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

UNITED STATES OF AMERICA ex rel.
CORI RIGSBY and KERRI RIGSBY — RELATORS/COUNTER-DEFENDANTS

v. — CASE NO. 1:06cv433-LTS-RHW

STATE FARM MUTUAL INSURANCE COMPANY — DEFENDANT/COUNTER-PLAINTIFF

and

FORENSIC ANALYSIS ENGINEERING CORPORATION;
EXPONENT, INC.; HAAG ENGINEERING CO.;
JADE ENGINEERING; RIMKUS CONSULTING GROUP INC.;
STRUCTURES GROUP; E.A. RENFROE, INC.;
JANA RENFROE; GENE RENFROE; and
ALEXIS KING — DEFENDANTS

DEFENDANT/COUNTER-PLAINTIFF
STATE FARM FIRE AND CASUALTY COMPANY'S
MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE ALL TESTIMONY
BY THE RIGSBYS' EXPERT WITNESS KEITH G. BLACKWELL, PH.D.

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Defendant/Counter-Plaintiff State Farm Fire and Casualty Company, improperly named in the First Amended Complaint as "State Farm Mutual Insurance Company" ("State Farm"), respectfully submits this memorandum in support of its motion, pursuant to Fed. R. Evid. 104(a), 702, 703, 401, 402, 403, Fed. R. Civ. P. 26(a)(2)(B), 37(c)(1), and Miss. Unif. Dist. Ct. R. 26.1(A)(2), to exclude the testimony of the Rigsbys' expert witness, Keith G. Blackwell, Ph.D.

I. PRELIMINARY STATEMENT

The Rigsbys proffer the expert testimony of Dr. Blackwell, a meteorologist, in a misguided attempt to create a genuine question of material fact in response to State Farm's dispositive motions. Yet Dr. Blackwell's opinion is incapable of doing so because it is irrelevant, inadmissible, and immaterial. "Rule 56 states that a court may consider only admissible evidence in ruling on a summary judgment motion." *Mersch v. City of Dallas*, 207 F.3d 732, 734-35 (5th Cir. 2000). Thus, to screen out incompetent summary judgment evidence, the Court must determine the admissibility of the expert's opinion "before reaching the question whether a fact issue exists," *id.* – a determination that the Fifth Circuit does not disturb on appeal absent an abuse of discretion. *See, e.g., id.* at 735; *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 196 (5th Cir. 1996); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1006, 1009 (5th Cir. 1991) (en banc).

Because no jury will be present, this Court need not make its ruling now and has the discretion to make its admissibility determination "during, rather than in advance of," the hearing. *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006). "That is not to say that the scientific reliability requirement is lessened." *Id.* Where, as here, an expert's opinion is inadmissible, it "cannot be relied upon by plaintiffs to prevent summary judgment." *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992). So, too, where, as here, the proffered evidence is also legally "insufficient … the court remains free … to grant summary judgment" under Rule 56. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993).

Dr. Blackwell's opinions are neither probative nor sufficient to inform whether the McIntosh flood claim submitted for payment to the National Flood Insurance Program was "knowingly" false or

fraudulent, 31 U.S.C. § 3729, or more particularly per this Court's Orders, "whether the payment of the flood insurance limits in the McIntosh case was justified, as a matter of law." ([261] at 3; *see* [274] at 2.) His opinions are incapable of creating any genuine issue of material fact, particularly in light of the dispositive effect of Kerri Rigsby's sworn factual admissions that she thought there was at least $250,000 in flood damage to the McIntosh home. ([91-7] at 139:9-140:8, 142:7-13.)

Like Dr. Fitzpatrick (the Rigsbys' other meteorological expert), Dr. Blackwell (whose opinions are largely and needlessly cumulative of Dr. Fitzpatrick's, *see* Fed. R. Evid. 403) offers no opinion on the cause or extent of damage to the McIntosh property and admits that he lacks the expertise to do so. Nor can Dr. Blackwell measure the wind or storm surge forces at the McIntosh property, which are beyond his data set. Instead, he undertakes an abstract and generalized discussion of Hurricane Katrina using high altitude data, none of which reveals the weather forces at the McIntosh property. Lacking any data that "fits" the McIntosh property, his opinion amounts to mere speculation and conjecture.

