

**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**

**VS.**

**CIVIL ACTION NO. 2:07CV188BP**

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

**DEFENDANT**

**MEMORANDUM IN SUPPORT OF  
MOTION OF JACKSON NEW MEDIA, INC. TO INTERVENE**

The matter before the Court represents a classic case of the right of a free press to gather and report news versus the historic delight of government to operate in secret. The Court's action is required to protect against a cloak of government secrecy shrouding a matter of great import to the people of the state of Mississippi.

Jackson New Media, Inc. ("New Media") has moved this Court for leave to intervene as of right, under Rule 24(a)(2), or alternatively, by permission, under Rule 24(b)(1)(B), Fed.R.Civ.P. New Media lacks the ability properly to pursue and protect its rights of free press and free access to government records unless this Court allows it to intervene in this matter for purposes of seeking the unsealing of the settlement agreement in this case.

**The Case**

This case involves a lawsuit filed by two State Farm insurance companies against the Attorney General of the State of Mississippi. State Farm claimed that the Attorney General broke an agreement not to pursue criminal charges against State Farm after State Farm had agreed to perform certain remedial measures.

After significant litigation, this Court compelled the Attorney General to testify under oath. Within hours, the parties announced a settlement to the Court, and persuaded the Court to place the terms of the settlement under seal.

New Media is a Mississippi corporation in good standing, in the business of gathering, reporting and commenting on legal and political news generated in and about the state of Mississippi. New Media's most well-known public face comes in the form of "YallPolitics.com", an interactive on-line collection of news, commentary and opinion, though New Media manages or publishes other on-line ventures, as well. New Media's principal is widely sought as a guest writer and commentator by mainstream print and broadcast media entities.

### **The Standard**

The law is replete with examples of cases in which the Fifth Circuit has ordered intervention of right for parties in circumstances similar to New Media's here.

Leave to intervene as of right is to be granted where a putative intervenor has satisfied four requirements:

(1)The application must be timely; (2) the applicant must have an interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

*Sierra Club v. Espy*, 18 F.3d 1202, 1204-05 (5<sup>th</sup> Cir. 1994); Rule 24(a)(2), Fed.R.Civ.P.

Timeliness, the first requirement of a Rule 24 motion, is assessed by consideration of four factors. Quoting the Fifth Circuit directly, the timeliness analysis must consider:

Factor 1. The length of time during which the would-be intervenor actually or reasonably should have known of his interest in the case before he petitioned for leave to intervene.

\* \* \* \* \*

Factor 2. The extent of prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.

\* \* \* \* \*

Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.

\* \* \* \* \*

Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

Although these factors give structure to our timeliness analysis, we have explicitly observed that the timeliness analysis remains "contextual," and should not be used as a

"tool of retribution to punish the tardy would-be intervenor, but rather [should serve as] a guard against prejudicing the original parties by the failure to apply sooner."

*Ross v. Marshall*, 426 F.3d 745, 754 (5<sup>th</sup> Cir. 2005) (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5<sup>th</sup> Cir. 1977), and quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5<sup>th</sup> Cir. 1994)).

The Court's consideration of a motion to intervene as of right "is a flexible one... [and] ... must be measured by a practical rather than a technical yardstick." *U.S. v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 841 (5<sup>th</sup> Cir. 1975). Indeed, the description that is commonly used for the standard of review under Rule 24 is that it be "liberally construed", and that doubts be resolved in favor of the intervenor. *U.S. v. Union Electric Co.*, 64 F.3d 1152, 1158 (8<sup>th</sup> Cir. 1995).

The second consideration under Rule 24(a)(2) requires a related "interest" of a putative intervenor in the underlying case; but the interest need not be identical to that of the original parties, so long as it is a substantive legal right or interest that the intervenor has standing to protect – such as First Amendment or public access rights. *Ford v. City of Huntsville*, 242 F.3d 235, 240 (5<sup>th</sup> Cir. 2001).

Third, an intervenor must demonstrate only that its ability to protect or preserve its rights "may" be impaired or impeded in the absence of being granted leave to intervene. *Sierra Club v. Espy*, 18 F.3d at 1204-05.

Fourth and finally, where the existing parties agreed to the very act of which the intervenor complains – in this case jointly moving for the sealing of otherwise public court records – it is clear that the existing parties do not adequately represent the free press and free access interests being asserted for protection by the intervenor. *Ford v. City of Huntsville*, 242 F.3d at 240-41.

### **The Argument**

This case is one that must certainly have been of the type contemplated by the drafters when the issue of intervention was first reduced to the Federal Rules. As in few other arenas of the law, the interests of parties to litigation on one hand, and the interests of the media on the other, are often in conflict. Particularly where the government is a litigant as in this case, the congenital interest of some in the political arena to keep from press and public scrutiny the details of their deal-making requires that procedural mechanisms be available for the protection of free press and public access rights.

