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

DANIEL B. O'KEEFE, CELESTE A. FOSTER O'KEEFE, and THE DANCEL GROUP, INC.,	**PLAINTIFFS**
v.	**Civil Action No. 1:08cv600-HSO-LRA**
STATE FARM FIRE AND CASUALTY COMPANY, and MARSHALL J. ELEUTHERIUS,	**DEFENDANTS**
Defendants.	

STATE FARM FIRE AND CASUALTY COMPANY'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND

COMES NOW, Defendant, State Farm Fire and Casualty Company ("State Farm Fire") and respectfully submits this Memorandum opposing Plaintiffs' Motion for Leave to File Amended Complaint.

INTRODUCTION

Plaintiffs seek the Court's approval to change the course of this Hurricane Katrina litigation, now well into its third year, with the unfounded addition of State Farm Mutual Automobile Insurance Company ("State Farm Mutual"), the parent company for the insurer of the O'Keefe Plaintiffs.[1] Plaintiffs' existing litigation already presents a host of complicating factors given that Plaintiffs have combined three insurance claims across two states involving a Business Insurance Policy, a Homeowners Insurance Policy, and a Flood Policy against not only State Farm Fire, but also against the Mississippi insurance agent, Marshall Eleutherius. Nonetheless, Plaintiffs wish to amend their complaint principally to add State Farm Mutual as a

[1] Plaintiff, The Dancel Group, Inc., is not a named insured on any of the subject insurance policies.

defendant — even though Plaintiffs identify ***all*** of the insurance policies listed in the proposed amended Complaint as State Farm Fire policies.

There is simply no legitimate purpose to add State Farm Mutual to this lawsuit. Plaintiffs cannot claim that State Farm Fire ever suggested that State Farm Mutual was responsible for claims made under State Farm Fire insurance policies. Moreover, Plaintiffs do not (and cannot) allege any particular involvement by State Farm Mutual in the adjustment of their claims. Indeed, this Court and other federal courts in Mississippi and Louisiana have repeatedly dismissed State Farm Mutual from nearly identical Hurricane Katrina–related lawsuits based on similar failures. Plaintiffs' only apparent purpose in attempting to add State Farm Mutual to this lawsuit is to implement a chaos strategy. Such a strategy prejudices not only State Farm Fire in being involved in a needlessly complicated case and State Farm Mutual in having to defend a case in which it does not belong, but also the Court in having to manage issues that have no bearing on whether Plaintiffs are entitled to the relief they seek. State Farm Fire respectfully requests that Plaintiffs' Motion to Amend be denied.

BACKGROUND

Plaintiffs are not the first Mississippi residents to attempt to sue State Farm Fire's parent company, State Farm Mutual, in connection with Hurricane Katrina–related litigation. In fact, scores of plaintiffs have now tried ***and failed*** to do just that. Indeed, on April 11, 2008, this Court granted a motion to dismiss State Farm Mutual from another Hurricane Katrina–related case with essentially the same allegations and claims Plaintiffs are now pursuing here. *See* Order (Apr. 11, 2008), *Bridgewater v. State Farm Fire & Cas. Co. et al.*, 1:07-cv-01273-HSO-RHW (Docket No. 14) (attached as Exhibit A). The Court's ruling embraced a similar opinion by Judge Senter in *Perkins v. State Farm Gen. Ins. Co.*, No. 1:07-cv-00116-LTS-RHW, 2007 WL 4375208 (S.D. Miss. Dec. 12, 2007) (attached as Exhibit B). On June 17, 2008, Judge Senter

dismissed State Farm Mutual from yet another case in which the plaintiffs presented the same kinds of alter ego, conspiracy, and fraud claims.[2] Order (June 19, 2008), *Abney v. State Farm Fire & Cas. Co. et al.*, 1:07-cv-0711-LTS-JMR (Docket Nos. 174, 175), 2008 WL 2509755 (S.D. Miss. June 19, 2008) (attached as Exhibit C). In all of these opinions, the Court would not allow plaintiffs to pursue claims against State Farm Mutual (an entity with whom plaintiffs had no contractual relationship) unless plaintiffs could set forth allegations of reasonable specificity against State Farm Mutual. *See* Ex. B (*Perkins*, 2007 WL 4375208, at *2); Ex. A (*Bridgewater* Order, at 5-6); Ex. C (*Abney*, 2008 WL 2509755 *2); *see also infra* at Section II.A.

Here, on April 15, 2009, Plaintiffs moved to amend their complaint, with the proposed amended Complaint attached. The proposed amended Complaint acknowledges, as it must, that the Plaintiffs who actually have a relationship with State Farm (Daniel and Celeste O'Keefe) are State Farm Fire insureds, that their insurance contracts are with State Farm Fire, and that State Farm Fire adjusted their insurance claims. (Pr. Compl. ¶¶ 14, 20.) Once again, and contrary to the well-publicized rulings in *Perkins*, *Bridgewater*, and *Abney*, Plaintiffs also fail to make any specific allegations against State Farm Mutual. Plaintiffs offer a smattering of references to State Farm Fire and State Farm Mutual, but they do not identify any particular actions taken by State Farm Mutual that had any specific impact on Plaintiffs. Plaintiffs simply declare that the addition of State Farm Mutual "is necessary to a full and complete adjudication of all the parties' rights and responsibilities." (Motion to Amend, ¶ 6.)

Clearly, Plaintiffs' assertions are divorced from reality. First, Plaintiffs do not even acknowledge the additional motion practice and discovery that will be required to address the

[2] The *Abney* plaintiffs argued that State Farm Mutual was directly liable for "Aiding and Abetting: Civil Conspiracy" (*See* Plaintiffs' Response and Memorandum in Opposition to State Farm Mutual's Motion to Dismiss First Amended Complaint, 1:07-cv-0711-LTS-JMR, Docket No. 100, at 16-18) just as Plaintiffs do again here.

proposed amended Complaint, nor any of the additional complications arising from inclusion of a party that does not belong. Second, Plaintiffs offer no legitimate explanation of why they need State Farm Mutual in this lawsuit. As set forth herein, Plaintiffs' counsel — who have been actively involved in identical cases in the Mississippi federal court— ignore the Court's repeated counsel to direct such litigation to issues relating to the handling of ***Plaintiffs'*** insurance claims. *See, e.g.*, Order (Mar. 17, 2008), *Marion v. State Farm*, No. 1:06-cv-969-LTS-RHW (Docket No. 228, at 3 ("A common thread that runs through the Magistrate's . . . order is that this litigation, including the discovery, should focus on and be limited to the Plaintiffs' claim.") (attached as Exhibit D).) As Plaintiffs' pursuit of the parent company of State Farm Fire is both unfounded and directly contrary to the goal of focusing the litigation on Plaintiffs' insurance claims (and resolving those claims), Plaintiffs' Motion to Amend should be denied.

ARGUMENT

Where a party petitions the court for leave to amend a complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure, the Court retains the discretion to deny the party's request. *See, e.g., McKinney v. Irving Indep. School Dist.*, 309 F.3d 308, 315 (5th Cir. 2002) (denial of plaintiffs' motion to amend complaint after defendants had successfully moved to dismiss complaint for failure to state a claim was not abuse of discretion where plaintiffs responded on the merits to motion to dismiss, failed to amend complaint as a matter of right, and amendment was futile); *Parish v. Frazier*, 195 F.3d 761, 763-64 (5th Cir. 1999) (denial of motion for leave to amend complaint was not abuse of discretion when motion was filed on same day as defendants' dispositive motion, would unduly prejudice defendants by increasing the delay and by expanding the allegations beyond the scope of the initial complaint, and raised concerns about seriatim presentation of facts and issues).

It is undeniable that adding a new defendant to this suit — which already contains three plaintiffs (one of whom is not even a State Farm Fire insured), three separate insurance claims, and two distinct defendants — *and* more than two years after Plaintiffs initiated this litigation in state court, would significantly prejudice State Farm Fire. And, of course, State Farm Mutual would be prejudiced by being joined in, and having to defend, a suit in which it does not belong. The record of this case reflects that Plaintiffs have already had multiple opportunities to articulate their claims against State Farm Fire and any other legitimate defendants. Now, in their latest effort, Plaintiffs seek leave to add State Farm Mutual as a defendant, even though the proposed amended Complaint alleges no facts suggesting that State Farm Mutual is a proper target of their suit and fails to plead adequately any cause of action against State Farm Mutual. For these and other reasons enumerated below, Plaintiffs' Motion to Amend should be denied.

I. ALLOWING THE AMENDMENT WOULD CREATE UNNEEDED COMPLICATIONS AND PREJUDICE.

State Farm Fire undoubtedly will be prejudiced if Plaintiffs' proposed amendment is allowed. With State Farm Mutual in the lawsuit, the parties will need to engage in additional dispositive motion practice, the issues relating to Plaintiffs' discovery demands will expand, and the litigation is likely to be otherwise complicated by the inclusion of a party that does not belong in the lawsuit. That alone is grounds for denying Plaintiffs' motion. *See, e.g., Hughes v. Boston Scientific Corp.*, No. 2:08CV79KS-MTP, 2009 WL 243045, at *1 (S.D. Miss. Jan. 30, 2009) (noting that courts may deny a motion to amend where there would be "undue prejudice" to the opposing party").