Even Dr. Blackwell's generalized meteorological opinion is based on an unreliable methodology. He cherry-picks data that conform to his personal opinions about Katrina. He discards the federal surface wind data and also ignores wind data measured on the ground across the bay from the McIntosh property. He instead attempts to extrapolate ground-level wind speeds from high altitude data. But to do so, Dr. Blackwell employs a series of mathematical conversions, none of which is disclosed in his report, contrary to the governing rules. *See* Fed. R. Civ. P. 26(a)(2)(B) & 37(c)(1); Miss. Unif. Dist. Ct. R. 26.1(A)(2). His unreliable methodology is clouded by undisclosed calculations and error rates. His opinion is unreliable, irrelevant, and immaterial. The Rigsbys cannot meet their burden to show otherwise.

II. THRESHOLD SCRUTINY OF EXPERT TESTIMONY

This Court must fulfill a vital "gatekeeping role" that requires it to make a threshold assessment "whether the reasoning or methodology underlying the [expert] testimony is scientifically valid and of

whether that reasoning and methodology properly can be applied to the facts in issue." *Daubert,* 509 U.S. at 592-93. Throughout the evaluation, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. These "exacting standards of reliability," *Weisgram v. Marley Co.*, 528 U.S. 440, 442 (2000), require far "more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. Yet Dr. Blackwell has neither relied on scientific data applicable to these facts, nor reliably applied a scientific methodology.

Federal Rule of Evidence 702 requires a sound basis and a sound methodology, properly applied to the facts of the case, before an opinion can be admitted into evidence.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, ***if*** (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, ***and*** (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702 (emphasis added). Thus, courts must exclude expert evidence that is not "based on sufficient facts or data," that is not "the product of reliable principles and methods," or whose methods are not applied "reliably to the facts of the case." *Id.* Indeed, "***any*** step that renders the analysis unreliable ... renders the expert's testimony inadmissible. ***This is true whether the step completely changes a reliable methodology or merely misapplies that methodology***." Fed. R. Evid. 702 advisory committee's note (2000) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)) (emphasis and omission in original).

Of course, an expert's "conclusions and methodology are not entirely distinct from one another," *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997), and the difference between an expert's conclusions and methodology "has only limited practical import." *In re Paoli*, 35 F.3d at 746. "When a judge disagrees with the conclusions of an expert, it will generally be because he or she thinks that there is a mistake at some step in the investigative or reasoning process of that expert." *Id.* As part of its gatekeeping function, the court "must examine the expert's conclusions in order to determine whether

they could reliably flow from the facts known to the expert and the methodology used." *Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3d Cir. 2000) (citation omitted). Upon doing so, a court may, for example, "conclude that there is simply too great an analytical gap between the data and the opinion proffered," and properly preclude the expert's testimony. *Joiner*, 522 U.S. at 146.

"It is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate." *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000). Indeed, a core rule of evidence is that "speculation is unreliable ... and is inadmissible." *Dunn v. Sandoz Pharm. Corp.*, 275 F. Supp. 2d 672, 684 (M.D.N.C. 2003). "The courtroom is not the place for scientific guesswork, even of the inspired sort." *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996). "Expert testimony is inadmissible if it is speculative, unsupported by sufficient facts, or contrary to the facts of the case." *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 757 (8th Cir. 2006).

The Rigsbys, as the proponents of the expert evidence, bear the burden of showing that it is admissible. *Mathis v. Exxon Corp.*, 302 F.3d 448, 459-60 (5th Cir. 2002); *Tanner v. Westbrook*, 174 F.3d 542, 547 (5th Cir. 1999) (superseded on other grounds) (citation omitted); *see also Daubert*, 509 U.S. at 592 n.10. State Farm does ***not*** bear the burden of demonstrating its inadmissibility. *See Rieger v. Orlor, Inc.*, 427 F. Supp. 2d 99, 102 (D. Conn. 2006); *Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434, 534 (W.D. Pa. 2003).

