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**

VS. **CAUSE NO. 1:08cv600-HSO-LRA**

STATE FARM FIRE & CASUALTY
COMPANY and MARSHALL J. ELEUTERIUS and
JOHN AND JANE DOES A, B, C, D, E, F, G and H **DEFENDANTS**

PLAINTIFFS' RESPONSE IN OPPOSITION TO
[111] STATE FARM'S "EMERGENCY" MOTION TO QUASH
And
MOTION TO COMPEL

COME NOW THE PLAINTIFFS, Danny and Celeste O'Keefe, and the Dancel Group, by and through undersigned counsel, and file their Response in Opposition to State Farm's Motion, as follows:

INTRODUCTION

1. The subject litigation involves, in essence, two separate lawsuits (each against multiple parties) filed in a single cause. One "suit" addresses claims under the Plaintiffs' State Farm business policy, which covers a business structure located at 10265 Rodriguez Street, D'Iberville, **Harrison** County, Mississippi, and loss of income sustained for the business operations conducted from those premises. The second suit addresses claims under Danny and Celeste O'Keefe's State Farm homeowner's policy, which covers their home, additional structures and personal contents located at 12901 Hanover Drive, Ocean Springs, **Jackson** County, Mississippi; and alternative living expenses arising from the Plaintiffs being unable to live there due to destruction of the home by Hurricane Katrina.

STATE FARM'S MOTION WAS NOT FILED IN GOOD FAITH

2. The United States Magistrate entered an [54] Order lifting the stay of proceedings in this cause on January 22, 2009, after the Plaintiffs' Motion to Remand was denied.

3. Undersigned Counsel for the Plaintiffs, Christopher C. Van Cleave, participated in the mandated attorney conference with Wayne Williams, Counsel for State Farm, on or about Tuesday, January 27, 2009. During that conversation, the issue of the number of discovery requests that would be permitted was expressly addressed. Undersigned Counsel for the Plaintiffs noted that this case in reality really involves two entirely separate law suits, and that the Plaintiffs would justly be entitled to serve a total of thirty (30) discovery requests (Interrogatories, Requests for Production and Requests for Admission) for each claim (30 of each type of request for claims under homeowner's policy, and 30 of each type of request for claims under business policy). Counsel also discussed the fact that the original discovery requests served in State Court were served by former counsel for the Plaintiffs, and that new counsel for Plaintiffs were pursuing additional and different claims than those pursued by original counsel for the Plaintiffs. **Undersigned Counsel certifies to this Honorable Court that Mr. Williams expressly agreed that State Farm would not object to Plaintiffs serving a total of 30 NEW Interrogatories and Requests for Production in the Federal Court proceeding**. Interestingly, the subject motion is not signed by Mr. Williams, but by Mrs. Bush, who was apparently on leave at the time of the attorney conference.

4. This Court entered its [57] Case Management Order on March 4, 2009, which adopted the proposed order submitted by consent of Counsel for the Plaintiffs and Counsel for State Farm, directing that "Interrogatories, request for production and admissions are limited to **30** of

each." There was no language in the Order indicating this limitation was inclusive of discovery requests served in the State Court proceeding. Indeed, undersigned counsel would not have *consented* to an Order limiting Plaintiffs to only thirty (30) interrogatories and requests for production INCLUSIVE of the requests previously filed in State Court, as such a limitation would prohibit Plaintiffs from conducting reasonable discovery on each of their insurance claims under totally different insurance policies covering totally different pieces of property in two different counties that were adjusted by totally different claims personnel.

5. State Farm chose to proceed with the current Motion despite the fact the relief requested therein is entirely inconsistent with Mr. Williams' prior agreement on behalf of State Farm. The progression of discussions on the issue were as follows:

(a) Mrs. Bush asked Counsel for the Plaintiffs to submit "new" discovery requests such that the total number of requests (inclusive of discovery served by former counsel for the Plaintiffs in the State Court proceeding) would be less than 30 for each form of written discovery request. Of course, this "objection", which was not based at all on the substance of Plaintiffs' discovery requests but only on the "number" of requests, was not made until May 20, 2009, **nineteen (19) days after** Plaintiffs served the subject Interrogatories and Requests for Production of documents (see [90] and [91]). (See email from Mrs. Bush to Mr. Van Cleave dated May 20, 2009, attached as "Exhibit 1").

