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

ROBERT R. GAGNÉ **PLAINTIFF**

V. **CASE NUMBER 1:06-cv-00711-LTS-RHW**

STATE FARM FIRE AND CASUALTY COMPANY & EXPONENT, INC., ET AL. **DEFENDANTS**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER RULINGS IN PRIOR CASES ON THE EFFECT OF INSURED'S CASHING CHECKS OFFERED BY STATE FARM DRAWN ON FEDERAL FLOOD INSURANCE FUNDS

FACTS RELEVANT TO THIS MOTION

Robert Gagné purchased both a homeowners policy and flood insurance on his home and its contents through his State Farm agent. The flood policy was a standard federal flood insurance policy issued and administered by State Farm under FEMA's National Flood Insurance Program.

When Gagné's home was destroyed by Hurricane Katrina, he promptly contacted State Farm and reported the loss. In reporting this loss, he did not make any representations that any part of his home was destroyed or damaged by flood or by storm surge. He simply reported the loss and requested that State Farm send an adjuster out. (Exhibit 1 - Gagné deposition at ? [or Exhibit 2 - Gagné affidavit at ¶ ?])

State Farm's adjuster made a decision to pay Gagné the limits of the federal flood policy without Gagné making any statement as to how his home was destroyed by the hurricane or submitting a sworn proof of loss or a claim form stating the cause of the loss.

Before Gagné accepted the check, State Farm's adjuster told Gagné that the check was just a way to quickly get him some of the money that would be due to him under one of the policies he had purchased through State Farm without having to wait for a determination of the cause of the loss. State Farm's adjuster assured Gagné that accepting the check would not affect his claim under the Stat e Farm homeowner's policy in any way. He represented to Gagné that once an investigation and determination of the cause of the loss had been made, the money Gagné received would be allocated to the appropriate policy by State Farm and the remaining funds due would be paid from the appropriate policy. Gagné relied on these representations in accepting the check, particularly the representation that accepting the check would not be used against him in handling his claim under his homeowner's policy. (Exhibit 1 - Gagné deposition at ? [or Exhibit 2 - Gagné affidavit at ¶ ?])

LEGAL ARGUMENT

In some recent Hurricane Katrina insurance cases, this court has made statements and rulings indicating that where plaintiffs have been paid flood insurance benefits, they may be estopped from denying that their insured property was damaged by storm surge to the extent of the amount of the flood benefits paid. This court has said this estoppel is based on the fact that receipt of flood insurance benefits constitutes an admission that some damage was caused to their homes by flooding. See e.g., *Holmes v. Meritplan Ins. Co.*, Civil Action No. 1:07cv680-LTS- RHW, 2008 U.S. Dist. LEXIS 87798 (SD Miss. October 16, 2008) citing *Tejedor v. State Farm Fire and Casualty Co.,* No. 1:05cv679,

2006 U.S. Dist. LEXIS 84983 (SD Miss. Nov. 6, 2006) ; *Dickinson v. Nationwide Mutual Fire Insurance Co.*, No. 1:06cv198, 2008 U.S. Dist. LEXIS 31153 (SD Miss. Apr. 4, 2008) , *Gemmill v. State Farm Fire and Casualty Co.*, No. 1:05cv692 jury instructions; *Aiken v. USAA Casualty Insurance Co.*, No 1:06cv741 jury instructions.

Gagné respectfully requests this court to reconsider its earlier rulings, at least to the extent that those rulings might be used to limit evidence Gagné may seek to introduce tending to show that his home was a total loss as a result of covered perils prior to the arrival of the storm surge. Gagné does not believe that the plaintiffs in the cases involving the prior rulings on this point have brought to the court's attention the appropriate law regarding the prerequisites for either precluding a party from taking a particular position or offering evidence in support of that position under the law concerning either judicial admissions or judicial estoppel. In addition to the arguments made here not being brought to the court's attention in the prior cases, Gagné believes that recent 5th Circuit decisions addressing judicial admissions and judicial estoppel decided after at least some of this court's decisions, and not referenced in any of the prior decisions, indicate that a reconsideration of this issue is appropriate.