Plaintiffs originally filed this suit in state court on August 28, 2006. They filed a First Amended Complaint (the first complaint to be served) on December 14, 2006, a Second Amended Complaint on January 19, 2007, and a Motion for Leave to File a Third Amended

Complaint in July of 2008. State Farm Fire removed this case to federal court on September 11, 2008, and Plaintiffs' July 2008 Motion for Leave became moot. Now, well over two years after Plaintiffs successfully filed their third stab at a complaint in this litigation, Plaintiffs ask this Court to permit them to amend their complaint again, principally to add State Farm Mutual as a defendant. However, Plaintiffs fail to identify any legitimate reason to change the direction of this lawsuit, especially given the existing complications in the case. As it now exists, this Court will need to sift through three different insurance claims involving different insurance policies, which multiple Plaintiffs have made against not only State Farm Fire, but also, a Mississippi insurance agent as well.

As set forth in the following section, Plaintiffs simply cannot state a claim against State Farm Mutual. In a considerable (and burgeoning) body of case law, Mississippi and Louisiana federal courts have repeatedly dismissed State Farm Mutual from nearly identical Hurricane Katrina–related lawsuits. There can be no colorable dispute that Plaintiffs' proposed amended Complaint fails to state a claim against State Farm Mutual, yet Plaintiffs nonetheless seek to sidetrack this litigation with these rejected theories.

In considering whether to grant a motion to amend, the court also may consider whether there is any "undue delay, bad faith or dilatory motive" in seeking the amendment. *Id*. Here, there is certainly a suggestion of bad faith. Notwithstanding Plaintiffs' claims based on "counsel for the Plaintiffs['] knowledge and belief in discovering evidence and eliciting testimony in other Hurricane Katrina related litigation" (Motion to Amend, ¶ 7), the fact remains that Plaintiffs have not alleged ***a single fact*** connecting State Farm Mutual to the adjustment of ***their*** State Farm Fire insurance claims. This is all the more troubling, given that the "other Hurricane Katrina related litigation" on which Plaintiffs' counsel rely has demonstrated repeatedly that such cases should

focus on the insurance claims at issue — that is, is there a covered claim, what is the amount of that claim, and is there any extra-contractual claim that may exist for improper claim-handling. The inclusion of State Farm Mutual in this lawsuit runs completely contrary to this counsel. There is simply no reason to infuse such unnecessary complexity into the handling of this case, to delay the progress of litigation now in its third year, or to bring a new party into the suit that has no business being there. It does not serve the Court, and it certainly does not serve the parties. *See Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 320 (5th Cir. 1991) (affirming district court's denial of motion to amend where "[a]mendment of the pleadings would provide ***no benefit*** to [the plaintiffs] under these circumstances" (emphasis added)) (also citing *Shivangi v. Dean Witter Reynolds, Inc.*, 825 F.2d 885, 890 (5th Cir. 1987)).

II. THE PROPOSED AMENDMENT IS FUTILE.

"Although leave to amend pleadings 'shall be freely given when justice so requires,' Fed. R. Civ. P. 15(a), leave to amend is not automatic. The decision to grant or deny a motion to amend is in the sound discretion of the trial court." *Avatar Exploration*, 933 F.2d at 320. The newly asserted matters set forth in Plaintiffs' proposed pleading clearly are deficient in numerous respects and could not survive a motion to dismiss under Rule 12(b)(6).

While the following argument does not provide an exhaustive discussion of all such defects, State Farm Fire submits that the examples set forth below are sufficient to demonstrate that allowing the amendment would be futile, and that Plaintiffs' Motion accordingly should be denied. First, Plaintiffs have failed to heed recent guidance from this Court concerning the threshold allegations that must be pled in order to state a claim against State Farm Mutual in Hurricane Katrina–related cases. Second, Plaintiffs' inability to allege conduct connecting State Farm Mutual to the issuance of ***their*** State Farm Fire policies or the adjustment of their claims means that they have no standing to bring claims against State Farm Mutual. Third, Plaintiffs

have not identified any particular causes of action against State Farm Mutual, and, to the extent Plaintiffs attempt to assert claims for conspiracy, fraud, and aiding and abetting, those claims fail to state a claim.

A. Plaintiffs' Proposed Amended Complaint Is Contrary to Existing Law.

On June 17, 2008, Judge Senter granted a motion to dismiss State Farm Mutual from another Hurricane Katrina-related case in which the plaintiffs attempted to bring claims against State Farm Mutual — despite the fact that State Farm Fire had issued their policies. The court concluded that "[i]n the absence of any substantive allegations of misconduct by Mutual, and in the absence of any allegations which would support the contention that the Court should disregard the corporate form of business under Mississippi law, the plaintiffs have not stated a cause of action against Mutual." Ex. C (*Abney,* 2008 WL 2509755 *2). Applying the reasoning of *Abney*, the Court subsequently dismissed State Farm Mutual from ***more than a hundred*** copycat cases.

On April 11, 2008, this Court granted a similar motion to dismiss, noting that "the Complaint contain[ed] no specific factual allegations of actionable conduct by State Farm Mutual or of disregard of corporate formalities sufficient to state a claim." Ex. A (*Bridgewater* Order), at 5. The Court further admonished that a plaintiff "cannot support alleged misconduct by a defendant not in privity with him by naming both State Farm Defendants collectively in his pleadings." *Id.*

Both *Abney* and *Bridgewater* built on a prior ruling by Judge Senter in the *Perkins* case, where two State Farm entities (including State Farm Mutual) were dismissed from the case because the plaintiffs could not articulate claims against State Farm entities that did not issue their insurance policies. *See* Ex. B (*Perkins* Order, 2007 WL 4375208), at *1-*2. The Court in

Perkins declared that it would "not allow Plaintiffs to allege misconduct by two defendants not in privity with them by the mere expedient of treating them collectively in framing their pleadings." *Id.* at *2. As the Court noted, there (as here) "State Farm Fire and Casualty Company ha[d] a contractual relationship with the Plaintiffs, owe[d] contractual obligations to them, and ha[d] the legal responsibility to fairly evaluate their claims in good faith and respond appropriately." *Id*. *See also* Ex. C (*Abney,* 2008 WL 2509755); Ex. A (*Bridgewater* Order).

Plaintiffs' ill-pled proposed claims against State Farm Mutual differ in no material respect from those of the *Perkins*, *Bridgewater*, and *Abney* plaintiffs. *Perkins*, *Bridgewater*, *Abney*, and this case each present a straightforward issue — whether a parent company, such as State Farm Mutual, may be held liable, directly or indirectly, for its wholly-owned subsidiary's denial of coverage on policies issued by that subsidiary. The answer in Mississippi and across the country is resoundingly "No."[3] In fact, in the *Perkins* opinion, Judge Senter dismissed two State Farm entities (including State Farm Mutual) where "there [was] no contractual relationship between Plaintiffs and either of [those] State Farm entities," "there was no evidence that the three named State Farm defendants ha[d] not respected the corporate form in conducting their business, and there [was] no indication that the parent, State Farm Mutual Automobile Insurance Company, ha[d] disregarded the formalities necessary to accomplish the lawful purpose of maintaining these forms." Ex. B (*Perkins* Order, 2007 WL 4375208), at *1. The Court further

[3] *See Cain v. United Ins. Co. of Am.*, No. 3:04 CV 867 WHB JCS, 2006 WL 581181, at *1 (S.D. Miss. Mar. 8, 2006) (granting summary judgment in favor of parent insurance company where "policy was issued" by its subsidiary); *Perry v. Unum Life Ins. Co. of Am.*, 353 F. Supp. 2d 1237, 1239-40 (N.D. Ga. 2005) (finding no claim against parent company where no veil-piercing); *Hann v. Paul Revere Life Ins. Co.*, No. 03 C 1062, 2004 WL 557380, at *1-*2 (N.D. Ill. Feb. 17, 2004) (on motion to dismiss: parent of insurer not liable for subsidiary's policies absent veil-piercing); *University Med. Assocs. of the Med. Univ. of S.C. v. UnumProvident Corp.*, 335 F. Supp. 2d 702, 707-08 (D.S.C. 2004) (confirming that plaintiffs' claims against defendants "collectively," which alleged "that all of the defendants undertook the actions that harmed plaintiffs," must be judged under veil-piercing analysis); *Cowley v. Texas Snubbing Control, Inc.*, 812 F. Supp. 1437, 1450-51 (S.D. Miss. 1992) ("[A]n insurance carrier owes a duty under its insurance policy only to its insureds and to intended beneficiaries of the insurance contract"; thus, no claim in contract or tort may be stated against a party with whom the plaintiff had no "contractual relationship": instead "the law is clear in Mississippi . . . that an insurance company owes no duty to one who is not an insured or a third-party beneficiary of the insurance policy").

declared that it would "not allow Plaintiffs to allege misconduct by two defendants not in privity with them by the mere expedient of treating them collectively in framing their pleadings." *Id.* at *2. As the Court noted, there (as here) "State Farm Fire and Casualty Company ha[d] a contractual relationship with the Plaintiffs, owe[d] contractual obligations to them, and ha[d] the legal responsibility to fairly evaluate their claims in good faith and respond appropriately." *Id.*

To be sure, Plaintiffs attempt to make a few separate references in their proposed Complaint to State Farm Fire and State Farm Mutual, but Plaintiffs' attempt is nothing but window dressing. Plaintiffs fail to identify any specific actions of State Farm Mutual and fail to articulate how State Farm Mutual caused them any harm. Indeed, Plaintiffs vaguely use the term "Defendants" dozens of times in their proposed amended Complaint to refer collectively to State Farm Fire and State Farm Mutual. Among those allegations are that "Defendants Failed to Conduct an Adequate Investigation" and "Defendants Wrongfully and Fraudulently Denied Plaintiffs' Claims." (Pr. Compl., at pp. 12, 13.) Clearly, such allegations make no sense as applied to State Farm Mutual, as the Mutual Company did not adjust or deny Plaintiffs' claims.