(b) Mr. Van Cleave immediately responded to Mrs. Bush's email, and informed her that during her absence Mr. Van Cleave participated in the attorney conference with Mr. Williams, and that Mr. Williams consented to the Plaintiffs being allowed to serve 30 additional interrogatories and requests for production in the Federal Court proceeding. (See

separate emails sent seconds apart from Mr. Van Cleave to Mrs. Bush dated May 20, 2009, attached as "Cumulative Exhibit 2").

(c) Mr. Williams responded to Mr. Van Cleave's email by making a "qualified" denial of Mr. Van Cleave's assertion, allowing that he "may have agreed that your clients could arguably propound additional written requests [on some claims]". (See email from Mr. Williams to Mr. Van Cleave, dated May 20, 2009, attached as "Exhibit 3") (emphasis added).

(d) Mr. Van Cleave responded to Mr. Williams that the conversation represented by Mr. Van Cleave DID occur, and refused to sign the "good faith" certificate proffered by State Farm on the grounds that nothing about the proposed motion was being done in "good faith" in light of Mr. Williams' prior, express agreement on behalf of State Farm. (See email from Mr. Van Cleave to Mr. Williams dated May 20, 2009, attached as "Exhibit 4").

(e) Mr. Williams again responded with a "qualified" denial, conceding that he did discuss the fact that Plaintiffs "***would* be entitled**" to serve some additional requests in light of the claims being pursed by the Plaintiffs. (See email from Mr. Williams to Mr. Van Cleave dated May 20, 2009, attached as "Exhibit 5"). Of course, there was no identification of a specific limitation to additional discovery requests being propounded to cover only certain claims in the Case Management Order, and none was requested by State Farm.

(f) Mr. Van Cleave responded to Mr. Williams again confirming the agreement that **was** made during the Attorney conference, and that "the current 'disagreement' arises solely as a result of [Mr. Williams'] failure to honor [his] previous agreement". Mr. Van Cleave also pointed out that some of the "new" requests covered the same subject matter as requests served in State Court, in light of the fact there are some material differences in a party's obligations to respond to discovery requests served pursuant to the Federal versus Civil Rules

of Civil Procedure, including but not limited to the requirements of Fed.R.Civ.P. 26(b)(5) (which is not contained in the Mississippi Rules). (See email from Mr. Van Cleave to Mr. Williams dated May 21, 2009, attached as "Exhibit 6"). Mr. Williams did not respond to this correspondence.

6. As set forth above, State Farm's Motion is contrary to the express agreement of its counsel made during the Attorney Conference, and contrary to logic and fair play. Plaintiffs respectfully submit that had this dispute arisen at the time of the Attorney Conference, and been presented to the Court, the Court would have fashioned an Order granting the Plaintiffs' the right to a full measure of discovery on the separate claims brought under **each** of the insurance policies (business and personal covering property in different counties) at issue in this litigation.[1]

7. It is clear that the real motive of State Farm's Motion is **delay**, not a "good faith" discovery dispute. Such a conclusion is implicit in the timing of State Farm's "form objection" (not raised until almost three weeks after the subject discovery requests were served); and from the relief sought in the Motion. Apparently recognizing the lack of merit in its Motion, State Farm prays that "in the event this Court denies Defendants' motion, Defendants seek thirty (30) days from the entry of this Court's Order denying same in which to respond to Plaintiffs' Interrogatories and Requests for Production." Obviously, State Farm is simply trying to extend the date of having to respond to Plaintiffs' written discovery requests, so that its reasonably anticipated to be incomplete and evasive answers cannot be addressed through a Motion to Compel until discovery is nearly at its currently scheduled end in this matter. Moreover, State

[1] State Farm's Motion asserts that the total number of discovery requests propounded by the Plaintiffs, inclusive of those served in State Court, are 57 interrogatories and 48 requests for production on State Farm; and only 40 interrogatories and 33 requests for production on Eleuterius. Clearly, these numbers are considerably less than the 60 (30 each for the homeowner's and business claims) Plaintiffs would be entitled to under any conceivable notion of justice and fair play.