GAGNÉ IS NOT SEEKING A DOUBLE RECOVERY

Gagné is not arguing that he is entitled to recover duplicate damages or recovery and keep for himself more than the total value of his home or the total amount of insurance purchased on his home. If his proof is sufficient to satisfy the jury that his property sustained accidental direct physical loss during a covered peril, which includes a

windstorm, and State Farm is unable to prove by a preponderance of the evidence to the jury's satisfaction portion of Gagné losses were caused or contributed to by storm surge flooding, the additional amount Gagné will be allowed to keep from the amount owed by State Farm under the policy on his contractual claim is the total amount of his loss less any amounts he has already received for those losses. However, if the jury finds he has met his burden of proof as to coverage and State Farm has not met its burden of proof as to the exclusions it relies upon, it does not follow that State Farm is entitled to a credit for the amount of the government's funds it decided should be applied to Gagné's claims.

State Farm should not receive the benefit of having the government pay a portion of its liability to Gagné under the homeowner's policy. State Farm should be required to accept such a verdict on an issue determined against it after full litigation and to make whatever adjustments on its books and in its reports to FEMA which are necessary to correctly allocate the funds already paid to the homeowner's policy effectively returning to the government money which the jury finds State Farm incorrectly used to subsidize its own liability. Alternatively, if the jury finds completely in favor of Gagné, State Farm should be required to pay the entire amount of coverage under the homeowners policy to Gagné with Gagné's receipt of that amount being subject to the subrogation clause of the Standard Federal Flood Policy which states that FEMA is subrogated to an insured's right to recover for a loss against any other person when FEMA makes a payment under the policy and requires an insured who obtains such a recovery to pay FEMA back first before the insured may keep any of the money recovered for the same loss. See SFIP at

Part VII § S.

Subrogation, as provided for in the SFIP or by law even in the absence of a subrogation provision, has historically been held to be the appropriate means of both placing the full liability upon the insurer who should rightfully bear the liability and preventing an insured from recovering and keeping a double recovery for the same loss when one insurer timely and under a reasonable good faith belief that payment is necessary[1] pays a debt (loss) for which another was primarily liable, and which, in equity, should have been paid by the primarily liable insurer. See analysis and authority discussed in *XL Ins. Am., Inc. v. TIG Speciality Ins. Co.*, Civil Action No. 3-07-cv-1701-M, 2008 U.S. Dist. LEXIS 62128, (N.D. Tex. August 13, 2008); *Foremost County Mutual Insurance Co. v. Home Indemnity Co.,* 897 F.2d 754, 762 (5th Cir. 1990); *Arkwright- Boston Manufacturers Mutual Insurance Co. v. Aries Marine Corp.,* 932 F.2d 442, 447 (5th Cir. 1991). When the payor with the subrogation right is the United States government, the government routinely, and often of necessity, follows the path taken in the SFIP of waiting until the insured pursues the action and obtains a full recovery against the person or insurer who is actually primarily liable and then obtaining its recovery from the full amount of the loss recovered by the insured. See *Waters v. Farmers Tex. County Mut. Ins. Co.*, 9 F.3d 397, 401 (5th Cir. 1993) (government has supreme subrogation over the proceeds payable to the beneficiary of the primary insurance but amount of its

1Payment by one insurer up to its policy limits has been found to meet this standard until such time as all liabilities had been finally fixed precluding any possibility that the paying insurer might be liable under their policies. *Foremost County Mutual Insurance Co. v. Home Indemnity Co.,* 897 F.2d 754, 762 (5th Cir. 1990).

subrogation claim cannot be determined until the amount of the beneficiary's rights against the private insurer are determined); *Metoyer v. Auto Club Family Ins. Co.*, 536 F. Supp. 2d 664 (ED La. 2008) (noting that subrogation is often the optimal solution to prevent double recovery and that the federal government's use of subrogation clauses in its efforts to provide prompt aid to citizens impacted by Hurricane Katrina demonstrated the governments intent that its action not benefit private insurers with primary liability).

However, avoiding double recovery through subrogation is entirely different from the judicial admission/estoppel/credit to private insurer approach adopted by this court in *Holmes, Tejedor, Dickinson, Gemmill,* and *Aiken*. Even more important, it is an entirely separate issue from precluding Gagné from making his best case that State Farm is primarily liable for the entire loss under the homeowner's policy. Both the judicial admission/estoppel credit approach and preclusion of the insured from establishing the private insurer's liability for the total loss under the private insurance policy involuntarily turn the insured's actions, the government's actions, and the provision of the SFIP conditioning payment of funds to an insured upon the insured taking no action contrary to the government's right to recover the funds paid through repayment from recoveries sought and obtained by the insured for the loss from any other person, upside down.

