Attorney General

cc: Sheila Birnbaum

EXHIBIT
"B"

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February 5, 2007

Via fax – 601/359-3441

The Honorable Jim Hood
Attorney General
State of Mississippi
Carroll Gartin Justice Building
450 High Street, P.O. Box 220
Jackson, MS 39205-0220

Dear Attorney General Hood:

I am in receipt of your letter of February 1, 2007. As you have noted in your letter, State Farm presented to Judge L.T. Senter a class action settlement that included the provisions described in our agreement with you. The Court's order last Friday denying preliminary approval is without prejudice to the right of the parties to renew their motion after the parties have addressed his concerns. State Farm and class counsel have been in contact with Judge Senter about the class action settlement, and we are continuing in our efforts to seek Judge Senter's approval.

Counsel for State Farm will keep your office advised of developments as we proceed with the approval process. We believe we are and will continue to be in full compliance with the settlement agreement.

Thank you for your letter. We look forward to working with your office and with the Court in pursuit of ways to get the people of the Gulf Coast quick and fair relief.

Sincerely yours,

Kim Brunner

Kim Brunner

KMB/kja

cc: Sheila Birnbaum
Jeff Jackson

tabbies
EXHIBIT
"C"