Plaintiffs' proposed amended Complaint is utterly devoid of facts supporting Plaintiffs' claims against State Farm Mutual. These deficiencies include:

- no facts to suggest that State Farm Mutual had any contractual relationship with the Plaintiffs; indeed, Plaintiffs acknowledge that all of the State Farm insurance contracts they have are with State Farm Fire;
- no facts to suggest that State Farm Mutual adjusted Plaintiffs' claims; indeed, Plaintiffs acknowledge that their insurance claims were adjusted by State Farm Fire;
- no facts to suggest that State Farm Mutual made any representations to Plaintiffs;
- no facts to suggest that State Farm Mutual had any relationship with Plaintiffs in respect to the policies or claims at issue;
- no facts to suggest that State Farm Mutual disregarded corporate formalities.

Indeed, one can search high and low in the proposed amended Complaint for allegations of State Farm Mutual's "own acts," and none will be found.

Plaintiffs' only attempt to connect State Farm Mutual to the allegations of the proposed amended Complaint is to mischaracterize the relationship between State Farm Mutual and its subsidiary, State Farm Fire. Plaintiffs attach a "Master Services and Facilities Agreement" between State Farm Fire and State Farm Mutual (Motion for Leave at 3) and make wholly unsupported conclusions regarding State Farm Mutual's "assum[ption] [of] duties related to the sale, administration and claims handling under the policies of insurance that are the subject of this litigation" (*id.* at 3). On that basis alone, Plaintiffs mechanically insert the phrase "and State Farm Mutual as co-principal" after numerous allegations against State Farm Fire. Plaintiffs' efforts fall short in numerous respects. First, Plaintiffs allege no facts whatsoever indicating that State Farm Mutual actually performed ***any*** services *vis-à-vis* the sale of their State Farm Fire insurance policies or the adjustment of their State Farm Fire insurance claims. Second, and more importantly, even if Plaintiffs had so alleged, such allegations alone would not support a claim against State Farm Mutual. The mere fact that State Farm Mutual and its subsidiaries, including State Farm Fire, entered into a Master Services Agreement, pursuant to which State Farm Mutual employees may have provided services to State Farm Fire in the course of State Farm Fire's issuance of homeowners policies and the adjustment of Hurricane Katrina–related claims, does not allege a satisfactory connection between State Farm Mutual and Plaintiffs, let alone a cause of action against State Farm Mutual. In fact, this Court specifically found in *Bridgewater v. State Farm Fire & Casualty Co. et al.*, 1:07-cv-01273-HSO-RHW, that, as a matter of law, this same Master Services Agreement did not establish a "direct role State Farm Mutual employees have played in [the plaintiff's] injuries" and did not establish any purported control over State

Farm Fire by State Farm Mutual. (Apr. 10, 2008 Order (Docket No. 14), at 5).) Therefore, Plaintiffs have no grounds on which to add their claims against State Farm Mutual.

B. Plaintiffs Have No Standing to Bring These Claims Against State Farm Mutual.

Plaintiffs acknowledge that all of the State Farm insurance contracts listed in the proposed amended Complaint are State Farm Fire policies and that State Farm Fire adjusted their insurance claims. (Pr. Compl. ¶¶ 14, 20.) Therefore, absent any allegation of another applicable contractual relationship or duty between Plaintiffs and State Farm Mutual — and Plaintiffs have proffered none — Plaintiffs have not pled cognizable injury resulting from the conduct of State Farm Mutual and have no standing to bring such claims against it. *See, e.g., Aguilar v. Allstate Fire & Cas. Ins. Co.*, No. 06-4660, 2007 WL 734809, at *5 (E.D. La. March 6, 2007) (holding that "because no named Plaintiff ha[d] any contractual relationship with Allstate Fire and Casualty or Allstate Property and Casualty, none of them could have been injured by [those] Defendants, and Plaintiffs d[id] not have standing to assert any claim against them"); *In re Franklin Mut. Funds Fee Litig.*, 388 F. Supp. 2d 451, 460-61 (D.N.J. 2005) ("a named plaintiff can bring suit against a party only if the plaintiff personally suffered an injury and that injury is traceable to that party . . . [i]f a plaintiff cannot trace an injury to a defendant, the plaintiff lacks standing with regard to that defendant"); *see also Tallahatchie Valley Elec. Power Ass'n v. Mississippi Propane Gas Ass'n*, 812 So. 2d 912, ¶ 41 (Miss. 2002) (noting that "question of whether [parties] suffered legally cognizable injury is closely tied to the question of standing"). Moreover, where a court lacks subject-matter jurisdiction over a defendant, dismissal of any and all claims against that defendant is required. *See, e.g., Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint.").

Faced with a similar set of facts in the *Abney* (2008 WL 2509755), *Bridgewater* (1:07-cv-01273-HSO-RHW), and *Perkins* (1:07-cv-00116-LTS-RHW) cases, both this Court and Judge Senter have granted the defendants' motions to dismiss State Farm Mutual from the litigation. *See* Ex. C (*Abney* Order (6/19/08), 2008 WL 2509755); Ex. A (*Bridgewater* Order (4/11/08)); Ex. B (*Perkins* Order (12/12/07), 2007 WL 4375208). As Plaintiffs cannot distinguish the holdings of *Abney*, *Bridgewater*, or *Perkins* in any material respects, State Farm Mutual should not be dragged into this litigation. *See also Skinner v. State Farm Fire & Casualty Co.*, 2:07-cv-06900-ILRL-JCW (E.D. La.), Docket No. 13, at 4-6 (citing *Perkins*; concluding that "Plaintiff cannot trace the injury suffered back to Defendant State Farm General [another State Farm subsidiary] because the policy was issued by State Farm Fire, not State Farm General" and that therefore "Plaintiff lacks standing as to Defendant State Farm General") (attached as Exhibit E).

C. Plaintiffs Have Failed to State Any Causes of Action Against State Farm Mutual.

The only specific cause of action Plaintiffs have attempted to state against State Farm Mutual is "conspiracy." (Pr. Compl. ¶¶ 103-113.) For the purposes of responding to the Motion to Amend, State Farm Fire also divines that Plaintiffs might be pursuing claims for fraud and /or aiding and abetting as well. The fact that State Farm Fire must largely guess as to the identity of the claims asserted against State Farm Mutual should be reason enough for the Motion to Amend to be denied.

1. No Conspiracy.

Plaintiffs cannot state a civil conspiracy claim against State Farm Mutual. The Mississippi courts have defined civil conspiracy under Mississippi law[4] as "a combination of

[4] Plaintiffs' proposed amended Complaint does not provide enough detail regarding the alleged conspiracy to apply Mississippi's center of gravity choice of law test with certainty. However, the proposed amended Complaint alleges that Plaintiffs are Mississippi residents, and it appears to allege that a number of the acts that serve as the basis for the alleged

persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully." *Shaw v. Burchfield*, 481 So. 2d 247, 255 (Miss. 1985). Its elements are: "1) a conspiracy; 2) an overt act of fraud in furtherance of the conspiracy and 3) damages to the plaintiff as a result of the fraud." *Croft v. Grand Casino Tunica, Inc.*, 910 So. 2d 66, 77 (Miss. Ct. App. 2005). Expanding on these requirements, the courts have explained that "[i]t is elementary that a conspiracy requires an agreement between the co-conspirators." *Gallagher Bassett Servs., Inc. v. Jeffcoat*, 887 So. 2d 777, 786 (Miss. 2004). Moreover, "[b]ecause a civil conspiracy is a derivative claim, it requires an overt tortious act independent of the conspiracy." *Wells v. Shelter Gen. Ins. Co.*, 217 F. Supp. 2d 744, 755 (S.D. Miss. 2002) ("Plaintiffs argue that a civil conspiracy claim can stand alone, without reference to an underlying tort. The Court finds no support for such a contention under Mississippi or any other law, however. Authority to the contrary is, in fact, legion."). Importantly, a claim of conspiracy also cannot be based on "speculation and conjecture." *Delta Chem. & Petroleum, Inc. v. Citizens Bank*, 790 So. 2d 862, 877-78 (Miss. Ct. App. 2001). Applying these principles to the case at bar, it is evident Plaintiffs cannot state a cause of action for civil conspiracy against State Farm Mutual.

