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 PATRICK J. FITZPATRICK, PH.D.

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Defendant/Counter-Plaintiff State Farm Fire and Casualty Company, improperly denominated 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, Patrick J. Fitzpatrick, Ph.D.

I. PRELIMINARY STATEMENT

The Rigsbys proffer the expert testimony of Dr. Fitzpatrick, a meteorologist, in a misguided attempt to create a genuine question of material fact in response to State Farm's dispositive motions. Yet Dr. Fitzpatrick'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. Fitzpatrick'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.)

Dr. Fitzpatrick offers no opinion on the degree of flood or wind damage to the McIntosh property and disclaims any expertise to do so. His meteorological opinion is largely generalized and abstract – focusing on high altitude weather conditions from which he purports to extrapolate conditions on the ground, where he contends that the "wave action" that was "superimposed" in "the actual surge [that] was near 18.0 feet" was only "1 feet or less." (Fitzpatrick Rpt. [279-6] at 20.) Yet such opinions are irreconcilable with empirical video evidence taken by the McIntoshes' neighbors early in the day that shows significantly higher wave action at only ***half*** of Katrina's maximum storm surge.

(Dean Rpt. [275-3] at 17, 35 & App'x G (video filed conventionally).) As the storm surge reached its maximum depth of over 18 feet, the waves increased in size and grew exponentially in power. *See* (Christopher D. Eamon, Patrick Fitzpatrick & Dennis D. Truax, *Observations of Structural Damage Caused by Hurricane Katrina of the Mississippi Gulf Coast*, 21 J. of Performance of Constructed Facilities 117, 126 (2007) (Ex. A to Mtn.); Dean Rpt. [275-3] at 27-28.)

Beyond these fatal methodological flaws, Dr. Fitzpatrick's ultimate opinions on the wind speeds do not support – and, indeed, undercut – the arguments being advanced by the Rigsbys. Dr. Fitzpatrick opines that winds at the McIntosh property hardly reached Category 2 strength, which causes, at worst, "[s]ome damage to roofing, windows, and doors of buildings." (Fitzpatrick Rpt. [279-6] at 10, 24.) At all other times, the wind forces were of only Category 1 or tropical storm strength, causing "[n]o real damage to building structures." (*Id.*) But the storm surge and waves reached into the Category 5 "catastrophic" severity that causes "[m]ajor damage to lower floors of all structures less than 15 feet above sea level." (*Id.*) That description fits the McIntosh house to a tee.

So, too, the arguments being advanced by the Rigsbys, through Dr. Fitzpatrick and others, run squarely counter to the peer-reviewed and published opinions made by Dr. Fitzpatrick and his co-authors about the structural damage sustained in Mississippi during Katrina. (Eamon, Fitzpatrick & Dennis Rpt. (Ex. A) at 117.) According to that study, "***high wave action*** is perhaps ***the most severe structural load*** during the storm, and is ***the cause of most of the damage*** reported in this paper." (*Id.* at 118 (emphasis added).) In fact, Katrina's wave forces reached four times the FEMA pre-storm estimate. (*Id.* at 126.) Winds "pose much less of a threat to structures than storm surge and wave action, which can produce loads orders of magnitude higher, and are severe enough in many cases to destroy entire structures." (*Id.* at 119.)

Moreover, Dr. Fitzpatrick's relatively insubstantial wind speeds may have been artificially inflated based on his belief of what the data should reflect. And the data Dr. Fitzpatrick did not inflate are laden with multiple and compounding rates of error. Dr. Fitzpatrick's 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. Fitzpatrick 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. Fitzpatrick'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. FITZPATRICK IS UNQUALIFIED TO OPINE ON THE CAUSE OR EXTENT OF DAMAGE

Dr. Fitzpatrick 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. Fitzpatrick cannot opine on the extent of flood damage to the McIntosh property because it is "outside of [his] area of expertise." (Fitzpatrick Dep. in *McIntosh* (Ex. B to Mtn.) at 16:4-16; *accord id.* at 17:15-18:3: 55:6-20.) He is unable to address whether "it is more likely than not that the damage to the first floor … would be caused by storm surge and not wind." (*Id.* at 124:7-20.) For these reasons and others, his opinion is irrelevant, inadmissible, and immaterial. *See* Fed. R. Evid. 401, 402, 702.