Daubert carefully distinguishes between the threshold reliability inquiry that the Rigsbys must satisfy and the role of cross-examination. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky ***but admissible*** evidence. ... These conventional devices ... are the appropriate safeguards ***where*** the basis of scientific testimony ***meets the standards*** of Rule 702." *Daubert*, 509 U.S. at 596 (emphasis added). As the highlighted language shows, the Rigsbys must first satisfy their burden of demonstrating that the proffered evidence is admissible. *See McLendon v. Georgia Kaolin, Co., Inc.*,

841 F. Supp. 415, 418 (M.D. Ga. 1994) ("these devices are only sufficient safeguards where the scientific testimony meets the standards of Rule 702"); *see also Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 297 (8th Cir. 1996) ("cross-examination at trial" cannot "take the place of scientific peer review"); *Porter v. Whitehall Labs.*, 791 F. Supp. 1335, 1345 & n.10 (S.D. Ind. 1992) ("an expert's opinion must have ***some*** basis other than hypothesis before the opinion may have the privilege of being assailed by cross-examination") (emphasis in original), *aff'd*, 9 F.3d 607 (7th Cir. 1993).

Even if Dr. Blackwell's testimony could somehow survive this Court's threshold scrutiny under Rule 702 (which it cannot), then it would be subject to further review and preclusion under Rule 403. "[E]xpert evidence can be both powerful and quite misleading. ... Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 ... exercises more control over experts than over lay witnesses." *Daubert*, 509 U.S. at 595. To this end, an expert opinion's "lack of reliable support may render it more prejudicial than probative, making it inadmissible under [Rule] 403." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987).

III. THE PROPOSED EXPERT TESTIMONY IS IRRELEVANT, INADMISSIBLE, AND IMMATERIAL

None of the Rigsbys' proposed expert testimony is probative of whether the McIntosh flood claim was "knowingly" false or fraudulent, 31 U.S.C. § 3729, and it should be excluded on that ground alone. *See* Fed. R. Evid. 401, 402, & 702. Indeed, it is incapable of raising a genuine issue of material fact given Kerri Rigsby's sworn factual admissions that she thought there was at least $250,000 in flood damage to the McIntosh home and that the damage to the first floor walls and floors appeared to her to be predominately caused by rising water from storm surge and waves.

> Q. And when you made the payment or agreed or authorized your subordinate, who was working – primarily working the claim, to request authority for $250,000, you thought there was at least that much flood damage to the home, didn't you?
>
> A. Was a lot of damage to that home.
>
> ….

A. It was a large home. It was insured for a lot of money, and I – yeah, I believe I thought there was $250,000 worth of flood damage to that home.

….

A. [T]here was severe damage to the home.

….

Q. The third bullet point [in the October 20, 2005 report], which states that the damage to the first floor walls and floors appears to be predominantly caused by rising water from storm surge and waves, was that consistent with what you saw when you went out to the McIntosh home?

A. Yes.

([91-7] at 139:9-140:8, 142:7-13.) The dispositive effect of these sworn factual admissions cannot be negated by their proposed expert testimony, rendering it irrelevant, inadmissible, and immaterial. *See, e.g., United States ex rel. Taylorvick v. Smith*, 513 F.3d 228, 232 (5th Cir. 2008).

IV. DR. BLACKWELL IS UNQUALIFIED TO OPINE ON THE CAUSE OR EXTENT OF DAMAGE

Dr. Blackwell admits he is unqualified to offer any opinion on the cause or extent of damage to the McIntosh house. This Court has set the hearing to determine "whether the payment of the flood insurance limits in the McIntosh case was justified," ([261] at 3), and does "not want to allow the … presentation of evidence that does not bear directly on the merits of the McIntosh flood claim." ([266] at 2.) Dr. Blackwell is unable to opine on the cause or extent of damage to the McIntosh property because he is "not qualified to – to assess damage" or "causes of damage." (Blackwell Dep. in *McIntosh* (Ex. A to Mtn.) at 91:12-17.) When asked about weather damage to the house, Dr. Blackwell adamantly declines to opine: "I don't know. I don't do damage assessment. I don't know." (*Id.* at 157:25-158:8.) "What actually damaged the house, I don't know." (*Id.* at 166:13-20.) For these reasons and others, Dr. Blackwell's opinion should be excluded as irrelevant and immaterial.