Farm failed to timely respond to **any** of the Interrogatories or Requests for Production propounded by the Plaintiffs in this cause, or to file a Motion that addresses substantive objections to specific discovery requests as required by Uniform District Court Rule 37.1(B).

PLAINTIFFS' DISCOVERY REQUESTS ARE NOT EXCESSIVE

8. The number of Interrogatories and Requests for Production served by the Plaintiffs on each of the Defendants in *this* Court are within the clear and unqualified parameters set forth by the Court's [57] Case Management Order. Plaintiffs did not propound in excess of 30 (and in fact served considerably less than 30 in most instances) Interrogatories or Requests for Production on any one Defendant in this cause. Specifically, Plaintiffs served 25 Interrogatories and 17 Requests for Production on Eleuterius; and 30 Interrogatories and 27 Requests for Production on State Farm (see [111-3 – 111-4] Exhibit "B" to State Farm's Motion).

9. In its motion, State Farm cites *Maddoux v. Heritage Properties Inc.*, Slip Copy, 2009 WL1155389 for the sweeping proposition that, under the Federal Rules of Civil Procedure and the Uniform District Court Rules, the limitation on discovery set forth in the Case Management Order "applies to all discovery whether propounded before or after removal from State Court." *Maddox* does not set forth the "general" rule of law suggested by State Farm, however, and is limited to the facts of that case by the very words of the opinion:

> The court holds that the limitation applies to all discovery **in *this* case**, whether propounded before or after removal from state court.

Id. at *2 (emphasis added). Of course, State Farm replaced the emphasized, qualifying language "in this case" with ". . ." in the quotation set forth in the Motion it filed with this Court (see pg. 4 pf State Farm's [111] Motion).

10. A review of the Court's opinion in *Maddox* reveals that, in addition to the decision being limited to the facts of *that case*, there is no discussion of facts even remotely similar to the facts

at bar. There is no suggestion that the Plaintiffs' cause sets forth two uniquely different claims under different insurance policies in a single Complaint, nor that there was an agreement between Counsel that the limitation on discovery in Federal Court would NOT be inclusive of discovery requests served in the State Court proceeding prior to Removal.

11. Plaintiffs' respectfully request that the Court enter an Order DENYING State Farm's [111] Motion.

MOTION TO COMPEL

12. Counsel for Plaintiffs made a good faith effort to have Counsel for State Farm serve responses to Plaintiffs' properly served discovery requests without filing the subject motion with the Court (See Exhibits "1" through "6").

13. State Farm's responses to Plaintiffs' interrogatories and requests for production were due no later than June 3, 2009; and Eleuterius' responses to Plaintiffs interrogatories and requests for production were due no later than June 8, 2009 (See "Exhibit B" to State Farm's [111] Motion). Both Defendants failed to file **any** substantive responses to Plaintiffs' Interrogatories or Requests for Production by the date same were due, and failed to obtain any Order from this Court relieving them of their duty to file timely, good faith responses to Plaintiffs' discovery requests (though there was certainly time to seek such relief by filing a motion quickly after the discovery was served if Defendants' real motive were to address what they perceived in good faith as an abuse of process).

14. Plaintiffs respectfully request that the Court enter Order COMPELLING State Farm and Eleuterius to serve complete, good faith responses each of the Interrogatories and Requests for Production served by Plaintiffs in this Court with five (5) days from the date of the Court's Order, or such other time as the Court deems just.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request the Court enter an Order DENYING Defendants' [111] Motion, COMPELLING State Farm and Eleuterius serve complete, good faith responses each of the Interrogatories and Requests for Production served by Plaintiffs in this Court with five (5) days from the date of the Court's Order, or such other time as the Court deems just; and granting any and all additional relief in favor of the Plaintiffs deemed appropriate by this Honorable Court.

Respectfully submitted, this the 11th day of June, 2009.

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

By: ***/s/ Christopher C. Van Cleave***
CHRISTOPHER C. VAN CLEAVE

Clyde H. Gunn, III, (MSB #5074)
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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:

B. Wayne Williams, Esq.
Dan W. Webb, Esq.
Roechelle R. Morgan, Esq.
Paige C. Bush, Esq.
Webb, Sanders & Williams, PLLC
363 North Broadway
Post Office Box 496
Tupelo, Mississippi 38802
(662) 844-2137 (off)

wwilliams@webbsanders.com
RRM@webbsanders.com

This the 11th day of June, 2009.