V. VIDEO EVIDENCE OF WAVE ACTION EMPIRICALLY REFUTES DR. FITZPATRICK'S OPINION

Dr. Fitzpatrick's opinion regarding the height of wave action on top of the storm surge is methodologically unsound, contrary to the facts of the case, and unreliable. In *McIntosh*, Dr. Fitzpatrick opined that the wave action superimposed on some 18 feet of storm surge was "0.5 feet [*i.e.*, six inches] or less," (Ex. B at 103:8-13; Fitzpatrick *McIntosh* Rpt. (Ex. C to Mtn.) at 6), but now opines that the

wave action was "1 feet or less." (Fitzpatrick Rpt. [279-6] at 20.) Dr. Fitzpatrick fails to explain what methodology he used to double his wave height opinion, *see id.*, but it reveals a high rate of error as well as the unfounded nature of his opinion. Neither estimate withstands scrutiny, particularly when measured against the actual facts and data.

Video evidence empirically refutes Dr. Fitzpatrick's opinion about the height of the wave action. Residents at the Church home located within 1,000 feet of the McIntosh house on South Shore Drive recorded the burgeoning wave activity from Katrina prior to the maximum storm surge. *See* (Dean Rpt. [275-3] at 17, 35 & App'x G (video filed conventionally).) As the following screenshots from the Church video reveal, to say that the wave action was only "1 feet or less" is manifestly unfounded.



Indeed, using Dr. Fitzpatrick's meteorological timeline, when these images were recorded between 8:30 a.m. and 9:00 a.m., the storm surge had only reached ***half*** of its full depth. *See* (Fitzpatrick Rpt. [279-6] at 24.) As the surge worsened and the waters deepened, the waves got larger and grew exponentially in power. *See* (Eamon, Fitzpatrick & Dennis Rpt. (Ex. A) at 126; Dean Rpt. [275-3] at 27-28.) An expert opinion, such as Dr. Fitzpatrick's, that is "contrary to the facts of the case," *Marmo*, 457 F.3d at 757, is not "based upon sufficient facts or data," not helpful, and not admissible. *See* Fed. R. Evid. 702.

Injecting even more uncertainty into his "1 feet or less" opinion, Dr. Fitzpatrick has also admitted that, at the McIntosh property, "[y]ou could have waves two feet, maybe three feet" high. (Ex. B at 34:1-18.) By inexplicably changing wave heights from six inches or less, to one foot or less, to two or three feet, Dr. Fitzpatrick reveals a gaping margin of error and methodological flaw that renders his

opinion unreliable. The unreliability of his methodology is even more pronounced when he admits that the basis for the proffered wave height is "mostly my opinion" and is just "a qualitative assessment" that was not even based on calculations using standard formulas. (Ex. B at 103:19-104:22.) Indeed, after revealing that his methodology was a mere qualitative hunch, Dr. Fitzpatrick further admits that he could have used a mathematical and modeling methodology to estimate the wave severity, which would have been the "best way to handle this kind of problem," but he does not "have the expertise right now or the software to do a shallow water wave model" and chose not to do so. (*Id.* at 104:19-106:4.)

Choosing not to use reliable methodology to study the issue and being unqualified to do so, Dr. Fitzpatrick has left the Court with little more than his "qualitative assessment" – *i.e.*, his say so. But "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). To be sure, "the existence of sufficient facts and a reliable methodology is in all instances mandatory. '[W]ithout more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible.'" *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007) (quoting *Viterbo*, 826 F.2d at 424). Dr. Fitzpatrick offers little more, and his opinion should be excluded.

VI. DR. FITZPATRICK'S WIND SPEED IS INSUBSTANTIAL; HIS STORM SURGE IS SUBSTANTIAL

Dr. Fitzpatrick's wind speed analysis does not support – and, indeed, undercuts – the arguments being advanced by the Rigsbys. If anything, his opinion confirms that the wind forces were relatively

low and the water forces were exceedingly high. Moreover, though Dr. Fitzpatrick's wind speeds are relatively insubstantial, they may be artificially inflated and they suffer from compounding rates of error.

A. Dr. Fitzpatrick's Wind Speed Is Category 2 or Less; His Storm Surge Is Category 5

By his estimate, the wind forces at the McIntosh property hardly reached Category 2 strength, which, at worst, causes only "[s]ome damage to roofing, windows, and doors of buildings." (Fitzpatrick Rpt. [279-6] at 10, 24.) At all other times, the wind forces were of only Category 1 or tropical storm strength, causing, at the most, "[n]o real damage to building structures." (*Id.*) Though Dr. Fitzpatrick theorizes that "it's possible the sustained winds were even stronger" than he reports, (*id.* at 11), "[o]pinions 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). In contrast to his relatively insubstantial wind speed estimates, Dr. Fitzpatrick opines that the storm surge together with its waves was at the Category 5 "catastrophic" severity that causes "[m]ajor damage to lower floors of all structures less than 15 feet above sea level." (Fitzpatrick Rpt. [279-6] at 10, 24.) That description fits the McIntosh house to a tee.