"[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss." *Gagne v. State Farm Fire & Cas. Co.*, No. 1:06cv711-LTS-RHW, 2006 WL 3335506, at *3 (S.D. Miss. Nov. 16, 2006) (quoting *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993)). In the proposed amended Complaint, Plaintiffs offer nothing but conclusory allegations of a supposed conspiracy. Plaintiffs fail to identify any specific action State Farm Mutual undertook that had

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conspiracy occurred in Mississippi and Louisiana. However, both State Farm Fire and State Farm Mutual are Illinois companies with their headquarters in Illinois. In any event, Plaintiffs' claims are due to be dismissed whether Illinois, Mississippi, or Louisiana law were to control.

any specific impact on Plaintiffs. Instead, Plaintiffs assert, with no supporting factual allegations, that State Farm Mutual and State Farm Fire participated in a "top-down" conspiracy. (Pr. Compl. ¶¶ 46-49, 103-113.) Conclusory allegations of a "conspiracy" are particularly suspect, and Plaintiffs' vague conclusions are no exception. Indeed, such "a general allegation of conspiracy, without a statement of the facts constituting that conspiracy, is only an allegation of a legal conclusion and is insufficient to constitute a cause of action." *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 631-32 (5th Cir. 1999) (quoting *McCleneghan v. Union Stock Yards Co.*, 298 F.2d 659, 663 (8th Cir. 1962)); *see also Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir. 1982) (same); *Badon v. RJR Nabisco, Inc.*, 224 F.3d 382, 394 (5th Cir. 2000) (concluding that generalized allegations that in-state distributors of tobacco products participated in conspiracy to manipulate nicotine in cigarettes were insufficient); *Norris v. Krystaltech Int'l, Inc.*, 133 F. Supp. 2d 465, 469 (S.D. Miss. 2000) (finding that "plaintiffs' allegations of conspiracy [were] entirely conclusory, unsupported by any *factual* allegation and thus [were] not sufficient to state a cause of action" (emphasis in original)); *Smith v. St. Regis Corp.*, 850 F. Supp. 1296, 1324 (S.D. Miss. 1994) ("The plaintiffs' allegations are conclusory at best. Hence, this court finds no basis for the state law claim of civil conspiracy."), *aff'd*, 48 F.3d 531 (5th Cir. 1995); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 702 (E.D. Pa. 1973) (rejecting plaintiff's attempt to establish standing based on "a general allegation of conspiracy without any statement of facts to support this legal conclusion"); *Bartley v. Thompson*, 542 N.W.2d 227, 235 (Wis. Ct. App. 1995) (noting that "[e]ven with 'notice pleading, . . . a general allegation of conspiracy, without a statement of the facts constituting that conspiracy, is only an allegation of a legal conclusion and is insufficient to constitute a cause of action.'" (quoting *McCleneghan*, 298 F.2d at 663)).

The proposed amended Complaint fails to make any allegations relating to the formation of a conspiratorial agreement including State Farm Mutual and fails to allege any particulars regarding the individual conduct of State Farm Mutual in furtherance of the purported conspiracy. Instead, the Complaint simply alleges the *legal conclusion* that a conspiracy was formed. This is clearly insufficient. Thus, Plaintiffs cannot state a civil conspiracy claim against State Farm Mutual. S*ee* Exhibit B (*Perkins* Order, 2007 WL 4375208), at *2 (dismissing conspiracy claim against State Farm Mutual where "Plaintiffs' allegations attempt to paint a complex civil conspiracy, but there are no specific allegations of actionable misconduct by State Farm General Insurance Company or State Farm Mutual Automobile Insurance Company").[5]

2. No Fraud.

Plaintiffs do not allege that State Farm Mutual had any contact with them. There are no allegations of any statements State Farm Mutual made to them, let alone misstatements. There are no allegations of Plaintiffs' relying on any actions of State Farm Mutual. And there are no cognizable allegations that State Farm Mutual caused Plaintiffs any harm. As a result, Plaintiffs have failed to identify any claim of fraud against State Farm Mutual. *See Nichols v. Tri-State Brick & Tile Co., Inc.*, 608 So. 2d 324, 330 (Miss. 1992) (stating that fraud requires, *inter alia*, a false representation, "the speaker's knowledge of its falsity or ignorance of its truth," and "his intent that it should be acted upon by the person and in the manner reasonably contemplated); *Powell v. Cohen Realty, Inc*., 803 So. 2d 1186, 1191 (Miss. Ct. App. 1999) (upholding summary

[5] Aside from the pleading deficiencies, Plaintiffs' conspiracy allegations suffer from the fatal error of attempting to allege an intra-corporate conspiracy. Such claimed conspiracies are simply improper as they do nothing more than attempt to pierce through the corporate structure of a family of companies. As the Fifth Circuit has explained, "[i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy." *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952). "A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Id*. The rule that a corporation cannot conspire with itself includes affiliated companies that fall under one corporate umbrella. Thus, "wholly owned subsidiaries are incapable of conspiring with their parent as a matter of law." *Id*.

judgment where defendant had no contact with plaintiff and made no representations to plaintiff); *Taylor v. Southern Farm Bur. Cas. Co.*, 954 So. 2d 1045, 1049 (Miss. Ct. App. 2007) ("In Mississippi, a claim of fraud by omission arises only where the defendant had a duty to disclose material facts purportedly omitted.").

Not only does Plaintiffs' proposed amended Complaint violate Rule 9(b), but it cannot even satisfy the pleading requirements of Rule 8. Interpreting Rule 9(b), the Fifth Circuit requires that plaintiffs identify "the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993) (quoting *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139 (5th Cir. 1992)). Plaintiffs' proposed amendment does not remotely satisfy this standard. Furthermore, Rule 8 sets forth the general threshold pleading requirements. Recent guidance from the Supreme Court on Rule 8 indicates that Plaintiffs' pleading should recite sufficient facts "to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true," and it must contain "more than labels and conclusions" or the mere "formulaic recitation of a cause of action's elements." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). Accordingly, "the complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 1216 at 156-59 (2d ed.). Plaintiffs' proposed amended Complaint misses this mark as well. *See also* Ex. B (*Perkins* Order, 2007 WL 4375208), at *2 (dismissing fraud claim against State Farm Mutual where "[t]he

fraud claims are so general and conclusory that they do not satisfy the requirements of Fed. R. Civ. P. 9(b)").

3. No "Aiding and Abetting."

To the extent Plaintiffs attempt to assert some hybrid claim of aiding and abetting, any such claim would fail as well. As the Southern District has acknowledged, the Mississippi Supreme Court has yet to recognize a claim for aiding and abetting alleged tortious conduct. *See Dale v. Ala Acquisitions, Inc.*, 203 F. Supp. 2d 694, 700-01 & n.5 (S.D. Miss. 2002) (predicting that Mississippi would recognize cause of action for aiding and abetting consistent with *Restatement of Torts* § 876 and the law of other jurisdictions, including Illinois) (citing *Sanke v. Bechina*, 576 N.E.2d 1212, 1218-19 (Ill. Ct. App. 1991)). Moreover, to the extent any such claim does exist, it should require the same elements required in Illinois and other jurisdictions that recognize such a claim under the Restatement of Torts § 876 (b). *Id.* (citing *Sanke*, 576 N.E.2d at 1218-19 (recognizing cause of action consistent with *Restatement of Torts* § 876). Accordingly, for this case at least, Illinois law provides persuasive, if not binding authority on any aiding and abetting claims. And Illinois precedent firmly demonstrates that any such claim against State Farm Mutual is invalid.

First, where (as here) a defendant is accused of contributing to a ***contractual*** (as opposed to tortious) breach, Illinois has held that the proper claim is not one for "aiding and abetting," but rather tortious interference with contract, which Plaintiffs have not attempted to plead as a cause of action. *See Reuben H. Donnelley Corp. v. Brauer*, 655 N.E.2d 1162, 1170-71 (Ill. Ct. App. 1995) (affirming dismissal of complaint alleging aiding and abetting breach of contract; such claim would be more properly stated as tortious interference with contractual relations)

(distinguishing *Sanke v. Bechina*).[6] Second, to the extent Plaintiffs are alleging that State Farm Mutual aided and abetted not merely breach of their policies but also some fraudulent tortious conduct by State Farm Fire, such a theory is equally flawed. *See 766347 Ontario Ltd. v. Zurich Cap. Markets, Inc.*, 249 F. Supp. 2d 974, 993 (N.D. Ill. 2003) (rejecting aiding and abetting claim and granting motion to dismiss) (citing cases). As the court explained in *766347 Ontario*, "[t]here is nothing to be gained by multiplying the number of torts, and specifically by allowing a tort of aiding and abetting a fraud to emerge by mitosis from the tort of fraud." *Id.* (quoting *Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 623-24 (7th Cir. 2000). Thus, once again, Plaintiffs' purported aiding and abetting claim is an improper substitute for their failed fraud claim.

Finally, even if Plaintiffs could identify some tortious conduct on which an aiding and abetting claim could be predicated, they still have omitted to plead two essential elements of such a claim under Illinois law: (1) that State Farm Mutual knew that State Farm Fire's conduct was tortious; and (2) that State Farm Mutual gave "substantial assistance or encouragement" to State Farm Fire's commission of that tort. To be sure, Plaintiffs parrot these words in their proposed amended Complaint, but they fail to offer any facts to support those bare conclusions. In fact, Plaintiffs have not identified a single act by which State Farm Mutual allegedly provided "assistance or encouragement" to State Farm Fire's alleged breach of the Plaintiffs' policies, let alone that State Farm Mutual did so with the ***specific intent*** to foster a tort by State Farm Fire. These omissions are fatal to any aiding and abetting claim, since neither Illinois nor Mississippi

[6] Even if Plaintiffs had attempted to plead a claim for tortious interference, that claim would likewise fail because a parent company is privileged against a claim for interference with the performance of its subsidiary's insurance policies. *See, e.g., Perry*, 353 F. Supp. 2d at 1240-41 (granting motion to dismiss claim against parent company for alleged interference with subsidiary's contract of insurance with third party: "as a matter of law," a "parent corporation cannot be a stranger to its subsidiaries' business or contractual relations," and "no claim can be sustained against a parent for tortious interference with such relations").

law would support a theory of aiding and abetting based on "deliberate ignorance." *Weber, M.D. v. E.D.&F. Man Int'l, Inc.*, No. 97 C 7518, 1999 WL 258496, at *5 (N.D. Ill. April, 9, 1999) (granting motion to dismiss).

In sum, Plaintiffs cannot state any claim against State Farm Mutual. Indeed, Plaintiffs' failure to identify any causes of action they propose to pursue against State Farm Mutual is the tell-tale sign that none exists.

CONCLUSION

For all of the foregoing reasons, State Farm Fire respectfully requests that this Court deny Plaintiffs' Motion to Amend their complaint.

RESPECTFULLY SUBMITTED, this 4th day of May, 2009.