/s/ Christopher C. Van Cleave
CHRISTOPHER C. VAN CLEAVE

From: Paige Bush
To: "Christopher C. Van Cleave";
cc: Sandy; Mary Stults; Wayne Williams;
Subject: O"Keefe v. State Farm
Date: Wednesday, May 20, 2009 2:26:57 PM
Attachments: 546097.DOC

Christopher:

The Case Management Order limits discovery requests to 30. Below is an accounting of the discovery which has been propounded by Plaintiffs to date. Based on same, it appears that you are only entitled to propound an additional 3 INT and 10 RPD to State Farm and 14 Int and 14 RPD to Eleuterius. We are asking that you please limit your discovery to 30 total requests. Please advise if you are agreeable to same. In the event you are not, please see the attached Good Faith Certificate. Please execute same or provide me authority to execute on your behalf and I will indicate that you oppose the motion.

Interrogatories to SF
State– 27
Federal– 30

RPD to SF
State – 20
Federal– 28

Interrogatories to Eleuterius
State – 16
Federal– 24

RPD to Eleuterius
State 16
New – 17

Thank you,

Paige

Paige C. Bush
Webb, Sanders & Williams, P.L.L.C.
P.O. Box 496
363 N. Broadway St.
Tupelo, MS 38802-0496

From:	Christopher C. Van Cleave
To:	"Paige Bush";
cc:	Sandy; "Mary Stults"; "Wayne Williams";
Subject:	RE: O"Keefe v. State Farm
Date:	Wednesday, May 20, 2009 3:15:36 PM

Paige:

It may have been while you were out for maternity leave, but when we discussed scheduling as part of the required attorney conference, Wayne and I **expressly discussed the number of discovery requests, and agreed that the 30 interrogatories and 30 requests for production set forth in the Scheduling Order were NOT inclusive of requests served in the State Court proceeding.**

Obviously, the Federal Court's Scheduling Order does not say "inclusive of the discovery requests served in the previous State Court proceeding". The Scheduling Order sets forth how many discovery requests may be propounded in the Federal Court proceeding, and, as you note in your email, the Plaintiff propounded less than the maximum amount allowed.

Regards,

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Sandy

From: Christopher C. Van Cleave [christopher@cgvclaw.com]
Sent: Wednesday, May 20, 2009 3:16 PM
To: 'Paige Bush'
Cc: Sandy; 'Mary Stults'; 'Wayne Williams'
Subject: RE: O'Keefe v. State Farm

Paige:

As a follow up to my previous email, it was because of the agreement reached between me and Wayne, and ONLY because of that agreement, that I agreed to limiting the discovery requests to 30. Otherwise, I would have sought 30 requests related to the homeowner's claim, and 30 separate requests related to the totally separate business claim. Moreover, I could (under the rules) serve 30 requests (interrogatories and requests for production) from each of the three Plaintiffs.

There is no valid reason not to answer the pending discovery requests, and a decision to not answer based on the "number" of requests would be contrary to the express agreement of defense counsel when the Scheduling Order was agreed on.

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From: Wayne Williams
To: "Christopher C. Van Cleave"; Paige Bush;
cc: Sandy; Mary Stults;
Subject: RE: O"Keefe v. State Farm
Date: Wednesday, May 20, 2009 3:54:04 PM

Christopher,

I'm not even going to respond to the suggestion that your clients somehow have the right to propound 90 additional discovery requests to SF and its agent. As to your recollection of our conversation during the attorney conference, I did not agree to a completely new set of discovery from your clients. The only issue I may have agreed that your clients could arguably propound additional written requests on would have been the flood issue, which formed the basis of our removal, and then only a limited set of discovery given the extensive written discovery which your clients had propounded to SF in the state court case. In no event and under no circumstances did I ever agree that your clients could propound 30 additional requests and interrogatories to SF and Mr. Eleuterius.

I take it from your correspondence that you believe you are entitled to the discovery at issue. Please execute the good faith certificate and return same to us so we can provide that to the Court with our Motion.