[Gagné is also not seeking exclusion of evidence concerning State Farm's payment of a portion of his loss with FEMA flood insurance funds. He seeks to have the jury hear all the evidence concerning the cause of damage to his property, State Farm's "investigation" of his loss, all of State Farm's actions in "adjusting" his loss including its

practice of proffering quick "flood" checks with the representation that accepting the checks would not affect a claim under the homeowner's policy, and State Farm's use of federal FEMA flood insurance funds to further its own interests at the expense of both himself and the government. He seeks to have the jury determine whether and to what extent his loss was covered by the homeowner's policy, the amount State Farm was primarily liable for from its own funds under the homeowner's policy, and whether the practices State Farm adopted for handling Katrina claims and applied in adjusting his loss were adopted and applied in bad faith to secure an unfair advantage for itself limiting its own losses under its homeowner's policies at the expense of its insureds and the federal government. He does not seek a "double payment" and simply wants a valid determination on causation and then the appropriate accounting to occur so that the taxpayers do not pay for losses that should have been paid for under his homeowner's policy. IF the Court determines that all of his losses were covered by his homeowner's policy then he expects State Farm to reimburse the NFIP program for the improper use of their funds. For example, were the Court to conclude his entire loss was covered under his homeowner's policy then Gagné simply seeks (on his contract claim) that he receive his policy limits under the homeowner's policy and that the Court direct NFIP program and State Farm to reconcile their accounts so that the taxpayers do not wind up paying a covered loss that should have been paid by State Farm under Mr. Gagné's homeowner's policy.

These Facts Do Not Support Either A Judicial Admission OR Judicial Estoppel Preventing Gagné From Presenting Proof that His Entire Home Was Destroyed By Wind Prior to Arrival of the Storm Surge

A judicial admission is an admission voluntarily made in court by a person's attorney for the purpose of being used as a substitute for the regular legal evidence of facts at trial. It is a formal waiver of proof that both relieves the opposing party from making proof of the admitted fact and bars the party who made the admission from disputing it. *Black's Law Dictionary,* (6th ed.) at p. 48. Although factual assertions in pleadings can constitute judicial admissions which may be considered binding on the party making them, they must be unequivocal, deliberate, and unambiguous. Judicial admissions are generally restricted to matters of fact which otherwise would require evidentiary proof that a party is uniquely positioned to know and concede. They do not include legal theories or conclusions. Moreover, "considerations of fairness and the policy of encouraging judicial admissions" provide trial judges with broad discretion to relieve parties from the consequences of judicial admission in appropriate circumstances. See *Kiln Underwriting Ltd. v. Jesuit High Sch. of New Orleans*, Civil Action No: 06-04350c/w06- 05060,06-05057, 2008 U.S. Dist. LEXIS 60901, (E.D. LA. August 8, 2008) citing *White v. Arco/Polymers, Inc.,* 720 F.2d 1391, 1396 (5th Cir. 1983); *MacDonald v. General Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997); *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 225, (D.N.J. 2000); *In re Methyl Tertiary Butyl Ether Products Liab. Litig.*, 379 F.Supp.2d 348, 371 (S.D.N.Y. 2005); *U.S. v. Belculfine*, 527 F.2d 941, 944 (1st Cir. 1975); *Coral v. Gonse*, 330 F.2d 997, 998 n. 1 (4th Cir. 1964);

Sullivan v. William Randolph, Inc., 504 F.3d 665, 669 (7th Cir. 2007)

In *Dickerson v. New Century Energies*, 77 Fed. Appx. 225 (5th Cir. 2003), the 5th Circuit, in a per curium opinion rejected an argument that statements by a party's attorney constituted conclusive judicial admissions saying:

> First, NCE's counsel's closing argument statements regarding whether Helton's raises were in the ordinary course of business did *not* constitute a judicial admission: the statements were not a clear concession; they did not prejudice how the case was litigated.

Id at 277. In *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1142 (5th Cir. 1991), the 5th Circuit pointed out that occurrences outside the specific formal proceedings before the court may be admissible evidence as hearsay admissions, they do not constitute conclusively binding judicial admissions. Judicial admissions must occur in the formal context of the current proceedings to be given conclusive binding weight.

