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

STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — PLAINTIFFS

v. — CIVIL ACTION NO. 2:07cv188-DCB-MTP

JIM HOOD, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI — DEFENDANT

PLAINTIFFS STATE FARM'S BENCH MEMORANDUM
REGARDING TRIAL DEPOSITION OF RICHARD F. "DICKIE" SCRUGGS

Plaintiffs State Farm Fire and Casualty Company and State Farm Mutual Automobile Insurance Company (collectively "State Farm"), submit this Bench Memorandum Regarding Trial Deposition of Richard F. "Dickie" Scruggs.

INTRODUCTION

This Bench Memorandum responds to J. Lawson Hester, Esquire's letter to Magistrate Judge Michael T. Parker of yesterday (ex. A to Mem.), in which he requests a telephonic status conference to discuss some method to avoid State Farm taking the deposition of Dickie Scruggs.

Mr. Scruggs, who resides in Oxford, is beyond the subpoena power of this Southern District of Mississippi Court. For that reason, the only method available to State Farm for the presentation of his testimony to the Court at next week's preliminary injunction hearing is to take and offer his deposition testimony.

To date, Mr. Scruggs has made no filing in a Northern District alias proceeding seeking to stop or delay his deposition, even though he has known of the coming proceeding since at least last Thursday, January 25, 2008. (01/25/08 Proof of Serv., docket no. 85.) If Mr. Scruggs desires to stop or delay the deposition, he has every right to file a Northern District alias proceeding and an appropriate motion.

The fact that Mr. Scruggs has not done so and that it is *General Hood* – not Mr. Scruggs – who is seeking to stop the deposition is very telling indeed. General Hood is clearly concerned that his co-conspirator will either tell the truth or invoke the Fifth Amendment on specific questions related to their extortion conspiracy. To avoid the adverse inferences the Court may draw from Mr. Scruggs' testimony, General Hood proposes a stipulation, from which no adverse inference likely will be drawn. For the reasons explained below, General Hood's proposal should be rejected and Mr. Scruggs' deposition should proceed.

ARGUMENT

I. WHY MR. SCRUGGS' TESTIMONY IS IMPORTANT TO STATE FARM'S CASE

The essence of this case is State Farm's allegation that Mr. Scruggs and Attorney General Hood have engaged in a conspiracy to violate State Farm's constitutional rights, by threatening a bad faith criminal prosecution of State Farm and its officials in order to leverage Mr. Scruggs' civil cases and perhaps relieve Mr. Scruggs of the situation he is in with regard to alleged criminal contempt of Judge Acker's order in the *Renfroe* litigation in Birmingham. General Hood and Mr. Scruggs' conduct is not only a violation of State Farm's constitutional rights, but also is a breach of General Hood's noninvestigation agreement with State Farm.

In addition to State Farm's motion for a preliminary injunction, also pending before the Court is General Hood's motion to dismiss this Action based on *Younger* abstention. As explained to the Court in numerous filings, because Judge Bramlette has decided not to adjudicate the abstention motion on a Rule 12(b)(6) standard, under *Montez v. Department of the Navy*, 392 F.3d 147, 150 (5th Cir. 2004), the Court must accept jurisdiction and allow State Farm to present its merits evidence on the bad faith issue – which relates to both jurisdiction and the preliminary injunction motion.

Mr. Scruggs' testimony is critical to State Farm's presentation on that issue in two alternative ways. First, if Mr. Scruggs does testify and does so truthfully, his testimony will confirm the allegations in State Farm's First Amended Complaint – which would further establish General Hood's bad faith. Alternatively, if Mr. Scruggs chooses to assert the Fifth Amendment in response to specific questions, State Farm would be entitled to a negative inference that should be imputed not only against Mr. Scruggs, but also against General Hood.

II. WHY MR. SCRUGGS' TESTIMONY IS NECESSARY EVEN IF HE INVOKES THE FIFTH AMENDMENT

Even if Mr. Scruggs invokes the Fifth Amendment, his testimony is necessary because that invocation will entitle State Farm to a negative inference against Mr. Scruggs' principal and co-conspirator, General Hood. In *FDIC v. Fidelity & Deposit Co. of Maryland.*, 45 F.3d 969 (5th Cir. 1995), the Fifth Circuit "refuse[d] to adopt a rule that would categorically bar a party from calling, as a witness, a non-party who had no special relationship to the party, for the purpose of having that witness exercise his Fifth Amendment right." *Id* at 978.

