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

D. NEIL HARRIS AND ASSOCIATES, P.A. and
D. NEIL HARRIS, SR., INDIVIDUALLY AND D/B/A
D. NEIL HARRIS AND ASSOCIATES, P.A. PLAINTIFFS

VS. CIVIL ACTION NO. 1:08cv1489 LG-MTP

STATE FARM FIRE AND CASUALTY COMPANY;
STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY; AND JOHN AND JANE DOES
A, B, C, D, E, F, G and H DEFENDANTS

PLAINTIFFS' RESPONSE IN OPPOSITION TO STATE FARM'S MOTION FOR PROTECTIVE ORDER

COME NOW THE PLAINTIFFS, D. Neil Harris, Sr., Individually and D. Neil Harris and Associates, P.A., by and through undersigned counsel, and file their Response in Opposition to State Farm's Motion for Protective Order, as follows:

1. Defendants' request for a protective order is not made in good faith, is exceedingly broad; unacceptably unilateral; and Defendants have not come close to satisfying their burden to demonstrate "good cause" for the relief they are seeking. Quite simply, State Farm, while acknowledging the Plaintiffs' right to discover claims procedures, coverage interpretation documents and similar information in the prosecution of their claims for bad faith and fraudulent claims practices, wants to make sure that any evidence proving Plaintiffs' allegations of institutional fraud is not made available to the public.

STATE FARM CANNOT MEET ITS BURDEN OF SHOWING A GOOD FAITH EFFORT TO RESOLVE THE ISSUE

2. State Farm's Motion **violates the requirements of Uniform District Court Rule 37.1(A).** Rather than attach the required "Good Faith Certificate", State Farm merely attaches a "Certificate

of Consultation" to its Motion (See "exhibit B" to State Farm's Motion). State Farm cannot assert to this Honorable Court that it sought to resolve this discovery controversy in good faith, because **State Farm ignored Plaintiffs' good faith efforts to resolve the discovery dispute**. Counsel for Plaintiffs offered a good faith resolution of the dispute, to the point of agreeing to entry of an agreed protective order identical to that entered in numerous Federal Court Katrina lawsuits against State Farm in which Counsel for these Plaintiffs are current Counsel for State Farm are also Counsel of Record. State Farm refused (and failed to even acknowledge to this Court) this good faith offer of compromise, however, and is instead seeking entry of an Order from this Court that would make ALL information produced by State Farm (from this point forward) confidential – but no personal and confidential information produced by Plaintiffs would be subject to protection from State Farm's proposed Order. Specifically:

a. Counsel for State Farm sent Counsel for Plaintiffs an email, dated March 2, 2009, wherein they suggested entry of a consent protective Order incorrectly referred to as "standard" in Katrina litigation. (See email correspondence from Counsel for State Farm to Counsel for Plaintiffs dated March 2, 2009, with attachment, attached as "Exhibit 1").

b. Counsel for Plaintiffs promptly responded that Plaintiffs "do **not** consent to a protective order in the form you suggested, which would make ALL documents produced by State Farm confidential." (emphasis in original) Counsel for Plaintiffs offered a good faith resolution to the dispute, however, and advised State Farm "We will agree to entry of a consent protective order that will **mutually protect truly confidential information produced by both parties**. I am **attaching a form of Order that has been entered by Judge Walker in most, if not all of the cases in which we have been associated**." (emphasis added). (See email from

Counsel for Plaintiffs to Counsel for State Farm, with attachments, dated March 3, 2009, attached as "Exhibit 2").

3. State Farm refused to even acknowledge Plaintiffs' good faith attempt to resolve the issue by entry of a protective Order **identical to that entered in numerous other cases involving State Farm and the same counsel involved herein**, however. Instead, it filed the subject Motion on June 9, 2009.