These definitions and decisions demonstrate that there are several prerequisites for an act or statement to constitute a judicial admission and additional requirements before such an act or statement can be used to preclude a party from taking a position or presenting evidence. First, the act or statement must occur in the context of formal action voluntarily taken in the current proceedings in pleadings or other situations demonstrating a clear, unambiguous and deliberate concession of a fact at issue in the specific proceeding before the court. State Farm's delivery of the check did not occur in the formal context of this court proceeding. Gagné cashing of the check also occurred outside the context of these court proceedings. Next, the full context of Gagné's

explanation of how he came to have and cash the check contradict the concept that his cashing of the check was a clear, unambiguous or deliberate concession that the check represented either a settlement of his reported loss to State Farm or an acknowledgment that the causation of any of his loss was flood or storm surge. The check was proffered, delivered, and cashed under the specific representation that it was not a final determination of the cause of his loss, that an investigation of the actual cause of the loss would occur later and an adjustment would be made allocating the payment to appropriate policy after the investigation, and that accepting and cashing the check would not be used against him in the adjustment and payment of his claim under his homeowner policy. ***These facts are not in dispute.*** See Exhibits, 1, 2, 3, & 4 of the Motion this Memorandum is filed in support of. The circumstances certainly do not rise to the level of a formal waiver of the requirement that State Farm prove not only that some of Gagné's loss was caused by storm surge but also which parts of his losses, and the amount of those parts, which would not have occurred as a result of other covered perils such as wind in the absence of storm surge.

Next, admission of the fact that he cashed the check may conclusively establish that Gagné cashed the check, but conclusive admission of such a fact would not extend to the legal theory or conclusion that cashing the check is legally equivalent to Gagné admitting the legal conclusion that any of the losses were excluded from coverage under the homeowner's policy because they were caused solely by storm surge or would not have occurred in the storm surge. Even if the act of cashing the check were an clear and

unambiguous concession of the actual cause of some of Gagné losses, the actual cause of his losses, including the distinction between causes contributing to a loss, sole causes of a loss, and causes without which a loss would not otherwise have occurred, are not facts otherwise requiring evidentiary proof that Gagné is uniquely positioned to know and concede. Gagné lacks the expertise to conduct the kind of investigation necessary to investigate the specific actual contributing causes of his losses or to draw conclusions from the facts uncovered by such an investigation as to the actual cause of his losses. State Farm and its hired adjusters and expert investigators are in a far better position than Gagné to know and concede the causes of Gagné specific losses.

Furthermore, Gagné's explanation of the circumstances under which the check was cashed is not inconsistent with his current position that the results of investigations conducted subsequently to State Farm's delivery of the check demonstrate that his property suffered a total loss under the policy prior to the arrival of the surge and would have been a total loss even in absence of the surge. There is no inconsistency between offering proof now that his property suffered a total loss from covered perils prior to the arrival of the storm surge and accepting a preliminary payment prior to an actual investigation of the property and the cause of the loss under the understanding that it was not a final settlement of a loss, that no investigation of the cause of the loss has yet occurred, that a subsequent investigation will be made, that after that investigation further adjustments of the loss will be made to allocate the payment to the proper policy proving coverage, and that acceptance of the payment would not be used against him on his

homeowner's claim.

For all these reasons, Gagné's cashing of the check State Farm delivered to him drawn on flood insurance funds does not constitute a judicial admission which precludes him from offering proof tending to establish that his property suffered a total loss from covered perils prior to the arrival of storm surge. And even if it were sufficient to constitute such a preclusive admission, the circumstances of the representations he and the State Farm flood adjuster acknowledge were made to him when he was persuaded to accept and cash the check are the kinds of considerations of fairness which justify the exercise of discretion to relieve to relieve him from the consequences of judicial admission in order to further the policy of encouraging parties to make judicial admissions when appropriate.

Last month in *Hopkins v. Cornerstone Am.*, No. 07-10952, 2008 U.S. App. LEXIS 21406 (5th Cir. October 13, 2008) reversed an application of judicial estoppel by a district court because all the elements for judicial estoppel were not satisfied. The court held:

> Judicial estoppel is an equitable doctrine that "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." Hall v. GE Plastic Pac. PTE Ltd., 327 F.3d 391, 396 (5th Cir. 2003) (citations omitted). The purpose of the doctrine is to "protect [] the essential integrity of the judicial process" by reducing the "risk of inconsistent court determinations." New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (internal quotations omitted). Generally, we have recognized at least two requirements to invoke the doctrine: (1) the party's position must be clearly inconsistent with its previous one, and (2) the previous court must have accepted the party's earlier position. Hall, 327 F.3d at 396; see also New Hampshire, 532 U.S. at 750-51 (approving of the requirements in Hall as general factors rather than inflexible or exhaustive prerequisites). ...