This holding tracks the decisions of other courts faced with the same issue. In *United States v. District Council of New York City & Vicinity of United Brotherhood of Carpenters & Joiners of America*, 832 F. Supp. 644 (S.D.N.Y. 1993), the court rejected the defendants' *in limine* objection to any adverse inference directed toward them as the result of the Fifth Amendment invocations of non-party witnesses and held that "the refusal to testify by a proven co-conspirator may justify an adverse inference against other conspirators." *Id.* at 652. The court then extended the holding of *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983) – which found that the Fifth Amendment invocation of an employee was "proper and competent evidence against an employer," 832 F. Supp. at 651 – to the suit before it.

District Council found that the argument for allowing adverse inference from non-party

Fifth Amendment invocation is

> conceptually close to adverse inference by reason of employment or agency, since co-conspirators are generally said to act as agents for each other. Again, the fairness of taxing a party with a non-party's conduct depends upon the relationships between them, here the alleged conspiratorial relationship.

District Council, 832 F. Supp. at 652.

This analysis was also adopted by the District Court for the Northern District of Illinois, in a party-party rather than party-non-party context, in *State Farm Mutual Automobile Insurance Co. v. Abrams*, No. 96 C 6365, 2000 WL 574466 (N.D. Ill. May 11, 2000), which was a civil conspiracy suit brought by an insurance company against a group of doctors alleged to have conspired to defraud the plaintiff with millions of dollars of claims arising from phony car accidents, the court noted that

> under appropriate circumstances, an adverse inference could be drawn against a party from an alleged co-conspirator's invocation of the Fifth Amendment privilege against self-incrimination. . . . As alleged co-conspirators, some degree of loyalty and/or control may prevent one party from rendering damaging testimony against another.

Id. at *6-7.

Here, General Hood has repeatedly labeled Mr. Scruggs as his "confidential informant." As such he is General Hood's agent, as well as his co-conspirator. Thus, for the above reasons, Mr. Scruggs' testimony is of great value to State Farm on both the jurisdictional and merits issues. Alternatively, if he invokes the Fifth Amendment, a negative inference may be imputed against his principal, General Hood.

III. WHY A STIPULATION BY GENERAL HOOD IS INSUFFICIENT

In his letter of yesterday, Mr. Hester proposes that the Parties stipulate alternatively that "Mr. Scruggs either (a) will not answer any questions from either side …or (b) …stipulate to the specific questions each side would have asked at the deposition…" (1/29/08 Letter from Hester

to MJ Parker at 2, ex. A to Mem.) Neither alternative is sufficient to protect State Farm's right to a full and fair presentation of it is case.

A. Why a Blanket Stipulation Would Be Insufficient

First, Mr. Hester's proposal that the Parties stipulate that Mr. Scruggs will not answer any questions by either side would produce a nearly worthless result that would deprive State Farm of any useful negative inference. This is because in order to draw a negative inference, there must be a *specific question* that the witness has declined to answer on Fifth Amendment grounds. As one court explained:

> [T]he permissibility of some adverse inferences against the Custer Battles defendants, does not mean that Relators are entitled to adverse inferences from the dozens of questions asked of Morris in the deposition. In addition to being cumulative, there is a danger that at some point the jury will become deaf to the substance of the questions asked and unanswered, and as a result, the specific inferences that are appropriately drawn will blur into a single inference that the defendants have committed all the acts alleged by the Relators.

U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 415 F.Supp.2d 628, 636 (E.D. Va. 2006); *see also Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc. and The Hartz Mountain Corp.*, no. 81 Civ. 458 (RLC), 1983 WL 1805, at *6 (S.D. NY Apr. 13, 1983)("To be admissible in this proceeding, however, the fifth amendment assertions must have come in response to questions concerning activities relevant to plaintiff's claims").

Indeed the Fifth Circuit has instructed that a blanket invocation of the Fifth Amendment – as proposed by Mr. Hester – ***is per se inappropriate*** and should not be permitted:

> "A blanket refusal to answer questions at deposition on the ground that they are privileged is an improper invocation of the fifth amendment, irrespective of whether such a claim is made by a plaintiff, defendant, or a witness." Note, *Plaintiff as Deponent: Invoking the Fifth Amendment*, 48 U.Chi.L.Rev. 158, 164 (1981); *id.* at 161. This Court has held that such a blanket assertion of the privilege is insufficient to relieve a party of the duty to respond to questions put to him, stating that "even if the danger of self-incrimination is great, (the party's) remedy is not to voice a blanket refusal to produce his records or testify. Instead,