V. DR. BLACKWELL ONLY SPECULATES AS TO WEATHER FORCES AT THE MCINTOSH HOUSE

Dr. Blackwell's report is written at a high level of abstract generality, most of which lacks "fit" with the facts of the case, with a few scant paragraphs that purport to address conditions at the McIntosh property. An expert whose "opinions amount[] to abstract conclusions not adequately grounded in the

facts of the case" is properly excluded. *El Aguila Food Prods., Inc. v. Gruma Corp.*, 131 F. App'x 450, 454 (5th Cir. 2005). Dr. Blackwell's report contains no discussion of any ground based data gathered at the McIntosh site or its vicinity to help ascertain the reliability *vel non* of the abstract values he recites.

Dr. Blackwell acknowledges that "the wind speeds where the structures are located" are the speeds "that count." (Ex. A at 103:7-104:2.) But he has no information on the wind speeds at the McIntosh house. "I don't know what the wind speeds at that time were at McIntosh." (*Id.* at 105:21-24.) In fact, Dr. Blackwell states that the lowest elevation for which he could measure wind speed with the radar data he uses would "likely be within a couple thousand feet of the ground." (*Id.* at 115:14-20.)

> Q. [Y]ou can't tell exactly what was happening at and affecting the residence wind-wise; correct?
>
> A. I can't see the wind at the elevation of the house, no.

(*Id.* at 106:19-107:3.) Even Dr. Blackwell's occasional references to "hurricane-force winds," *see, e.g.* (Blackwell Rpt. [279-3] at 39), refer only to winds at least 74 mph. (Ex. A at 75:8-23.) Such wind speeds amount to a Category 1 strength hurricane, which results in "[n]o significant damage to building structures." *See* (Fitzpatrick Rpt. [279-6] at 10.)

Lacking specific data, Dr. Blackwell presents several vague opinions that do not suffice as admissible expert opinion. For instance, Dr. Blackwell theorizes that downdraft winds affected "coastal Mississippi locations" generally and might have enhanced ground-level winds "possibly to ≥ 140 mph" and there might have been tornadoes. (Blackwell Rpt. [279-3] at 17, 32.) "Opinions merely expressing 'possibilities' do not suffice to support the admissibility of expert testimony." *Dunn*, 275 F. Supp. 2d at 681. "Where expert evidence is necessary to establish a causal relationship, the party bearing the burden of proof may not prevail if the 'expert evidence consists of testimony expressed only in terms of various possibilities.'" *Cleary v. Knapp Shoes, Inc.*, 924 F. Supp. 309, 318 (D. Mass. 1996) (citation omitted); *see also Hammond v. Coleman Co., Inc.*, 61 F. Supp. 2d 533, 539, 541 (S.D. Miss. 1999) (rejecting expert testimony expressed in terms of "possibilities"), *aff'd*, 2000 WL 283165 (5th Cir. 2000).

So, too, Dr. Blackwell is unqualified to opine on the admittedly "massive storm surge," (Ex. A at 53:17-20), and waves produced by Katrina. He freely admits that he is "not a storm surge expert" (*id.* at 53:21-54:14), he does not "actually do any storm surge modeling," and any opinion he expressed about the timing of the storm surge is "just a subjective estimate on [his] part." (*Id.* at 145:16-146:5.) His lack of expertise on storm surge further marginalizes whatever utility his opinions might arguably otherwise have. *See, e.g., Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990); *Edmonds v. Ill. Cent. Gulf R.R. Co.*, 910 F.2d 1284, 1287 (5th Cir. 1990); *see also* Fed. R. Evid. 702.

Yet that lack of expertise and that subjectivity does not dissuade him from opining on the cause, nature, and timing of Katrina's storm surge. *See* (Blackwell Rpt. [279-3] at 6, 38-39.) But even that discussion amounts to mere lip service to the magnitude of the storm surge or the waves superimposed atop the surge – neither of which he quantified with respect to the McIntosh property – even though he concedes that Katrina's "storm surge" was "equivalent to a category 5 hurricane," (*id.* at 6), and that "storm surge is a major and deadly component of hurricanes." (*Id.* at 38).

