

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

**DANIEL B. O'KEEFE and
CELESTE A. FOSTER O'KEEFE,
and THE DANCEL GROUP, INC.**

PLAINTIFFS

VS.

Civil Action No. 1:08cv600 HSO-LRA

**STATE FARM FIRE AND CASUALTY
COMPANY and MARSHALL J. ELEUTERIUS**

DEFENDANTS

**PLAINTIFFS' REBUTTAL TO STATE FARM FIRE AND CASUALTY COMPANY'S
[96] MEMORANDUM IN OPPOSITION TO [85] PLAINTIFFS'
MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

COME NOW THE PLAINTIFFS, Daniel B. O'Keefe, Celeste A. Foster O'Keefe, and The Dancel Group, Inc., by and through undersigned counsel of record, and file their *Rebuttal to State Farm Fire's [96] Motion for Leave to Amend*, and, in rebuttal thereto, would show the Court as follows:

This Case is Distinguishable from Cases Where this Court Dismissed State Farm Mutual

1. State Farm Fire attempts to paint Plaintiffs' proposed, Amended Complaint as just another in a long line of virtually identical claims against State Farm Mutual held to be invalid by this Court. Contrary to State Farm Fire's argument, Plaintiffs' Motion to Amend, and Plaintiffs' proposed Amended Complaint are unique, and encompass claims and facts that were not before the Court in the matters referenced by State Farm Fire.

2. First, unlike any of the cases cited by State Farm Fire in its response, Plaintiffs' proposed Amended Complaint asserts claims that State Farm Mutual acted as the "co-principal" of State Farm Fire with regard to the marketing, sale, claims adjustment and investigation, and claims decisions on the subject claims. The claims Plaintiffs are attempting to assert against State Farm Mutual in this regard are virtually identical to claims the Mississippi Supreme Court recently

found are **valid under controlling law**; and which the Mississippi Supreme Court found raise issues of fact which may not be decided as a matter of law when one insurance entity contracts away responsibilities under a policy of insurance sold in its name to another insurance entity. *Fonte vs. Audubon Ins. Co.*, 2009 WL 468584, ¶¶ 10-11 (Miss. 2009).

3. Second, unlike the cases cited by State Farm Fire in its response, the claims Plaintiffs are attempting to make against State Farm Mutual are **not conclusory, but are supported by undisputed facts**. (See discussion, and exhibits incorporated into ¶¶ 7, 10-18 of Plaintiffs' [85] Motion). State Farm's assertion that "Plaintiffs have not alleged *a single fact* connecting State Farm Mutual to the adjustment of *their* State Farm Fire insurance claims" (emphasis in original) is simply **false**. As set forth in detail in the referenced paragraphs of Plaintiffs' [85] *Motion to Amend*, Plaintiffs' have asserted sufficient *facts* in support of their claims against State Farm Mutual to support a claim to relief under controlling Mississippi law that is plausible on its face. see *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Those *facts* include the fact that State Farm Mutual wrote and implemented claims procedures that a State Farm Mutual employee admitted encompassed extra-contractual requirements for coverage. Plaintiffs' proposed Amended Complaint specifically alleges that the use of the fraudulent claims procedures written and implemented by State Farm Mutual, as co-principal of State Farm Fire and/or independent contractual adjuster, resulted in the wrongful denial of Plaintiffs' Hurricane Katrina insurance claims. (see, i.e. ¶¶ 98-100 of Plaintiffs' proposed Amended Complaint). Those *facts* also include the undisputed fact that, pursuant to the [85-5] *Master Services and Facilities Agreement* ("Exhibit 4" to Plaintiffs' [85] Motion), State Farm Mutual contractually undertook the obligation to, among other things: provide the underwriting services for the underwriting / sale of the subject policies; provide the marketing services for the sale of the subject policies; provide

the “policies” used in the conduct of State Farm Fire’s business (which would include claim handling procedures); provide “qualified personnel” to conduct the business of State Farm Fire (which would include claims adjustment and investigation). (See [85-5] “Exhibit 4” to Plaintiffs’ [85] Motion). Plaintiffs’ proposed Amended Complaint specifically alleges that State Farm Mutual, as co-principal to State Farm Fire, failed to conduct an adequate investigation of Plaintiffs’ claims, and failed to follow Mississippi public policy with regard to its investigation of Plaintiffs’ claims (see ¶¶ 35-39 of proposed Amended Complaint). Plaintiffs’ proposed Amended Complaint also alleges that State Farm Mutual, as co-principal of State Farm Fire pursuant to the referenced contractual agreement, fraudulently induced Plaintiffs to purchase the subject policy of insurance. (See ¶¶ 74-76).

4. State Farm Fire’s assertion that “Plaintiffs allege no facts whatsoever indicating that State Farm Mutual actually performed *any* services *vis-à-vis* the . . . adjustment of [Plaintiffs’ claims]” (emphasis in original) is likewise **false**. As set forth in Plaintiffs’ [85] Motion, and the exhibits incorporated therein, the Plaintiffs have presented **undisputed facts** that *at least* eight (8) employees of State Farm Mutual were involved and editing the admittedly extra-contractual claims provisions that were used, in part, to deny the Plaintiffs’ Hurricane Katrina claims. (see discussion and exhibits incorporated into ¶ 11 and its sub-parts of Plaintiffs’ [85] Motion). The undisputed facts likewise show that State Farm Fire contracted away virtually all of its responsibilities under the subject insurance policy to State Farm Mutual, pursuant to the 85-5] *Master Services and Facilities Agreement*.