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BY: /s/ Wayne Williams
B. WAYNE WILLIAMS

CERTIFICATE OF SERVICE

I, Paige C. Bush, one of the attorneys for Defendant, State Farm Fire and Casualty Company, do hereby certify that I have this date electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to the following ECF participant:

Christopher C. Van Cleave, Esq.
CORBIN, GUNN 7 VAN CLEAVE, PLLC.
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Biloxi, Mississippi 39533-1916

THIS, the 4th day of May, 2009.

BY: **/s/ Wayne Williams**
B.WAYNE WILLIAMS

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

ROBERT BRIDGEWATER	§	**PLAINTIFF**
	§	
v.	§	**Civil No. 1:07CV1273-HSO-RHW**
	§	
STATE FARM FIRE AND CASUALTY	§	
COMPANY, *et al.*	§	**DEFENDANTS**

ORDER AND REASONS GRANTING DEFENDANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S MOTION TO DISMISS

BEFORE THE COURT is the Motion to Dismiss of Defendant State Farm Mutual Automobile Insurance Company ["State Farm Mutual"], filed February 29, 2008 [2-1], in the above-captioned cause. Plaintiff filed a Memorandum in Opposition [9-1] on March 17, 2008, and State Farm Mutual filed its Reply on March 25, 2008 [12-1]. After consideration of the submissions and the relevant legal authorities, the Court finds that State Farm Mutual's Motion [2-1] should be granted.

I. DISCUSSION

Plaintiff names two "State Farm" entities as Defendants in his thirty-five (35) page Complaint – State Farm Mutual and State Farm Fire and Casualty Company ["State Farm Fire"]. *See* Compl., at ¶¶ 2-3. In Paragraph 4 of his Complaint, Plaintiff asserts that "State Farm Fire and State Farm Mutual are juridically linked by contract and by the fact that the companies operate so that it is impossible to distinguish one company from another." Compl., at ¶ 4. Plaintiff contends that "State Farm Fire and State Farm Mutual also at all times relevant

Exhibit "A"

herein were each other's agents, alter egos and/or were co-conspirators in the unlawful actions described herein." Compl., at ¶ 4. Therefore, Plaintiff states that "both companies...will be referred to collectively as 'State Farm' herein." Compl., at ¶ 4. Plaintiff does so throughout the remainder of his Complaint. *See* Compl. *passim*.

The present Motion seeks dismissal of the State Farm Mutual entity on grounds that Plaintiff does not state a claim against it, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). According to the Motion, Plaintiff has failed "to allege *any facts* connecting State Farm Mutual with any of Plaintiff's purported causes of action, sounding in contract or tort." Mot., at p. 2 (emphasis in original). State Farm Mutual contends that Plaintiff cannot state a claim against it because it was not a party to Plaintiff's homeowner's insurance policy with State Farm Fire, it did not adjust Plaintiff's claims, and it did not make any representations to Plaintiff. *See* Mot., at p. 1. State Farm Mutual asserts that Plaintiff "fails to make a single specific allegation that links State Farm Mutual to his State Farm Fire insurance policy or his State Farm Fire-adjusted claim." *See* Mot., at p. 2 (*citing* Compl., ¶ 4).

Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The statement need only "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. ----, ----, 127 S.Ct. 1955, 1964 (2007) (*quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations...a plaintiff's obligation to provide the "grounds" of his "'entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.... Factual allegations must be enough to raise a right to relief above the speculative level...on the assumption that all the allegations in the complaint are true (even if doubtful in fact)....

Twombly, 127 S.Ct. at 1964-65 (*quoting Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

In this case, Plaintiff contends that he has asserted claims against State Farm Mutual under both a veil-piercing or "mere instrumentality" theory, as well as a direct-participant liability theory for purportedly wrongful acts committed by State Farm Mutual. *See* Pl.'s Mem. in Opp'n, at p. 2. The Court is of the opinion that Plaintiff fails to state a claim for relief against State Farm Mutual under either theory.

The question of whether the use of corporate forms will be respected is a matter of state substantive law. *See United States v. Bestfoods*, 524 U.S. 51, 62-63 (1998). As in all diversity cases, the Court is bound by the forum state's choice-of-law rules in order to determine which state's substantive law will govern the determination of corporate veil piercing. *See Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640, 644 (5th Cir. 2002); *Jefferson Pilot Broadcasting Co. v. Hilary & Hogan, Inc.*, 617 F.2d 133, 135 (5th Cir. 1980).

State Farm Mutual is organized and has its principal place of business in Illinois. *See* Mem. in Supp. of Mot., at p. 8. While Plaintiff looks solely to

Mississippi law in support of his Response, State Farm Mutual notes that there may be a conflict of laws, since both Illinois and Mississippi have some connection to this litigation. State Farm Mutual nevertheless contends that regardless of whether Mississippi or Illinois substantive law applies, the outcome is the same. The Court agrees.

Under Illinois law, two requirements must be met in order to pierce the corporate veil. First, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist. *See People v. V & M Industries, Inc.,* 298 Ill. App. 3d 733, 739, 700 N.E.2d 746, 750-51 (Ill. App. 5th Dist. 1998) (internal citations omitted). Also, circumstances must exist such that adherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, or promote inequitable consequences. *See id.*

Under Mississippi law, the general rule is that the corporate form will not be disregarded unless the party seeking to pierce the corporate veil can show: 1) some frustration of expectations regarding the party to whom he looked for performance; 2) the flagrant disregard of corporate formalities by the defendant corporation and its principals; and 3) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder. *See Rosson v. McFarland*, 962 So. 2d 1279, 1285 (Miss. 2007) (*quoting Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044, 1047 (Miss. 1989)); *Penn Nat. Gaming, Inc. v. Ratliff*, 954 So. 2d 427, 431-32 (Miss. 2007) (*citing Miles v.*

Am. Tel. & Tel. Co., 703 F.2d 193, 195 (5th Cir. 1983)). In tort cases, some misfeasance other than the tort itself must also be shown. *See Penn National Gaming, Inc.*, 954 So. 2d at 432.

Plaintiff places great reliance on a Master Services Agreement ["MSA"] between State Farm Mutual and State Farm Fire. *See* MSA, attached as Ex. "A" to Pl.'s Mem. in Opp'n. Plaintiff maintains that the MSA establishes State Farm Mutual's purported exercise of control over State Farm Fire, as well as the purported direct role State Farm Mutual employees have played in Plaintiff's injuries. *See* Pl.'s Mem. in Opp'n *passim*. The Court is of the opinion that the existence and terms of the MSA demonstrate quite the opposite.

Moreover, the Complaint contains no specific factual allegations of actionable misconduct by State Farm Mutual or of disregard of corporate formalities sufficient to state a claim under either a direct-participant liability or a veil-piercing theory of recovery. Plaintiff's Complaint therefore cannot withstand a Rule 12(b)(6) challenge. Nor has Plaintiff alleged facts sufficient to support the existence of any contractual relationship with State Farm Mutual.

Plaintiff cannot support alleged misconduct by a defendant not in privity with him by naming both State Farm Defendants collectively in his pleadings. *See Perkins v. State Farm General Ins. Co.*, 2007 WL 4375208 (S.D. Miss. Dec. 12, 2007) (dismissing State Farm defendant entities, in a

factually similar case, against whom plaintiffs had not stated claims and with whom plaintiffs had no contractual relationship). State Farm Fire has a contractual relationship with Plaintiff, owes contractual obligations to him, and has the legal responsibility to fairly evaluate his claims in good faith and respond appropriately.

State Farm Mutual will be dismissed from this cause of action pursuant to Rule 12. This dismissal will be without prejudice to the right of Plaintiff to seek the Court's leave to file an amended complaint stating a valid cause of action against State Farm Mutual, if there are facts in his case later shown with particularity to support a claim against it. It will not be acceptable for Plaintiff to treat "State Farm" collectively in any future pleadings, and with respect to the dismissed State Farm Defendant, in any future Complaint in this case, Plaintiff will be required to make allegations against State Farm Mutual with reasonable specificity.

II. CONCLUSION

IT IS, THEREFORE, ORDERED AND ADJUDGED that, for the reasons cited herein, the Motion to Dismiss of Defendant State Farm Mutual Automobile Insurance Company filed February 29, 2008 [2-1], should be and is hereby **GRANTED**. All claims asserted against Defendant State Farm Mutual Automobile Insurance Company are hereby dismissed without prejudice.

SO ORDERED AND ADJUDGED, this the 10th day of April, 2008.

s/ Halil Suleyman Ozerden

HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

LOUISE PERKINS AND RICHARD PERKINS — PLAINTIFFS

V. — CIVIL ACTION NO. 1:07CV116-LTS-RHW

STATE FARM GENERAL INSURANCE COMPANY, — DEFENDANTS
STATE FARM FIRE AND CASUALTY COMPANY,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
AND HAAG ENGINEERING CO.

ORDER

There are several pending motions before the Court in this cause of action. The issues raised by them are not new to this Court. Defendant State Farm General Insurance Company has filed a [33] Motion to Dismiss for Lack of Standing; Defendant State Farm Fire and Casualty Company has filed a [35] Motion to Strike Class and Other Allegations in the First Amended Complaint and a [36] Motion for More Definite Statement; Defendant State Farm Mutual Automobile Insurance Company has filed a [39] Motion to Dismiss Plaintiffs' Trust Claims; and Defendant Haag Engineering Co. has filed a [57] Motion to Dismiss, a [59] Motion for More Definite Statement, and a [60] Motion to Strike.