Ultimately, Dr. Blackwell offers little more than speculation on the weather forces at the McIntosh property. Subjective estimates and mere possibilities are unhelpful and inadmissible. "Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible," *Viterbo*, 826 F.2d at 424, and "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146.

The "exacting standards of reliability," *Weisgram*, 528 U.S. at 442, demanded by the rules regulating expert evidence are not satisfied by "subjective belief or unsupported speculation," *Daubert*, 509 U.S. at 590, "mere guesswork," *Allen*, 102 F.3d at 199, "scientific guesswork," *Rosen*, 78 F.3d at 319, or a "scientific hunch." *Christophersen*, 939 F.2d at 1115. "[A] district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being

unscientific speculation offered by a genuine scientist." *Rosen*, 78 F.3d at 318 (internal citation omitted). Dr. Blackwell's opinion as to the weather effects at the McIntosh property is inadmissible speculation.

VI. DR. BLACKWELL'S METHODOLOGY IS UNRELIABLE AND HIS REPORT IS INCOMPLETE

Dr. Blackwell employs an unreliable methodology to form his opinion. He heavily relies on instruments that do not measure weather forces on the ground. Nor does he rely on any other instruments that recorded wind forces at the McIntosh location. Indeed, he dismissed data that contradicted his opinions, including wind data that were recorded on the ground near the McIntosh property. Dr. Blackwell's cherry-picked data only draw greater attention to the methodological flaws in his analysis. Though he tries to paper over these methodological weaknesses by using a series of mathematical computations, Dr. Blackwell discloses none of them in his report, as he must. *See* Fed. R. Civ. P. 26(a)(2)(B) & 37(c)(1); Miss. Unif. Dist. Ct. R. 26.1(A)(2).

A. Dr. Blackwell Uses Inapposite Data

Dr. Blackwell uses radar and dropsonde data from several thousand feet in the air that cannot reliably determine the wind conditions affecting the McIntosh residence at ground level. He admits that the data from such instruments cannot "see the wind at the elevation of the house." (Ex. A at 106:19-107:3.) Rather, the lowest altitude the radar data shows is "within a couple of thousand feet of the ground," due to the curvature of the earth and upward angle of the radar beam. (*Id.* at 101:24-102:7, 115:14-20.) So, too, "most dropsondes are dropped over water" and land "in water" (*id.* at 123:11-124:14), where wind speeds are greater than over land. (*Id.* at 139:13-19.) No dropsonde was deployed at the McIntosh residence. (*Id.* at 110:16-17.) Even if one had been, dropsondes do not "actually measure surface wind" because they stop "reporting winds within 800 feet of the surface." (*Id.* at 133:16-134:11.) "[T]he non-existence of good data does not allow expert witnesses to speculate or base their conclusions on inadequate supporting science." *Perry v. Novartis Pharm. Corp.*, 564 F. Supp. 2d 452, 467-68 (E.D. Pa. 2008). Rather, an expert's opinion "is admissible only if [the existing] data are objectively sufficient to support it." *Id.* at 468. Here they are not.

B. Dr. Blackwell Cherry-Picked Data and Did Not Seriously Consider Contrary Data

Though Dr. Blackwell relies heavily on high altitude dropsonde and radar data, he is unwilling to seriously consider data from other sources, including ground based data, that contradict his opinions. Thus, he does not seek to falsify his extrapolated estimates with ground based data, which is a significant flaw in his methodology. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." *Daubert*, 509 U.S. at 593 (citation omitted).

For instance, he rejects Katrina wind data from the H*Winds analysis – produced by the National Oceanographic and Atmospheric Administration's Hurricane Research Division ("HRD") using actual surface wind and other data – because H*Winds did not include his "double eye wall" theory. (Ex. A at 156:3-20.) While Dr. Blackwell discards the H*Winds analysis because it does not mesh with his theories, Dr. Fitzpatrick, the Rigsbys' other meteorological expert, relies on the H*Winds data. *See, e.g.*, (Fitzpatrick Rpt. [279-6] at 11, 25.) According to Dr. Fitzpatrick, H*Winds was "the beginning point" for his analysis and is "a good tool" that has "obtained a certain amount of acceptability in the hurricane community." (Fitzpatrick Dep. (Ex. B to Mtn.) at 59:3-10, 60:21-61:10.) Dr. Fitzpatrick thus "stand[s] by the H*Wind product." (*Id.* at 76:7-19.) Dr. Blackwell refuses to use it.