### **Timeliness the only close issue**

From the plain language of Rule 24(a), it is apparent that if New Media's motion here is timely, then intervention as of right should be allowed. After timeliness, the other three elements of intervention as of right detailed in Rule 24(a)(2) and in *Sierra Club v. Espy* are easily present

in this case, particularly so in light of the “flexible”, “practical” and “liberally construed” analysis proper under Rule 24.

And, in fact, the timeliness requirement is satisfied here. This Court’s Judgment of Dismissal, which had the concomitant effect of sealing the settlement agreement between State Farm and Attorney General Hood, was entered barely over a year ago. New Media’s – and the public’s – First Amendment and open access interests at risk in this case, and the jurisprudence of the timeliness issue in the Fifth Circuit, together call strongly for the conclusion that this motion to intervene is timely filed.

The four timeliness factors beside which this motion is to be considered are known in the Fifth Circuit the “*Stallworth* factors”, after *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5<sup>th</sup> Cir. 1977). The factors do not constitute a specific formula, and courts have even noted that timeliness may be found even where all four factors militate against it. So inclined, in fact, is the Fifth Circuit to grant intervention where it appears to be appropriate, that the standard of timeliness has been described in shorthand form as follows:

Federal courts should allow intervention “where no one would be hurt and greater justice could be attained.”

*Sierra Club v. Espy*, 18 F.3d at 1205.

That, of course, is precisely this case. No one would be hurt by allowing New Media to intervene in this matter for purposes of seeking limited but substantive relief. And greater justice certainly would be attained by allowing the sun to shine in on a deal in which the public is intimately interested, but about which the public knows not the first detail.

### **The *Stallworth* factors of timeliness**

The *Stallworth* factors, taken individually or as a whole, reveal that New Media’s Motion to Intervene is timely under the requirements of Fifth Circuit law.

### **Factor 1: Lapse of time prior to motion**

New Media’s filing of this motion comes in light of a very reasonable cooling off period of just over twelve months for the original parties. As the Court will recall, the underlying litigation prior to settlement was marked by considerable emotion on both sides, and had New Media sought leave to intervene for the unsealing of the settlement agreement immediately in the aftermath of its entry, matters would only have been further inflamed. As the Fifth Circuit has noted, New Media should not be punished for tardiness in seeking to intervene. 18 F.3d at 1205. To the contrary, New Media’s restraint in waiting a reasonable time after settlement in this case should be lauded, in view of the relief that New Media will seek if granted leave to intervene.

Though New Media is left only to speculate as to the contents of the State Farm/Hood settlement agreement, it is certainly reasonable to think that the agreement might originally have been sealed in order not to prejudice any other Hurricane Katrina-related investigations. The storm occurred nearly four years ago – surely no legitimate investigative interests would now be threatened by the unsealing of the agreement. New Media’s and the public’s deference to the possible need for law enforcement secrecy in the case should not have to be endless, nor should their patience be a basis for anyone now to complain that New Media should have sought to have the agreement unsealed earlier. The first *Stallworth* timeliness factor, the lapse of time prior to the filing of the motion to intervene, should not bar New Media’s opportunity to participate in this action in a limited way and for a limited purpose.

**Factor 2: Prejudice to existing parties if allowed**

The Fifth Circuit has spoken directly to this second factor, making clear that the “prejudice” with which the court is concerned is only that which would have resulted from any delay in the filing of the intervention. The mere fact that the original parties might not like the relief to be sought by the intervenor, or might argue that the intervenor’s actions “prejudice” their interests in some way, is not the sort of prejudice to which the court looks when considering this factor. *Stallworth*, 558 F.2d at 265.

Stated another way, this a court considering this second factor could ask this question: Is there some reason caused only by the delay in filing of the motion to intervene that an original party is less likely to be able to protect its interests than if the motion to intervene had been filed earlier?

Seen this way, it is apparent that the second factor – the “prejudice” factor – militates strongly in favor of a finding of timeliness of New Media’s motion. Had New Media filed a motion to intervene on the day of the Court’s Judgment of Dismissal, immediately upon learning of the existence of a sealed settlement agreement, the original parties’ interests would have been affected precisely to the same degree, perhaps even more acutely, as would be true today. The fact that the parties might not favor the intervention or the substantive relief sought is not the sort of “prejudice” the Fifth Circuit allows to be considered.

**Factor 3: Prejudice to New Media if not allowed**

Conversely, the third *Stallworth* timeliness factor requires a look to the question of the extent to which New Media’s rights and interests would be prejudiced by failure to grant intervention in this case.

Of all the four factors, this one cries the most loudly for New Media’s intervention to be allowed. Unless granted leave to intervene and to seek vindication of its free press and free access rights, New Media is faced with the Hobson’s choice of doing nothing, and leaving the details of a deal affecting the taxpayers of this state shrouded in secrecy, or pursuing a collateral

order appeal to the Fifth Circuit, a costly expedition and one fraught with significant additional delay.