THE PROPOSED PROTECTIVE ORDER IS OVERLY BROAD

4. The "Protective Order" proposed by State Farm is, on its face, overly broad. Although State Farm's Motion suggests State Farm is simply trying to afford protection to certain documents currently withheld from production that State Farm deems "trade secrets", the proposed "protective order" submitted by State Farm far exceeds the protection State Farm asserts it is "legitimately" seeking. The "protective order" proposed by State Farm seeks to make ***ALL*** **documents and information produced by State Farm, or any of its agents or representatives**, "confidential". (See ¶ 1 of proposed Order)

5. The proposed Order would conflict with existing Protective Orders entered in other Katrina cases against State Farm in which Counsel for these Plaintiffs are Counsel of Record. In certain situations, Counsel for these Plaintiffs agreed to entry of consensual protective orders in the context of prosecuting Katrina cases.[1] In each such case, the Order entered by the Court specifically allowed for Counsel for these Plaintiffs to utilize "confidential" information obtained from State Farm in the

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1 The fact that Counsel for Plaintiffs "agreed" to entry of protective orders in other Katrina cases against State Farm does not mean that Counsel for Plaintiffs agreed that protective orders were "necessary", or that the information State Farm sought to protect warranted protection. Counsel for Plaintiffs merely agreed to entry of protective orders in those cases as a good faith resolution of a disputed issue, to prevent the necessity of Court intervention. As shown above, Counsel for Plaintiffs offered such a good faith resolution in this case

prosecution of **each and every** Katrina case against State Farm in which Counsel for these Plaintiffs are Counsel of Record. (See, e.g. Agreed Protective Orders entered in several cases against State Farm, attached hereto as "Exhibit 3"). The order proposed by State Farm in this case would stand in conflict with those numerous Orders previously entered by the United States District Court, allowing information produced by State Farm to be used ONLY in those cases filed by Counsel for these Plaintiffs (see ¶ 3 of proposed Order); and then only to the extent such information is used prior to sixty (60) days past the termination of this specific case. The protective Order proposed by State Farm directs in ¶ 11, that all documents deemed "confidential" in light of the Order (which encompasses ALL information and testimony produced by State Farm after the date of its entry) shall be returned within sixty (60) days after the termination of this litigation. Such a provision is in direct contrast with Consent Protective Orders entered into in numerous other Katrina cases against State Farm in which undersigned Counsel are counsel of record, which provide (in ¶ 10) that properly designated "confidential" information shall be returned within sixty (60) days of the termination of all aspects of litigation "against State Farm Fire in which Counsel for Plaintiffs are Counsel of Record involving claims arising from Hurricane Katrina." (See "Exhibit 3"). No legitimate purpose is served by restricting general claims related procedures and information produced in this case from being used in similar Katrina cases against State Farm Fire in which undersigned counsel are also counsel of record. Indeed, the Order proposed by State Farm would constitute a waste of judicial economy, time and money.

STATE FARM HAS FAILED TO DEMONSTRATE REQUISITE GOOD CAUSE

6. The fatal defects in State Farm's Motion are not limited to its lack of good faith and the

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– which was rejected by Counsel for State Farm, who insisted on entry of an unfair, single sided, ridiculously

exceedingly overbroad nature of its proposed motion. State Farm failed to meet the requirement of "good cause" for a protective Order, set forth in Rule 26(c) of the Federal Rules of Civil Procedure. There is compelling authority from the Fifth Circuit and Supreme Court demonstrating the insufficiency of a Motion such as that filed by State Farm. "The burden is upon the movant to show the necessity of the issuance of a protective order, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *United States v. Garrett*, 571 F.2d 1323, 1326 (5th Cir. 1978) (fn. 3); *In re Terra Intern., Inc.*, 134 F.3d 302, 306 (5th Cir. 1998); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193, 2201, 68 L.Ed.2d 693 (1981) (party seeking protective order has burden of showing that good cause exists by stating particular and specific facts).

7. State Farm's mere assertion that certain information constitutes "trade secrets" does NOT mean that such information should "necessarily" be protected. Fed.R.Civ.P. 26(c)(1)(g) (formerly 26(c)(7)) addresses alleged "trade secrets" and/or "proprietary" information. Under the Federal rule, the court may enter an order restricting disclosure of trade secrets and confidential research, development, or commercial information obtained during discovery. *Seattle Times v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). There is **no absolute privilege or protection** with respect to such matters, however. *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 99 S.Ct. 2800, 61 L.Ed.2d 587 (1979) (emphasis added). The common policy in federal and state courts is to promote sharing of materials among litigants. See Wilk v. American Medical Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980); Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D.Colo. 1982); United States v. Hooker Chemicals & Plastics Corp., 90 F.R.D. 421, 426 (W.D.N.Y. 1981); Patterson v.

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overbroad order.