Wayne

From: Christopher C. Van Cleave
To: "Wayne Williams"; "Paige Bush";
cc: Sandy; "Mary Stults";
Subject: RE: O"Keefe v. State Farm
Date: Wednesday, May 20, 2009 4:04:33 PM

Wayne:

We did have this conversation, and expressly discussed the fact this case is really two cases in one. We also discussed the fact that the previous discovery requests were propounded by Plaintiff's original counsel, and that I wanted to propound clear requests of our own making. I specifically asked, and you specifically agreed that we would be entitled to serve 30 Interrogatories and 30 requests for production in the Federal Court proceeding.

Clearly, we would be entitled to a full set of discovery requests on each claim. We did not file that many requests, and did not seek leave of Court to file that many requests based on my conversation with you, and **my good faith reliance on your representations**. I will not sign your "good faith" certificate under these circumstances – as your position now is NOT in good faith, and is contrary to your prior representations. I suggest you file each of my emails responding to this issue as evidence of your "good faith" efforts to resolve this "dispute" if you choose to go forward with filing a motion on these grounds under these circumstances. I urge you to reconsider, however, and comply with your previous agreement on this issue.

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From: Wayne Williams
To: "Christopher C. Van Cleave"; Paige Bush;
cc: Sandy; Mary Stults;
Subject: RE: O"Keefe v. State Farm
Date: Wednesday, May 20, 2009 4:29:32 PM

Christopher,

As I just said, we never agreed that you would be entitled to a complete set of new discovery on behalf of your clients, regardless of whether they had previous discovery by previous counsel. The fact remains that your clients have previously propounded a full set of discovery, less a few requests and interrogatories, to SF and Mr. Eleuterius. We discussed the fact that the flood issue was the basis of the removal and that you would be entitled to some discovery on those flood issues but, again we did not reach any agreement that you would be entitled to propound a complete new set of discovery to SF and Mr. Eleuterius. The fact that your clients hired new counsel does not grant them the right to completely new discovery. Our position is a good faith effort, despite your belief to the contrary, to limit your clients' discovery as outlined in Paige's initial email. It is not contrary to our previous conversation, again despite your belief to the contrary. As an alternative position, please identify those interrogatories and requests from this most recent set which you feel relate to the flood issues and we will consider those. Otherwise, as you suggest, we will have to bring our disagreement before the Court.

Wayne

From: Christopher C. Van Cleave
To: "Wayne Williams"; "Paige Bush";
cc: Sandy; "Mary Stults";
Subject: RE: O"Keefe v. State Farm
Date: Thursday, May 21, 2009 9:53:36 AM

Wayne:

The current "disagreement" arises solely as a result of your failure to honor your previous agreement.

In no way is Plaintiffs' ability to propound interrogatories and requests for production in accordance with the agreed Scheduling Order entered by the Honorable Magistrate Judge limited to propounding discovery on the subject of flood claims handling. Indeed, there is a question as to State Farm's obligation to supplement responses to discovery requests that were filed in the State Court proceeding. You will see that many of the discovery requests served in this proceeding cover virtually the same subject matter as discovery requests served in the State Court proceeding (which should make them easy for State Farm to respond to). Of course, the present requests are served pursuant to the agreed Scheduling Order, and pursuant to the Federal Rules of Civil Procedure as opposed to the Mississippi Rules of Civil Procedure. As I'm sure you are aware, there are some significant differences between the two, one of which is the requirements set forth in F.R.C.P. 26(b)(5) (which does not exist under the Mississippi Rules). State Farm chose to remove this case to Federal Court, and Plaintiffs are entitled to propound discovery, and have it responded to in accordance with the Federal Rules of Civil Procedure. Your stated objections to Plaintiffs' propounded discovery requests are frivolous, in addition to being contrary to your express agreement during the required attorney conference.

Your suggestion that State Farm is agreeable to Plaintiffs conducting discovery into the manner in which State Farm handled NFIP claims arising from Katrina is also disingenuous. Although I repeatedly requested deposition dates from State Farm over a period of several months to take the depositions of Dan Carrigan and Juan Guevera, two individuals directly involved in the formulation of, and negotiations with the Federal Government regarding use of "amended" guidelines for handling flood claims, State Farm provided NO response until May 18, 2009, when Ms.

Bush reported State Farm does not agree to produce them for deposition. Obviously, State Farm's tactics in this litigation resolve around obstruction, not "good faith" efforts to resolve discovery disputes.

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