> there is no legal inconsistency in claiming to be an employee under the FLSA and an independent contractor under the TCHRA. While this conclusion may seem paradoxical, we are convinced that it is in line with the purposes of the doctrine estoppel is designed to reduce "the risk of inconsistent court determinations." New Hampshire, 532 U.S. at 750-51. Because Fox's claim of employee status under the FLSA could not result in a legally inconsistent court determination, we conclude that the district court abused its discretion in applying judicial estoppel.

The 5th Circuit then went on to explain in a footnote that its prior decisions on the requirement that the party to be estopped have persuaded the court to accept the prior inconsistent position were vague and alerted district courts to the fact that earlier decisions appearing not to require actual acceptance were of the prior inconsistent position are apparently in conflict with U.S. Supreme Court precedent.

> Although our analysis of the clearly-inconsistent requirement disposes of the current appeal, we note that the contours of our judicial-acceptance requirement are vague. In practice, we have required that the prior court actually accept the party's earlier position, "either as a preliminary matter or as part of a final disposition." See, e.g., In re Superior Crewboats, Inc., 374 F.3d 330, 335 (5th Cir. 2004) (finding that the bankruptcy court accepted the party's previous position by issuing a "no asset" discharge). The Supreme Court appeared to approve of this actual-acceptance approach in New Hampshire. 532 U.S. at 750-51 [*21] ("Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity.") (internal citations and quotations omitted). On the other hand, New Hampshire did not purport to establish "inflexible prerequisites," id. at 751, and we have at times implied a broader approach to our judicial-acceptance requirement, see Hall, 327 F.3d at 399. In Hall, we noted in dicta that "[o]ur cases suggest that [judicial estoppel] may be applied whenever a party makes an argument with the explicit intent to induce the district court's reliance." Id. In the present case, the district court apparently relied on this statement from Hall in applying judicial estoppel absent any indication that the prior court had accepted Fox's position. While we need not rule on the validity of this decision here, we note its potential inconsistency with our general approach and with the Supreme Court's

analysis in New Hampshire. 532 U.S. at 750-51.

It does not appear that this court had the benefit of the *Hopkins* case when it considered an issued its prior opinions concerning the effect of an insured's acceptance of flood insurance payments in an action brought against the insured's private homeowner's insurer.

The 5th Circuit has also held that judicial estoppel differs from a judicial admission as judicial estoppel requires the additional element of detrimental reliance by the party asserting the estoppel. *Colonial Refrigerated Transp., Inc. v. Mitchell*, 403 F.2d 541, 550 (5th Cir. 1968)

This court's prior decisions which state that an insured is estopped from denying that their insured property was damaged by storm surge to the extent of the amount of the flood benefits paid based on the fact that receipt of flood insurance benefits constitutes an admission that some damage was caused to their homes by flooding fails to satisfy several of the requirements for judicially estopping a party from taking a position or presenting evidence inconsistent with prior action. First, there is no previous legal proceeding in which the insured took the position that is inconsistent with the position in the current proceeding that all the insured's losses were caused by covered perils. Second, without a prior legal proceeding, there can be no satisfaction of the requirement of actual acceptance by a court of a prior in consistent position in a prior legal proceeding. Third, under the circumstances of Gagné's explanation of how he came to have and cash the check, his current position is not clearly inconsistent with a prior

position. Just as there is no clear inconsistency between claiming to be an employee under FLSA and an independent contractor under the TCHRA, there is no clear inconsistency between making a claim by reporting a loss without taking a position as to the actual causes and sequence of contributing factors to a loss or which policy a loss is covered under and accepting a preliminary payment under express representations that an investigation of the cause has not been made but that appropriate adjustments will be made later after an investigation of the actual cause with the representation that the preliminary payment not being used against the insured on his claim under the policy with greater benefits and later contesting the insurer's positions concerning the results of its later determination.