> he must present himself with his records for questioning, and as to each question and each record elect to raise or not to raise the defense." *United States v. Roundtree*, 420 F.2d 845, 852 (5th Cir. 1969) (footnote omitted). *See United States v. Malnik*, 489 F.2d 682, 685 (5th Cir. 1974); Note, *supra*, 48 U.Chi.L.Rev. at 161. Requiring a party to object with specificity to the information sought from him permits the district court to rule on the validity of his claim of privilege. A party is not entitled to decide for himself whether he is protected by the Fifth Amendment privilege. Rather, this question is for the court to decide after conducting "a particularized inquiry, deciding, in connection with each specific area that the questioning party seeks to explore, whether or not the privilege is well-founded." *United States v. Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976). Even where a party has a legitimate claim of privilege with respect to certain questions or lines of inquiry, that person may not be entitled to invoke his privilege to remain totally silent. Only where the court finds that he could "legitimately refuse to answer essentially all relevant questions," *United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir. 1975), because of the threat of incrimination from any relevant questioning is a person totally excused from responding to relevant inquiries. Otherwise, a person is entitled to invoke the privilege "(o)nly as to genuinely threatening questions ...." *United States v. Melchor Moreno*, *supra*, 536 F.2d at 1049. *See generally United States v. Goodwin*, 625 F.2d 693, 700-01 (5th Cir. 1980). Therefore, a blanket invocation of the fifth amendment privilege is insufficient to relieve a civil litigant of the responsibility to answer questions put to him during the civil discovery process and to claim the privilege with respect to each inquiry. See *National Life Insurance Co. v. Hartford Accident & Indemnity Co.*, 615 F.2d 595, 598-600 (3d Cir. 1980); id. at 599 (cases cited); *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 873 (7th Cir. 1979) (per curiam); 8 C. Wright & A. Miller, Federal Practice and Procedure: Civil s 2018, at 142-43 (1970 & Supp.1981); Note, supra, 48 U.Chi.L.Rev. at 161, 164.

Securities and Exchange Commission v. First Financial Group of Texas, Inc., 659 F.2d 660, 668 -669 (5th Cir. 1981).

B. Why a Question-Based Stipulation Would Be Insufficient

Mr. Hester alternatively proposes that that General Hood stipulate that Mr. Scruggs would invoke the Fifth in response to a list of specific written questions submitted by State Farm. *However, neither General Hood nor State Farm has any way of knowing whether or not Mr. Scruggs would in fact take the Fifth on those questions unless and until he is asked in his*

deposition.[1] As a result, State Farm may well be deprived of the full value of the negative inference to which the law entitles it.

Mr. Hester is correct that in two separate e-mails, Mr. Scruggs' attorney has contended that Mr. Scruggs should not be deposed. *See* (Keker E-mails, ex. B to Mem.) However, **Mr. Keker has not unequivocally stated that there are no questions that Mr. Scruggs will answer**. Of course, given the Fifth Circuit law on this topic, he could not properly take that position in any event.

For that reason, it is critical that State Farm be permitted to depose Mr. Scruggs and to ask him specific questions relevant to the issues at next week's hearing. Mr. Scruggs may, if appropriate, invoke the Fifth Amendment in *response to specific questions*. Yet until Mr. Scruggs is faced with those questions one at a time, none of us know whether he will answer them substantively or not.

CONCLUSION

In summary, State Farm cannot overstate the importance of Mr. Scruggs' testimony to State Farm's ability to fairly prosecute its case. Refusing to permit State Farm to take Mr. Scruggs' deposition at this critical juncture in the case would deny State Farm the process it is due in the upcoming hearing. Should Mr. Scruggs or his counsel have substantive or procedural issues with the coming deposition, their remedy is to initiate a Northern District alias proceeding and file an appropriate motion. Their remedy is not – as has apparently happened here – for Mr. Scruggs to use his co-conspirator General Hood as his secret proxy to attack the deposition collaterally.

[1] Anticipating General Hood's likely response on this issue, State Farm should not be required to submit a list of questions to Mr. Scruggs in advance of his deposition, as such would merely tip-off both Mr. Scruggs and his counsel and present much opportunity for further mischief.

Respectfully submitted, this the 30th day of January, 2008.

STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiffs

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CERTIFICATE OF SERVICE

I, E. Barney Robinson III, one of the attorneys for Plaintiffs, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following, via the means directed by the Court's Electronic Filing System to:

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THIS the 30th day of January, 2008.

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