5. It is important to note that, as compared to prior cases where this Court has considered efforts to join State Farm Mutual as a co-defendant in Katrina litigation, in the only prior case involving claims and asserted facts that are substantially similar to the claims and facts at issue in

the case at bar, this Court **granted** Plaintiffs' Motion to Amend to add State Farm Mutual as a party (and even that case did not include the compelling "co-principal" claims set forth in Plaintiffs' proposed Amended Complaint). (See Court's [193] *Order Granting Leave to File Second Amended Complaint* in *Guice vs. State Farm, et al.*, Civil Action No. 1:06-cv-1-LTS-RHW, attached as "Exhibit 9" to Plaintiffs' [85] Motion).

Granting Plaintiffs' Motion Promotes the Interests of Justice

6. Fed.R.Civ.P. 15(a) provides that leave to amend "shall be freely given when justice so requires." The tenor of Rule 15 and its very words "encourage the court to look favorably on requests to amend." 6 Wright and Miller, *Federal Practice and Procedure*, §1484; *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

7. State Farm Fire suggests Plaintiffs' Motion should be denied because granting it would require additional discovery and litigation, which State Farm Fire argues would constitute undue prejudice. State Farm's argument is disingenuous, as it was State Farm that removed this case to this Honorable Court after Plaintiffs' filed their Motion to Amend in the State Court proceeding (and after Plaintiffs' action had been pending in that Court for a considerable period of time) – necessitating considerable delay and additional litigation. Although State Farm Fire makes a conclusory allegation that it would suffer "prejudice" if Plaintiffs' Motion is granted, it does not come close to meeting its burden of demonstrating that it would suffer actual prejudice in the event Plaintiffs' Motion is granted.

8. State Farm Fire's conclusory allegation that Plaintiffs' attempt to amend is untimely also falls short. State Farm Fire recites the "history" of this litigation without acknowledging that the prior amendments it references were made by former Counsel for Plaintiffs, and without acknowledging that after present counsel entered their appearance on behalf of the Plaintiffs,

Plaintiffs timely sought leave of the Circuit Court of Harrison County, Mississippi to file an amended Complaint substantially similar to that they are currently seeking to file with this Honorable Court. State Farm Fire is the party that initiated further delay in these proceedings, by removing this cause to this Honorable Court approximately two months after Plaintiffs filed their Motion for Leave to File Amended Complaint, and prior to the time the Circuit Court ruled on that motion. Plaintiffs filed a Motion to Remand, resulting in a stay of proceedings. After Remand was denied, the Honorable Magistrate Judge entered a Case Management Order in this case on March 4, 2009, which [57] Order set the deadline for filing motions for joinder of parties or to amend pleadings as April 15, 2009. This Motion for Leave to Amend was timely filed, within the time frame Ordered by this Honorable Court.

9. State Farm Fire's arguments that Plaintiffs "have no standing" to sue State Farm Mutual, and that Plaintiffs "have failed to state any causes of action against State Farm Mutual" in their proposed Amended Complaint must also fail. Plaintiffs addressed these arguments in their initial [85] Motion (See ¶¶ 10-21 of Plaintiffs' [85] Motion), and incorporate same herein.

10. The United States Supreme Court recently confirmed the right of an **individual plaintiff** pursuing punitive damages, such as the Plaintiffs in the case at bar, **to demonstrate institutional fraud** to demonstrate the degree of reprehensibility of the Defendant. *Philip Morris USA vs. Williams*, 127 S.Ct. 1057, 166 L.Ed.2d 940, 75 USLW 4101 (2007); 127 S.Ct. 1062-1064. As this Court stated in *McFarland v. State Farm Fire and Casualty Company*, Civil Action No. 1:06cv932-LTS-RHW, "This Court has no intention to limit Plaintiffs' claims or remedies, so long as they are asserted in a procedurally correct manner (*see, e.g.*, Fed. R. Civ. P. 9(b)) and can be supported by admissible evidence." Restricting Plaintiffs from pursuing critical claims against the existing Defendants, and State Farm Mutual in this litigation will effectively restrict

Plaintiffs from fully developing their claims of bad faith – and simultaneously shield State Farm Mutual from full accountability and liability for its conduct. The Supreme Court acknowledges a litigant’s right to have equal and full access to the Court, and has noted that this right is grounded in the Article IV *Privileges and Immunities Clause*; the First Amendment Petition Clause; the Fifth Amendment Due Process Clause; and the Fourteenth Amendment Equal Protection provisions of the *United States Constitution*. *Christopher vs. Harbury*, 122 S.Ct. 2179, 536 U.S. 403, 153 L.Ed.2d 413 (2002), 122 S.Ct. at 2187, n. 12.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request the Court enter an Order Granting Plaintiffs’ leave to file their Amended Complaint, attached to their [85] Motion as “Exhibit 1”, and granting any and all additional relief in favor of the Plaintiffs deemed appropriate by this Honorable Court.

Respectfully submitted, this the 13th day of May, 2009.

**DANIEL B. O’KEEFE, CELESTE A. FOSTER
O’KEEFE, AND THE DANCEL GROUP, INC.,
PLAINTIFFS**

By: /s/ Christopher C. Van Cleave
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CERTIFICATE OF SERVICE

I, undersigned counsel of record, hereby certify that I have this day electronically filed the foregoing with the Clerk of the Court using the EFC system which sent notification of such filing to the following:

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Respectfully submitted, this the 13th day of May, 2009.

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