Plaintiffs' [25] First Amended Class Action Complaint is forty pages long; it includes the citation of legal authority usually found in briefs and other material more appropriately left to the discovery process. In other words, the Amended Complaint is hardly an illustration of Fed. R. Civ. P. 8(a)'s admonition that a pleading which sets forth a claim for relief "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."

While there are plenty of documents attached to the Amended Complaint that have nothing to do with Plaintiffs' particular claim arising out of Hurricane Katrina, the insurance policy issued to them (presumably by State Farm Fire and Casualty Company) is not. The Plaintiffs claim that the home they owned in Waveland, Mississippi, was destroyed by a tornado and other high-velocity winds spawned by Hurricane Katrina. They refer to the insurance entities collectively as State Farm, who they say wrongfully denied their claim for insurance policy benefits.

The First Amended Complaint added Defendants Haag Engineering Co. and E. A. Renfroe & Company, Inc. By [77] Order dated August 7, 2007, E. A. Renfroe was dismissed without prejudice at Plaintiffs' [76] request.

Exhibit "B"

It is well established that dismissal is proper only if it appears that the Plaintiffs can prove no set of facts in support of their allegations that would entitle them to relief, *Conley v. Gibson*, 355 U.S. 41 (1957). That is not an impossible burden to meet, especially given the state of the First Amended Complaint and, as will discussed in more detail, given that class certification is not warranted.

The question whether the use of corporate forms will be respected is a matter of state law. *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998). Under Mississippi law, in a contract case such as this, the general rule is that the corporate form will not be disregarded unless the party seeking to pierce the corporate veil can show: 1) some frustration of expectations regarding the party to whom he looked for performance; 2) the flagrant disregard of corporate formalities by the defendant corporation and its principals; and 3) a showing of fraud or other equivalent malfeasance on the part of the corporate shareholder. *Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044 (Miss. 1989). The rule of Mississippi law is the same in tort claims: corporate forms are respected unless the form itself is used in an abusive way or to accomplish an unlawful or fraudulent purpose. *Penn National Gaming, Inc. v. Ratliff*, 954 So. 2d 427 (Miss. 2007).

Plaintiffs' allegations attempt to paint a complex civil conspiracy, but there are no specific allegations of actionable misconduct by State Farm General Insurance Company or State Farm Mutual Automobile Insurance Company. The fraud claims are so general and conclusory that they do not satisfy the requirements of Fed. R. Civ. P. 9(b). Furthermore, there is no contractual relationship between Plaintiffs and either of these State Farm entities. There is no evidence that the three named State Farm defendants have not respected the corporate form in conducting their business, and there is no indication that the parent, State Farm Mutual Automobile Insurance Company, has disregarded the formalities necessary to accomplish the lawful purpose of maintaining these forms.

The Court will not allow Plaintiffs to allege misconduct by two defendants not in privity with them by the mere expedient of treating them collectively in framing their pleadings. State Farm Fire and Casualty Company has a contractual relationship with the Plaintiffs, owes contractual obligations to them, and has the legal responsibility to fairly evaluate their claims in good faith and respond appropriately.

Under the standards of Fed. R. Civ. P. 12, both State Farm General Insurance Company and State Farm Mutual Automobile Insurance Company will be dismissed from this cause of action. These dismissals will be without prejudice to the right of the Plaintiffs to seek the Court's leave to file an amended complaint stating a valid cause of action against these two corporations if there are facts in their case shown with particularity to support a recovery against them. It will not be acceptable for Plaintiffs to treat "State Farm" collectively in any future pleadings, and with respect to the two dismissed State Farm defendants, Plaintiffs will be required to make allegations against these defendants with reasonable specificity.

This Court has denied two requests for class certification under Fed. R. Civ. P. 23, both in

the litigation context, *see Guice v. State Farm Fire and Casualty Co.*, No. 1:06cv1, and for settlement purposes, *see Woullard v. State Farm Fire and Casualty Co.*, No. 1:06cv1057. The Court remains convinced that class certification is not appropriate under any section of Fed. R. Civ. P. 23. All class allegations will be dismissed, and Plaintiffs' trust theories related to them will, also.

The Court will not dismiss claims against State Farm Fire and Casualty Company and Haag Engineering Co.. The United States Magistrate Judge should schedule at his earliest convenience a Case Management Conference in order to meet the objectives of Fed. R. Civ. P. 16. This conference will be held with the understanding that this case will be limited to the facts surrounding the Plaintiffs' particular claim. The Magistrate Judge may also consider the wisdom of the Fed. R. Civ. P. 12(e) motions for a more definite statement (pending motions [36] [59] will be denied without prejudice in light of the Court's rulings) as to the claims against the remaining defendants. It should be pointed out that if Haag Engineering Co.'s claims that it had no participation in the investigation of Plaintiffs' claims are true (and the Court cannot find anything now in the pleadings to indicate otherwise), then the Court will revisit dismissing Haag as a defendant.

Accordingly, **IT IS ORDERED**:

Defendant State Farm General Insurance Company's [33] Motion to Dismiss is **GRANTED**, and said defendant is hereby **DISMISSED** from this cause of action, **WITHOUT PREJUDICE**.

Defendant State Farm Mutual Automobile Insurance Company's [39] Motion to Dismiss Plaintiffs' Trust Claims is **GRANTED**, and said defendant is hereby **DISMISSED** from this cause of action, **WITHOUT PREJUDICE**.

Defendant State Farm Fire and Casualty Company's [35] Motion to Strike Class and other Allegations in the Amended Complaint is **GRANTED IN PART** (as to class action allegations, which are hereby **DISMISSED)** and **DENIED IN PART**, and said defendant shall remain a defendant in this cause of action.

Defendant State Farm Fire and Casualty Company's [36] Motion for More Definite Statement is **DENIED**, **WITHOUT PREJUDICE**.

Defendant Haag Engineering Co.'s [57] Motion to Dismiss is **DENIED**, **WITHOUT PREJUDICE**, and said defendant shall remain a defendant in this cause of action.

Defendant Haag Engineering Co.'s [59] Motion for More Definite Statement is **DENIED**, **WITHOUT PREJUDICE**.

In light of the dismissal of class action allegations, Defendant Haag Engineering Co.'s [60] Motion to Strike Class Allegations is also **GRANTED**, with all such class action claims being hereby **DISMISSED**.

SO ORDERED this the 7th day of December, 2007.

s/ L. T. Senter, Jr.
L. T. SENTER, JR.
SENIOR JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

LARRY ABNEY and CYNTHIA ABNEY **PLAINTIFFS**

V. **CIVIL ACTION NO.1:07CV0711 LTS-JMR**

STATE FARM FIRE AND CASUALTY COMPANY,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
ET AL. **DEFENDANTS**

MEMORANDUM OPINION

The Court has before it the motion [15] to dismiss the plaintiffs' claims against Defendant State Farm Mutual Automobile Insurance Company (Mutual). For the reasons stated below, this motion will be granted.

Plaintiffs are insured under a homeowners policy issued by Defendant State Farm Fire and Casualty Company (State Farm). This policy was in effect at the time of Hurricane Katrina, and the plaintiffs are seeking recovery of insurance benefits for property damage sustained during that storm. Plaintiffs have also alleged causes of action for bad faith claims adjusting practices.

Plaintiffs have named Mutual as a defendant, but the complaint does not make any specific allegations of actionable misconduct by Mutual. Plaintiffs have framed the allegations of their complaint to treat State Farm and Mutual "collectively," alleging that these two defendants acted as a single entity in connection with the plaintiffs' claims. Plaintiffs have no contractual relationship with Mutual, and the complaint does not allege any specific misconduct unique to Mutual.

Plaintiffs assert that Mutual is a proper party defendant in this action because State Farm is a wholly-owned subsidiary of Mutual and because, through a contractual arrangement, Mutual performs certain business services for State Farm. The documents the plaintiffs have submitted in camera, in support of their theory that Mutual is a proper party, indicate to me that State Farm and Mutual have respected the corporate form in conducting their business, and I see no indication that Mutual has disregarded the formalities necessary to accomplish this lawful purpose. Likewise, there is nothing in these documents to suggest that the contractual arrangement between State Farm and Mutual was used to accomplish an unlawful objective. If State Farm and Mutual have indeed observed the proper formalities in their corporate relationship, Mutual, as the sole shareholder of State Farm, is not liable for the conduct of State Farm, and Mutual is not obliged to perform State Farm's contractual obligations.

Exhibit "C"

The question whether the use of corporate forms will be respected is a matter of state law. *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). Under Mississippi law, in a contract case such as this, the general rule is that the corporate form will not be disregarded unless the party seeking to pierce the corporate veil can show: 1) some frustration of expectations regarding the party to whom he looked for performance; 2) the flagrant disregard of corporate formalities by the defendant corporation and its principals; and 3) a showing of fraud or other equivalent malfeasance on the part of the corporate shareholder. *Gray v. Edgewater Landing, Inc*., 541 So.2d 1044 (Miss.1989). The rule of Mississippi law is the same in tort claims: corporate forms are respected unless the form itself is used in an abusive way or to accomplish an unlawful or fraudulent purpose. *Penn National Gaming, Inc. v. Ratliff*, 954 So.2d 427 (Miss.2007).

In the absence of any substantive allegations of misconduct by Mutual, and in the absence of any allegations which would support the contention that the Court should disregard the corporate form of business under Mississippi law, the plaintiffs have not stated a cause of action against Mutual. I can find no authority that would allow a plaintiff to allege misconduct by two defendants merely by the expedient of treating them "collectively" in framing his pleadings. State Farm (and not Mutual) has a contractual relationship with the plaintiffs; State Farm (and not Mutual) owes contractual obligations to the plaintiffs; and State Farm (and not Mutual) has the legal responsibility to fairly evaluate the plaintiffs' claims in good faith and respond appropriately.