Ford Motor Co., 85 F.R.D. 152, 153-54 (W.D.Tex. 1980); Williams v. Johnson & Johnson, 50 F.R.D. 31, 32-33 (S.D.N.Y. 1970). Such a policy prevents and/or substantially cuts down on duplicative discovery and associated cost, increases judicial efficiency, and promotes the trial of any dispute on its merits, rather than on the basis of the patience, diligence, or deep pockets of plaintiffs counsel and the plaintiffs.

8. It is black-letter law that a litigant who might be embarrassed, incriminated, or exposed to litigation through dissemination of materials is not, without more, entitled to the Court's protection. Stated otherwise, those types of harm do not constitute "good cause" for entry of a protective order under the Rules. See, e.g., Nestle Foods Corp. v. Aetna Casualty and Surety Co., 129 F.R.D. 483, 486 (D.N.J. 1990) (claims that non-protection would result in prejudice to defendant in the form of other litigants' use of those documents held to be insufficient to justify entry of broad protective order, especially in view of policy of discouraging duplicative discovery); Wauchop v. Domino's Pizza, Inc., 138 F.R.D. 539 (D.C.Ind. 1991) (defendant not entitled to order preventing dissemination of internal materials regarding its 30 minute delivery guarantee despite claims that it would suffer harm in present case or future litigation); Culinary Foods, Inc., v. Raychem Corp., 151 F.R.D. 297 (N.D.Ill. 1993) (documents concerning dangerousness of defendant's product and defendant's knowledge thereof not subject to protective order, despite defendant's claim that such information was incriminating or publicly embarrassing). State Farm has not right to an automatic protection from the public being granted access to evidence of its misconduct in the arena of responding to Hurricane Katrina claims in Mississippi.

THE PUBLIC HAS A PRESUMPTIVE RIGHT OF ACCESS TO COURT RECORDS UNDER THE FIRST AMENDMENT AND AT COMMON LAW – STATE FARM, IS ATTEMPTING TO CIRCUMVENT THAT RIGHT

9. The types of documents sought by the plaintiffs in this case are required for conducting the insurance business of State Farm, in compliance with the rules and regulations of the State of Mississippi that require systems for the prompt investigation and settlement of claims. The idea behind the legislative scheme of oversight of the insurance industry is that the public and its regulators, the Mississippi Department of Insurance and courts of competent jurisdiction, will have access to the internal instructions of the insurer, should the insurer's claims handling methods come into dispute. Plaintiffs have clearly placed State Farm's claim handling procedures in dispute in this litigation.

10. Numerous courts have recognized that the common law gives the public a right of access to court records. "The existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute." Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1066 (1984). The right is anchored in English common law, and can be traced back to the Statute of Marlborough in 1287. (Id at 1068-69). "One of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial." E. Jeneks, *The Book of English Law* 73-74 (6th ed. 1967) (emphasis added), quoted in Publicker, 733 F.2d at 1069. In evaluating claims involving the public common law right of access to court records, the Ninth Circuit "require[s] courts to start with a strong presumption in favor of access." Hagestad v. Tragesser, 49 F.3d 1410, 1434 (9th Cir. 1990). Publicker, 733 F.2d at 1068-1069 (tracing presumption of openness in all court proceedings from

the Statute of Marlborough of 1287). The English right of public access to courts was continued in the American colonies and later memorialized in the Constitutions of colonies and the first states. Id. at 1069.

11. In addition, numerous courts have held there is a First Amendment right of access to court records and proceedings. Globe Newspaper Co. v. Superior Court, 102 S.Ct. 2613, 2619-20, 457 U.S. 602, 603-07 (1982). In Globe, the Supreme Court recognized that the first Amendment granted to press and public alike a constitutional right of access to criminal trials. Other circuits have concluded that the policy in favor of making a criminal justice system transparent and accessible to the people applies with equal force to the civil justice system. See, e.g., Publicker Industries, 733 F.2d 1059, 1070 (3rd Cir. 1984) (quoting Globe Newspaper, 102 S.Ct. at 2618-19, 457 U.S. at 604-5); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988); Brown v. Advantage Engineering, Inc., 960 F.2d 1013, 1016 (11th Cir. 1992). Justice Powell once noted:

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, [FN7] including judicial records and documents.

Nixon v. Warner Communications, Inc., 435 U.S. 589, 1597, 98 S.Ct. 1306, 1311, 55 L.Ed.2d 570 (1978).