Nor does Dr. Blackwell use the HRD's wind swath maps. He also rejects the use of wind speeds measured on the ground at Keesler Air Force Base, four miles across the bay from the McIntosh property. To this end, he believes the Keesler ground level wind speeds were too low and states the high altitude data "from dropsondes," which he prefers, were "quite a bit higher" than what he "was seeing with … some of the station data that was ground based" at Keesler. (Ex. A at 80:16-81:6.) Nor does he use other available like data. His conscious disregard of available and relevant data is not reliable science.

An expert who "cherry-picked the facts he considered to render an expert opinion" and who "merely accepted some of the … weather data that suited his theory and ignored other portions of it that

did not" fails to employ a reliable methodology. *Barber v. United Airlines, Inc.*, 17 F. App'x 433, 437 (7th Cir. 2001). "[S]uch a selective use of facts fails to satisfy the scientific method and *Daubert*, and it thus fails to assist the trier of fact." *Id.* (internal quotations omitted). Courts routinely reject such selective cherry-picking of data. "[A]ny theory that fails to explain information that otherwise would tend to cast doubt on that theory is inherently suspect. By the same token, if the relevant scientific literature contains evidence tending to refute the expert's theory and the expert does not acknowledge or account for that evidence, the expert's opinion is unreliable. Accordingly, courts have excluded expert testimony 'where the expert selectively chose his support from the scientific landscape.'" *In re Rezulin Prod. Liab. Litig.*, 369 F. Supp. 2d 398, 425 & n.164 (S.D.N.Y. 2005) (citation omitted).

C. Dr. Blackwell Fails To Disclose Fundamental Steps in His Methodology

To attempt to patch over his lack of relevant weather data, Dr. Blackwell subjects his data to a series of mathematical conversions. Yet his report discloses none of these computations. Though he vaguely alluded to his calculations in his *McIntosh* deposition, including "averaging technique," calculations to "normalize[]" the "wind profile," methods to "generate sustained wind estimates," and the use of "the conversion factor, whatever it is," (Ex. A at 125:8-128:17), these methodological steps are nowhere to be found in his report. Without disclosing these data conversions and mathematical steps, Dr. Blackwell's report is far from being "a complete statement of all opinions the witness will express and the basis and reasons for them" – running afoul of the rules governing expert disclosures. *See* Fed. R. Civ. P. 26(a)(2)(B) & 37(c)(1); Miss. Unif. Dist. Ct. R. 26.1(A)(2). Nor can these deficiencies be cured and backfilled at a deposition or at a hearing. *See, e.g., Ciomber v. Cooperative Plus, Inc.*, 527 F.3d 635, 642 (7th Cir. 2008), *accord Williams v. Daimler Chrysler Corp.*, 2008 WL 4449558, at *5 (N.D. Miss. July 22, 2008) (quoting *Ciomber*).

By failing to disclose key calculations in his methodology, Dr. Blackwell has completely obscured any opportunity to test the reliability of his calculations, which fundamentally alter his data. Since "***any step*** that renders the analysis unreliable ... renders the expert's testimony inadmissible," Fed.

R. Evid. 702 advisory committee's note (2000) (quoting *In re Paoli*, 35 F.3d at 745) (emphasis in original), these omissions are highly prejudicial. Nor does Dr. Blackwell give any indication whether or how he addressed the rates of error that accompany such calculations. Where, as here, a technique has "no known potential rate of error," it is unreliable and inadmissible. *Black v. Food Lion, Inc.*, 171 F.3d 308, 313-14 (5th Cir. 1999).

CONCLUSION

For the foregoing reasons, State Farm respectfully urges this Court to grant its motion and exclude Dr. Blackwell's testimony in its entirety.

This the 6th day of May, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, E. Barney Robinson III, one of the attorneys for State Farm Fire and Casualty Company, 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:

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This the 6th day of May, 2009.

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