Accordingly, I find that under the standards of F.R.Civ.P. 12, Mutual should be dismissed from this action. This dismissal will be without prejudice to the right of the plaintiffs to seek leave of court to amend their complaint to state a valid cause of action against Mutual if there are facts sufficient to support a theory of recovery against Mutual. Any such acts on the part of Mutual must be alleged with particularity, and it will not be acceptable to treat State Farm and Mutual "collectively" in any future pleadings.

An appropriate order will be entered.

DECIDED this 17th day of June, 2008.

s/ L. T. Senter, Jr.
L. T. SENTER, JR.
SENIOR JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

LARRY ABNEY and CYNTHIA ABNEY **PLAINTIFFS**

V. **CIVIL ACTION NO.1:07CV0711 LTS-JMR**

STATE FARM FIRE AND CASUALTY COMPANY,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
ET AL. **DEFENDANTS**

ORDER GRANTING MOTION TO DISMISS

In accordance with the Memorandum Opinion I have this day signed, it is hereby

ORDERED

That the motion [15] of State Farm Mutual Automobile Insurance Company to dismiss the plaintiffs' claims against it is **GRANTED**.

SO ORDERED this 17th day of June, 2008.

s/ L. T. Senter, Jr.
L. T. SENTER, JR.
SENIOR JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

MELISSA MARION AND ANDREW MARION — PLAINTIFFS

V. — CIVIL ACTION NO. 1:06cv969-LTS-RHW

STATE FARM FIRE AND CASUALTY COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, JOHN DOES A THROUGH G, AND JANE DOES A THROUGH G — DEFENDANTS

ORDER

Plaintiffs have filed several [194] [196] [197] [213] [214] [216] 218] Applications for Review and Objections to Orders of Magistrate Judge. They take exception to the Magistrate's decisions to [188] deny their [119] Motion to Compel discovery responses, and to grant [189] [190] defense motions [132] [158] to quash depositions of high-ranking corporate officers. Three of the applications [213] [214] [216] are basically aimed at the same [200] order, in which the Magistrate granted in part and denied in part Plaintiffs' [137] Motion to Compel; denied Plaintiffs' [121] Motion for Sanctions; and, at an [201] order related to [200], granting defendants' [146] motion for protective order. A review of the Magistrate's orders clearly shows that he carefully assessed the issues in the proper light, and that as a result he correctly drew the lines within the context of this particular litigation as governed by the Federal Rules of Civil Procedure. With a few minor exceptions, which can be corrected easily so that the scheduled May, 2008, trial can still be held, this Court finds, under the standard of Fed. R. Civ. P. 72(a), that the Magistrate's orders overall are not clearly erroneous or contrary to law.

What might be called error arises from the Plaintiffs' being afforded more latitude than was necessary to develop the theory of their case. There is not much in the challenged orders that pleases Plaintiffs, who have submitted a voluminous amount of material to support their applications for review. The Court takes note of Plaintiffs' numerous references to the "established law of the case," as well as to the case of *Guice v. State Farm Fire and Casualty Co., et al.*, No. 1:06cv1. Plaintiffs seem to rely on each as a springboard to rationalize the aggressive approach they believe should be taken in discovery. However, it is the Court's view that Plaintiffs' wide-ranging theory of recovery is not synonymous with a guiding principle that dictates a different control apparatus or case designation of which they can take special advantage. *See* discussion *infra*. And in *Guice*, this Court, as Plaintiffs' counsel need not be reminded, twice refused to grant class certification under Fed. R. Civ. P. 23. It is enough to say that *Guice* has been dismissed, and the Court will not recognize the instant case as one of its progeny.

Whether the facts recited in the Magistrate's orders surrounding the depositions of Mike

Exhibit "D"

Carroll and Susan Hood are disputed or not (and they are hotly contested by the opposing parties), the determination that must be made is whether the testimony and information to be elicited is material, on the one hand, or, on the other, results in undue burden or expense.

Stephen Hinkle, the State Farm employee responsible for drafting the well known wind/water protocol, testified in his deposition (the one taken in *Guice*, which is among the exhibits attached to Plaintiffs' objections) that it was he who suggested its creation, and he did not need anyone's approval to do it (p. 73); that once his initial draft of this protocol was submitted to other State Farm personnel, presumably including Mike Carroll, a director in State Farm's automobile section, little substantive change was made (p. 73); and that Carroll, not being a "fire claim person," was not involved in homeowners coverage interpretation, but coordinated the administrative process (p. 71).

The deposition of Susan Hood, who is described as a top level claims executive, is sought to discuss requests for (or the failure to request) engineers to perform property inspections. In Plaintiffs' particular case, an engineer was originally anticipated to give a report on their house even though the inspections were eventually not made. However, what use Plaintiffs may be able to make of this aspect, or any possible conflict in the testimony of Joe Caruso, the adjuster assigned to Plaintiffs' claim (*compare* Magistrate's [189] order at 2 *with* Caruso deposition at 200), does not change the fact that there was no engineering inspection of Plaintiffs' loss.

With regard to Plaintiffs' Motion to Compel disposed of in [188], the Plaintiffs do not deny that they failed to comply with the method and requirements set out in Uniform Local Rule 37.1(B) for making a proper showing for relief. Still, that was not the only ground on which the Magistrate based his decision. Furthermore, just because a party files an emergency motion to expedite consideration of a discovery matter does not make it an emergency demanding expeditious treatment. The Magistrate also pointed out that the answers to the particular discovery were attested to by one of State Farm's agents and a logical extension is that these answers are binding on State Farm. Left in the position that the Plaintiffs offered only general assertions related to State Farm's discovery responses, the Magistrate acted well within his discretion in denying Plaintiffs' motions.

As for the motions to compel and for sanctions, it appears that Plaintiffs would be satisfied with nothing less than a full-blown search warrant for State Farm offices and personnel. The magistrate's comment in his [200] order that this case presents "one of the more contentious discovery battles on [the Court's] Hurricane Katrina docket" is a gross understatement. The magistrate went on to state in that order:

> The central dispute does not differ to any great degree from hundreds of other Katrina cases that have been filed in this Court . . . . What has made this case particularly challenging for the Court with respect to discovery is Plaintiffs' attempt to construct a broad-ranging conspiracy theory that reaches to the uppermost levels of State Farm and involves virtually all of State Farm's formulation of policies, guidelines, and other responses to Hurricane Katrina.

Apparently Plaintiffs are even determined to undermine the Fifth Circuit's decision in *Tuepker v. State Farm Fire & Casualty Co.*, 507 F.3d 346 (5th Cir. 2007), and show the court of appeals the errors of its ways. While *Tuepker* contains a certain amount of *obiter* (or perhaps *gratis) dicta* though not to the extreme degree as in *Leonard v. Nationwide Mutual Insurance Co.*, 499 F.3d 419 (5th Cir. 2007)--and its applicability to the instant case is yet to be determined, that decision stands on its own. And that is the point: so does the instant case.

With that in mind, the gravest "error" committed by the Magistrate was thinking that "the parties [could] meet and confer to discuss any outstanding discovery requests," because after this "meet and confer" it was "clear that the parties had done little to resolve their perceived differences on document production." It is no wonder that the Magistrate was "not entirely clear on precisely what State Farm agreed to produce as a result of the meet and confer."

A common thread that runs through the Magistrate's [200] order is that this litigation, including the discovery, should focus on and be limited to the Plaintiffs' claim. To borrow the Plaintiffs' own words [213], "this case is about the claims of the Marions, who lost their only house in [Hurricane Katrina] on August 29, 2005" (unfortunately, they are not unique in experiencing that tragic outcome from Hurricane Katrina).

At the same time, the Magistrate wisely incorporated some reasonable flexibility, such as requiring State Farm to produce claim files consistent with the order entered in *Muller v. State Farm*, No. 1:06cv95 (docket entry [44]). The Magistrate's rationale is well stated in the concluding paragraph of his [200] order:

> With respect to Plaintiffs' request for sanctions, the Court finds that the motion should be denied. State Farm's "non-compliance" resulted to a large degree from Plaintiffs' expansive and overly broad discovery requests. In a sense, Plaintiffs' methods of discovery invited State Farm's non-compliance. There has been no demonstration to the Court's satisfaction that State Farm has withheld documents that relate specifically to the Marion claims, with the possible exception of the 82 emails identified by State Farm. The Court has indulged Plaintiffs' attempts to identify specific discoverable documents or categories of documents relating to their theories of conspiracy and fraud. General requests for any and all documents or communications relating to claims handling procedures, such as have been made by Plaintiffs in this case, are vastly over inclusive and have had the effect of slowing down the litigation of this particular and specific claim. The Court further has attempted to bring the parties together to reach an agreement with regard to document production. In the end, the Court finds that this case is about the Marions' claim, the denial of that claim, and how it relates to the terms of the Marions' insurance policy.

For the most part, this Court agrees with these comments. Because it does not appear to be reflected in the record, the Court has no reason to dispute Plaintiffs' assertions that this cause has been moved from its original [8] standard track (nevertheless, the Court's docket still shows a standard flag). With the benefit of hindsight, this is not a complex case, and the fact that the amended scheduling order [117] entered in October 2007, shows an estimated trial time of 4 days

bolsters this belief.