**Factor 4: Unusual circumstances militating either way**

Life in the state of Mississippi over the past few years has been so unusual that the “new usual” is almost surrealistic. A devastating hurricane of unprecedented proportion; followed by massive litigation and posturing by the State Attorney General, the insurance industry, the private bar and victimized homeowners; followed by criminal allegations – and investigations – of adjusters, claims managers and executives; followed by statewide elections in which all of these factors played a part; followed by earth-shattering indictments and then guilty pleas in several cases of attorney malfeasance; during all of which State Farm and Jim Hood have eyed each other like nervous cowboys about to draw leather: it is in that mind-boggling milieu that this case was finally settled in February of 2008. And in the vacuum created by the sealing of the settlement agreement, the public is left to wonder how many of these converging forces were or might have been affected by or had an effect upon the State Farm/Hood settlement.

There have also been contradictory statements made by both parties about the meaning of the settlement agreement or even the existence of one. On February 18, 2008, Attorney General Hood, in a Clarion Ledger op-ed column authored by him, stated, “In fact, allegations lodged against me by this [State Farm] were shown to be false when a federal judge recently threw out a lawsuit it had filed against my office.” This would leave a reader with the very clear impression that this Court dismissed this action for lack of standing or for some substantive reason favorable to the Attorney General. Instead, in its February 7, 2008 Judgment of Dismissal, this Court stated, “the January 23, 2007, Letter Agreement between Attorney General Jim Hood and State Farm is a standalone agreement, unambiguous and enforceable between the Mississippi Attorney General on behalf of the State of Mississippi and State Farm.”

Further, in an Associated Press story on February 19, 2008, General Hood’s office claimed “The case was dismissed (by this Court) because the allegations were false.” In response, in an inadvertently leaked e-mail, State Farm attorney Sheila Birnbaum replied, ““This is so over the top. Can we ask that he be held in contempt of court for misrepresenting a settlement agreement and order of the court?” It is obvious that there is a material difference of opinion between the parties as to the meaning and even the very existence of the settlement agreement. This creates confusion in the public and can easily be remedied by the relief that New Media seeks from this Court.

The Fifth Circuit has instructed that the timeliness factors are to be considered as “contextual”. *Sierra Club v. Espy*, 18 F.3d at 1205. It is unlikely that that court could ever have contemplated a context as ragged as the one in which this case was settled, but if ever this Court has call to describe “unusual circumstances”, the near-term horizon of our state’s legal and political past surely provides a perfect template.

This fourth factor strongly militates in favor of a finding that the motion to intervene has been filed timely.

**Intervention as of right the appropriate ruling**

Given the foregoing analysis, and in light of the frank direction from the Fifth Circuit that the analysis should be conducted with a view to granting intervention, the appropriate ruling in this case would surely be to grant New Media's motion.

The motion was made "timely" for purposes of Rule 24, as pointed out in the foregoing analysis. The remaining three requirements, the fact of New Media's related "interest" to the underlying litigation, the fact that New Media's interests "may" be impaired or impeded if intervention is not granted, and the fact that the current parties to the litigation are not representing New Media's or the public's free press and free access interests, are so clearly satisfied as not to justify burdening the Court with further argument on those points.

**Conclusion**

Under prior Supreme Court mandates, it can be said that media representatives are peculiarly in need of the procedural device of intervention, as their interests merit just as careful protection as the interests of litigants in high-profile legal disputes. *E.g., Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 7, 107 S. Ct. 2735, 2739 (1986). Particularly where, as here, the government or a government official is a litigant, the media play a very important role in the protection of the interests of the public, and even of other litigants in the same action. In its current posture, for example, nothing about this case allows New Media or the public to know whether Attorney General Hood might have coerced State Farm into agreeing to a sealed settlement in order that his breach of an earlier promise not to prosecute would never come to light.

State Farm, no doubt eager to settle the case on favorable terms, might well have felt that it had no choice but to agree to the demands of the Attorney General that the settlement be sealed if such a scenario occurred, to the end that State Farm's rights to an open court proceeding, to say nothing of the free press and free access rights of the public, might have been completely trampled.

Unfortunately, because the settlement is sealed, and because New Media has not yet been granted leave to intervene, all of those concerns must be left in the realm of speculation – speculation to which the people of this state should not have to resort.

In light of the extremely valuable interests at risk, and the clear direction of the case law that intervention is appropriate in matters such as this, New Media respectfully asks that this Court grant it leave to intervene as of right under Rule 24(a)(2).

Alternatively, New Media asks that the Court exercise its discretion and grant New Media leave to intervene by permission under Rule 24(b)(1)(B).

Respectfully submitted, this the 23<sup>rd</sup> day of April, 2009.

JACKSON NEW MEDIA, INC.

BY: /R. ANDREW TAGGART, JR.

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CERITIFICATE OF SERVICE

I, R. Andrew Taggart, Jr., counsel for Jackson New Media, Inc. certify that I have served a true and correct copy of this Memorandum in Support of Motion of Jackson New Media, Inc. to Intervene upon all parties via e-mail to their counsel, as follows:

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This the 23<sup>d</sup> day of April, 2009.

/R. Andrew Taggart, Jr. \_\_\_\_\_  
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