With the possible exception of collateral estoppel/res judicata which are inapplicable here because there are no prior proceedings to satisfy the required elements[2], Plaintiff has found no federal or Mississippi authority for estopping a plaintiff from presenting evidence which is allegedly inconsistent with a prior act or statement of the plaintiff in the absence of satisfying the requirements for judicial admission and judicial estoppel. There is some case law on the concept of equitable estoppel to offer inconsistent proof under Texas law. However, Texas law is not applicable to this case and even if it were, that concept requires the additional element of reliance by the party asserting estoppel. *Brown v. Lanier Worldwide, Inc.*, 124 S.W.3d 883, 899 (Tex. App. -- Houston [14th Dist.] 2004, no pet.) State Farm did not rely upon Gagné's cashing of the

2See *Texaco Inc. v. Duhe*, 274 F.3d 911, n. 16 (5th Cir. 2001)

check in any way. It made up its mind and took its position as to how it would handle the loss without regard to Gagné's claims or positions. To the contrary, it is Gagné who relied to his detriment on the representations made by State Farm when he accepted and cashed the check which State Farm is expected to assert now precludes him from offering proof that State Farm was liable for his entire loss under its private homeowner's policy.

STATE FARM SHOULD BE ESTOPPED FROM CLAIMING GAGNÉ'S ACCEPTANCE OF THE CHECK IS AN ADMISSION THAT ANY PART OF HIS HOME WAS DESTROYED BY STORM SURGE OR FLOOD WATERS

Gagné reported his losses from Hurricane Katrina to State Farm, who was the selling agent and the adjustor on both the private homeowner's policy and the NFIP policy. In reporting his loss, he stated that the losses were the result of Hurricane Katrina. However, he made no assertions in his report to State Farm as to the exact cause of the loss, i.e. the role of wind or water or storm surge in causing the loss. He made no representation to State Farm at the time of reporting his loss to them as to which policy his losses were covered under. He filed no claim forms and made no written or sworn proofs of loss for claims under either policy. In fact his written declarations filed with FEMA indicate a loss caused entirely by wind. Instead, he asked State Farm to send an adjustor to adjust the loss. It was State Farm's adjustor who made the decision to use federal funds to fund the primary payment proffered to Gagné for his losses. It was Gagné who relied on State Farm's adjustor's representations that the payment was a preliminary one which would be reallocated later after an investigation of the cause of the losses and a determination of coverages and who represented to Gagné that his

acceptance of the check would not be used against him on his claim under the coverage of his homeowner's policy. Gagné relied on those representations in cashing the check which action State Farm not seeks to use against him to his detriment in his claims on the homeowner's policy. These facts meet the elements of equitable estoppel such that State Farm should now be estopped from asserting that Gagné's cashing of the check it provided and decided how to fund constitutes an admission by Gagné directly contrary to Gagné's statements of what he was told by the State Farm adjustor who delivered the check. *J.P.M. v. T.D.M.*, 932 So. 2d 760, 767 (Miss. 2006)

CONCLUSION

In light of the facts, arguments and authorities brought to this court's attention in this memo, Robert Gagné requests this court to enter an order precluding State Farm from asserting that Gagné is estopped or precluded from offering evidence tending to establish prior to the arrival of the storm surge, his property suffered a total loss from covered perils. Gagné also requests this court to enter a ruling that Gagné may introduce evidence concerning the representations made by State Farm's adjustor when it delivered the check drawn on federal flood insurance funds to Gagné.

Robert Gagné is not seeking to recover from both policies for a similar loss. He simply wants State Farm to live up to their promise to him and for the appropriate policy of insurance to pay for his lost property after a determination on the cause of loss is made. If a determination is made by the finder of fact that the entire home was destroyed by covered losses under his homeowner's policy, he will expect the court to direct State

Farm to reimburse the NFIP program for the funds they improperly paid him prior to (by their own admission) determining causation of the loss of his property.

Respectfully submitted this 4th day of December, 2008.

Robert Gagné, Plaintiff

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CERTIFICATE OF SERVICE

COMES NOW the Plaintiff, Robert R. Gagné, by and through counsel, to hereby certify that I filed the foregoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER RULINGS IN PRIOR CASES ON THE EFFECT OF INSURED'S CASHING CHECKS OFFERED BY STATE FARM DRAWN ON FEDERAL FLOOD INSURANCE FUNDS with the Clerk of the Court using the ECF system which will send notification of such filing to ECF participants of record.

SO NOTICED this 4th day of December, 2008.

By: /s/ Jesse B. Hearin, III
Jesse B. Hearin, III