Nothing in this order should be interpreted in such a way that suggests that any of the parties is completely without fault in contributing to the condition of this case. The Magistrate's mention of "non-compliance" indicates that there has been some resistance on State Farm's part to both Plaintiffs' and the Court's efforts, but it has not reached the level of being sanctionable. That does not mean that it will never cross into that territory. Furthermore, there is a hint in the motion papers of a possible continuance of the May trial date. This case has been continued once, and to put it bluntly, that is not going to happen again. It is time for this folly to come to an end regardless of its cause with some direction.

Likewise, the Court will not tolerate Plaintiffs' engaging in harassment or annoyance. In short, Plaintiffs will be controlled by the limitation that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2). All of these factors weigh the same in all other cases on this Court's Hurricane Katrina docket.

The Magistrate shall conduct a status conference as soon as possible to address, and primarily clarify, outstanding discovery issues that remain to be resolved. He is welcome to revisit any matters which are the subject of his various orders, with his guiding principle being Plaintiffs' underlying contract claim. This Court on numerous occasions has indicated that it is difficult to envision a breach of an insurance policy lawsuit without considering the procedure used in handling the claim and the reasons it was denied. Plaintiffs are not going to be allowed to reinvent the wheel as to the promulgation of policy language or follow a chain of custody with respect to documents or contract interpretation, unless they relate specifically to Plaintiffs' claim. Given the state of the record, the Court hesitates to use examples, but something that is "general" may still be discoverable (e.g., a claims procedure manual) if it was applied to or governed Plaintiffs' claim. At some point, however, there are limits, and if the State Farm defendants have concerns, they can present the material to the Magistrate for *in camera* inspection. Of course, admissibility of any evidence will be for the Court to ultimately determine.

This Court demands the mutual cooperation of the parties. It hopes that some agreement can be reached; it is also understood that legitimate disagreement may exist, in which case the Magistrate is empowered to resolve it. Neither he nor this Court will hesitate to impose sanctions on any one party or counsel or both who engages in any conduct that causes unnecessary delay or needless increase in the cost of litigation. *See generally* Fed. R. Civ. P. 26(g).

Accordingly, **IT IS ORDERED**:

The [194] [196] [197] [213] [214] [216] [218] Applications for Review are **DENIED** subject to the provisions of this Order, and this matter is referred to the United States Magistrate Judge for proceedings consistent herewith.

The trial of this cause of action shall not be continued.

The mediation in this cause of action scheduled for 1:00 p.m. on Thursday, March 20, 2008, shall also not be continued. Failure in any regard to comply with the [198] Order for Mediation and any related matters shall result in the imposition of sanctions.

SO ORDERED this the 17th day of March, 2008.

s/ L. T. Senter, Jr.
L. T. SENTER, JR.
SENIOR JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT SKINNER	**CIVIL ACTION**
VERSUS	**NO. 07-6900**
STATE FARM FIRE AND CASUALTY COMPANY AND STATE FARM GENERAL INSURANCE COMPANY	**SECTION"B"(2)**

ORDER AND REASONS

Before the Court is State Farm General Insurance Company's Motion for Dismissal pursuant to Rule 12(b)(1) and 12(b)(6) (Rec. Doc. No. 6). After review of the pleadings and applicable law, and for the reasons that follow,

IT IS ORDERED that Defendant's Motion for Dismissal is **GRANTED** without prejudice to the right of Plaintiff to timely seek leave of Court to file an amended complaint stating a valid cause of action against State Farm General Insurance Company.

BACKGROUND

Plaintiff Albert Skinner filed a Complaint on or about August 24, 2007 in the Civil District Court for the Parish of Orleans. State Farm Fire and Casualty Company ("State Farm Fire") removed Plaintiff's Complaint to this Court on October 16, 2007. Plaintiff sued both State Farm Fire and State Farm General Insurance Company ("State Farm General") alleging that "State Farm" issued an insurance policy to him and that he filed a claim with State Farm for damages sustained to his building and personal

Exhibit "E"

property as a result of Hurricane Katrina. Plaintiff alleges that "State Farm" breached the insurance contract and therefore, Plaintiff seeks damages and penalties pursuant to LSA-R.S. 22:658 and 22:1220.

Defendant State Farm General contends that Plaintiff's references throughout the petition to "State Farm" does not suffice for stating any claims against State Farm General. In addition, Defendant contends that Plaintiff has no standing to sue. Defendant points out that the insurance contract is central to Plaintiff's lawsuit, and the insurance contract is between State Farm Fire and Plaintiff only. There is no privity of contract involving State Farm General.

Plaintiff Albert Skinner contends that collective references to two entities is common in pleadings filed in state and federal courts. Plaintiff claims that the petition has set forth specific allegations against both entities. Plaintiff points to the references to "State Farm" contained within insurance cover sheet. Plaintiff also highlights that State Farm General Insurance Company and State Farm Fire and Casualty Company have agreed to the terms of Directive 199, and therefore have recognized they are likely and viable defendants as to Katrina claims. Finally, Plaintiff notes that "State Farm Insurance" is not defined in the policy, and further notes that all ambiguities in the policy are to be construed against Defendant.

DISCUSSION

A. Standard for Dismissal Under Rule 12(b)(6) and 12(b)(1)

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is disfavored and should not be granted unless "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). In analyzing a 12(b)(6) motion, the court must liberally construe the complaint in favor of the plaintiff and assume that all facts pleaded in the complaint are true. *See Brown v. Nationsbank Corp.*, 188 F.3d 579, 585 (5th Cir. 1999). The issue is not whether the plaintiff will ultimately prevail, but "whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id*. at 586 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 at 601 (1969)); *Doe v. Hillsboro Independent School Dist.*, 81 F.3d 1395, 1401 (5th Cir. 1996). Thus, a court should not dismiss a claim unless the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in the complaint. *Vander Zee v. Reno,* 73 F.3d 1365, 1368 (5th Cir. 1996). To survive a 12(b)(6) motion, Plaintiffs need only state facts, which, if taken as true, would entitle them to relief under a particular claim. *GE Capital Corp. v. Posey*, 415 F.3d 391, 395

(5th Cir. 2005).

A party may invoke Federal Rule of Civil Procedure 12(b)(1) to challenge a district court's subject matter jurisdiction. The Court must grant a motion to dismiss for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *See Home Builders Ass'n of Miss., Inc. v. City of Madison,* 143 F.3d 1006, 1010 (5th Cir. 1998)(citation omitted). Where a plaintiff fails to allege that he or she has suffered injury in fact with respect to a given defendant, Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of all claims against the defendant for lack of standing and as a consequence for lack of subject matter jurisdiction. *Hastey v. Bush*, 100 F.App'x 319, 320 (5th Cir. 2004). The party who invokes federal court jurisdiction bears the burden of showing that jurisdiction is proper. *Dow Agrosciences, LLC v. Bates,* 332 F.3d 323, 326 (5th Cir. 2003).

B. Collective Framing of Defendants

In the Southern District of Mississippi, Judge Senter dismissed State Farm General Insurance Company and State Farm Mutual Automobile Insurance Company from a lawsuit where the plaintiffs alleged that "State Farm" wrongfully denied the plaintiffs' claim for insurance policy benefits following Hurricane Katrina. *Perkins v. State Farm General Insurance Company*, 2007 WL

4375208 (S.D. Miss., Dec. 12, 2007). No contractual relationship between plaintiffs and State Farm General or State Farm Mutual existed, and the court declined to allow "[p]laintiffs to allege misconduct by [State Farm General and State Farm Mutual] not in privity with them by mere expedient of treating them collectively in framing their pleading. *Id*. at *2. The Court determined that only State Farm Fire and Casualty Company had a contractual relationship with the plaintiffs so this entity remained in the lawsuit. *Id*. Likewise, in *Bridgewater v. State Farm Fire & Cas. Co.*, CA 07-CV-1273-HSO-RHF, the court granted a 12(b)(6) motion to dismiss when plaintiff named two entities as "State Farm" in the Complaint, which contained no specific factual allegations of actionable misconduct by State Farm Mutual, did not allege facts to support the existence of a contractual relationship, and failed to state a claim under alternative theories. A named plaintiff can bring a suit against a party only if the plaintiff suffered an injury that is traceable to that party; if a plaintiff cannot trace an injury to a defendant, the plaintiff lacks standing with regard to that defendant. *See Aguilar v. Allstate Fire & Cas. Ins. Co.*, 2007 WL 734809 (E.D.La. Mar. 06, 2007) at *5.

In the case at bar, Plaintiff cannot trace the injury suffered back to Defendant State Farm General because the policy was issued by State Farm Fire, not State Farm General. As such, Plaintiff lacks standing as to Defendant State Farm General. *See Aguilar*, at

*5. Without privity of contract, Plaintiff's claims for LSA-R.S. 22:658 and 22:1220 also fail. *Riley v. Transamerica Ins. Group,* 923 F. Supp. 882, 888 (E.D.La. 1996) *aff'd* 117 F.3d 1416 (5th Cir. 1997). Without privity of contract, plaintiff lacks standing as to Defendant State Farm General, and has failed to state a claim for which relief may be granted.

While State Farm General will be dismissed from this cause of action pursuant to Rule 12, this dismissal will be without prejudice to the right of Plaintiff to timely seek leave of Court to file an amended complaint stating a valid cause of action against State Farm General. Plaintiff will be required to make allegations against State Farm General with reasonable specificity.

CONCLUSION

For the reasons stated above, **IT IS ORDERED** that Defendant's Motion for Dismissal is **GRANTED** without prejudice to the right of Plaintiff to timely seek leave of Court to file an amended complaint stating a valid cause of action against State Farm General Insurance Company.

New Orleans, Louisiana, this 28th day of April, 2008.

IVAN L. R. LEMELLE

UNITED STATES DISTRICT JUDGE