12. Under either the First Amendment or the common law, the right of access extends to all documents filed with the court. "[T]here is a presumptive right to public access to all material filed in connection with nondiscovery pretrial motions, whether these motions are case dispositive or not." Lencadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 165 (3rd Cir. 1993). Thus the public has a presumptive right of access to all the records in this case, including pleadings, motions, discovery responses, briefs, exhibits, affidavits, etc.

> Once a matter is brought before a court for resolution, it is no longer solely the

> parties' case, but the public's case. Absent a showing of extraordinary circumstances set forth by the district court in the record consistent with (11th Circuit precedent), the court file must remain accessible to the public.

Brown v.Advantage Engineering, Inc., 960 F.2d 1013, 1016 (11th Cir. 1992). State Farm's request to have all "Proprietary, Confidential and Trade Secret Information" in this case (which it defines as including ALL information produced by State Farm and its representatives) filed with this Court "under seal" constitutes an impermissible attempt to limit the public's constitutionally guaranteed right of access to the Courts.

THERE IS NO COMPELLING REASON OVERCOMING THE PUBLIC'S PRESUMPTIVE RIGHT OF ACCESS AND INFORMATION REGARDING THIS CASE

13. "[T]o limit the public's access to civil trials there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest." Publicker, 733 F.7d at 1070, citing Globe Newspaper Co. v. Superior Court, 457 U.S. at 606-07. The record must demonstrate "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 23 509, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1984).

14. Access to records of judicial proceedings is critical to the integrity of the judicial system and to public confidence in that integrity. See, e.g., Publicker, 733 F.2d at 1070 (quoting Globe Newspaper Co., 102 S.Ct. at 2618-19, 457 U.S. at 605-5). By engaging in formal litigation, parties submit to the public nature of the process in exchange for the benefits conferred by the court's supervision. In this case, State Farm has not provided the Court with **any** reason why the public's right of access to court records should be limited. Clearly, State Farm's "generalized" request for

protection does not satisfy the legal burden required for a protective order, ***much less*** the burden for limiting the public's access to information related to a litigated case in their Circuit Court.

CONCLUSION

15. State Farm is asking this Court to enter a broad protective Order rendering virtually all the facts developed in this litigation regarding ***State Farm's*** conduct confidential. State Farm's request is representative of a growing practice in our Courts of defendants seeking to limit evidence of misconduct in one case to ***that*** case, to prevent the public from being apprised of the type of conduct that defendant has undertaken in the community – and to burden plaintiffs and their lawyers with additional expense and time obligations to "re-develop" the same information in related litigation. Such a practice is contrary to the very idea of our public and open Court system, and undermines its integrity. It should be **stopped**. State Farm failed to meet, or even make any reasonable effort to meet its burden of demonstrating specific facts justifying its request for relief, or to seek a ***good faith*** resolution of this issue. State Farm's Motion should be denied.

16. Alternatively, in the event the Court finds that a Protective Order should be entered in this case, Plaintiffs ask that the Court enter the proposed Order attached hereto as "Exhibit 4", which is identical in form to the Orders entered in numerous other Katrina cases against State Farm in which Counsel for Plaintiffs are counsel of record, and which was previously offered to State Farm as a good faith resolution of this discovery dispute.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request the Court enter an Order DENYING State Farm's [35] Motion for Protective Order, and granting any and all additional relief in favor of the Plaintiffs deemed appropriate by this Honorable Court. In the alternative, in the event the Court finds that a Protective Order should be entered in this case, Plaintiffs ask that the

Court enter the proposed Order attached hereto as "Exhibit 4", which is identical in form to the Orders entered in numerous other Katrina cases against State Farm in which Counsel for Plaintiffs are counsel of record, and which was offered to State Farm as a good faith resolution of this discovery dispute; and granting any and all additional relief in favor of the Plaintiffs deemed appropriate by this Honorable Court.

RESPECTFULLY SUBMITTED, this the 23rd day of June, 2009.

D. NEIL HARRIS & ASSOCIATES , P.A.
D. NEIL HARRIS, INDIVIDUALLY AND D/B/A
D. NEIL HARRIS & ASSOCIATES, 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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This the 23rd day of June, 2009.

By: */s/ Christopher C. Van Cleave*
Christopher C. Van Cleave (MSB #10796)