In light of the catastrophic storm surge and waves and insubstantial wind speeds, it is unsurprising that Dr. Fitzpatrick co-authored a peer-reviewed published study concluding that storm surge was the dominant cause of structural damage in Mississippi during Katrina, not wind. (Eamon, Fitzpatrick & Dennis Rpt. (Ex. A) at 118-19.). According to Dr. Fitzpatrick and his co-authors, "***high wave action*** is perhaps ***the most severe structural load*** during the storm, and is ***the cause of most of the damage*** reported in this paper." (*Id.* at 118 (emphasis added).) In fact, the wave forces during

Hurricane Katrina reached four times the pre-storm FEMA estimate. (*Id.* at 126.) Winds "pose much less of a threat to structures than storm surge and wave action, which can produce loads orders of magnitude higher, and are severe enough in many cases to destroy entire structures." (*Id.* at 119.)

B. Dr. Fitzpatrick Artificially Inflates His Wind Speed Data

Dr. Fitzpatrick has a history of artificially inflating the wind speed data according to his subjective expectations of what the data should reflect. In *McIntosh*, his high wind gust value was 132 mph, *see* (Fitzpatrick *McIntosh* Rpt., Ex. C, at 8), whereas in his report here it is listed as only 120 mph. *See* (Fitzpatrick Rpt. [279-6] at 24.) When previously asked whether he made any adjustments to the wind data, Dr. Fitzpatrick admitted that the wind speeds – "whatever you want to say they are" – "got bumped up" because "we know the winds … have to be a little more." (Ex. B at 77:19-78:8.) Dr. Fitzpatrick fails to disclose which wind speed data he "bumped up," if not all of it. Data cannot be subjectively "bumped up" *post hoc* based upon a preconceived belief of what the data should be. Experts are not allowed to "simply pick[] the cause that is most advantageous to [the plaintiffs'] claim," *Viterbo*, 826 F.2d at 424, nor may an expert "assume[] as truth the very issue that [plaintiff] needs to ***prove*** in order to recover." *Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999) (emphasis in original). Rule 702 requires that an expert base an opinion on "sufficient facts or data," without which the opinion must be excluded. *See Hathaway*, 507 F.3d at 318; *Montgomery Cty. v. Microvote Corp.*, 320 F.3d 440, 448 (3d Cir. 2003); *In re TMI Litig.*, 193 F.3d 613, 697 (3d Cir. 1999); *Guillory v. Domtar Indus. Inc.*, 95 F.3d 1320, 1331 (5th Cir. 1996); *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 622-25 (S.D. Tex. 2005).

C. Dr. Fitzpatrick's Wind Data Suffer from Multiple Layers of Compounding Error

Even if Dr. Fitzpatrick did not inflate the wind data, his wind speeds suffer from multiple layers of compounding error. Since he did not rely on any raw wind data at the McIntosh house, he attempted to extrapolate using a series of conversions, each of which introduces an additional margin of error. Dr.

Fitzpatrick fails to acknowledge, explain, or remedy these errors, which render his methodology unreliable and his opinions speculative and inadmissible.

Specifically, Dr. Fitzpatrick resorted to instantaneous wind speed readings from dropsondes at 1,000 feet, (Ex. B at 90:19-22), between 500 and 1,000 feet, (Fitzpatrick Rpt. [279-6] at 12), and others between 800 and 1,200 feet, *id.* – which are usually dropped over water. He then subjected these data to several conversions that introduced compounding rates of error, none of which is disclosed in his report.

By failing to furnish these data conversions in his report, Dr. Fitzpatrick's report falls short of 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*). Based on what little is known about his calculations, it is evident that Dr. Fitzpatrick subjected his data to compounding rates of error.

First, these instant wind speeds had to be converted to sustained wind speeds, which requires deducting somewhere between 20% and 54% of the value. (Ex. B at 46:19-47:9; 79:18-80:9, 84:5-20; Fitzpatrick Rpt. [279-6] at 25.) Dr. Fitzpatrick fails to disclose what deduction percentage was used for any dropsonde and fails to justify using one deduction instead of another. This step introduces a range of mathematical error that undermines the reliability of his opinion.

Second, the sustained wind speeds at high altitude then had to be converted to wind speeds on the ground. (Ex. B at 90:6-14.) While Dr. Fitzpatrick apparently uses a 0.8 factor for sustained winds at 500 feet (though we cannot be sure because it has not been disclosed), he does not disclose any factors used for winds at 1,000, 1,200 feet, or any other altitude. *Id.* Nor does he disclose whether those high altitude speeds were ever converted to ground speeds. 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). This second step introduces even more mathematical error into his wind speed opinion.

Third, once the data were converted to sustained wind speeds at ground level, they then had to be converted from speeds at one part of the Gulf Coast to speeds at the McIntosh location. (Ex. B at 91:7-21.) Dr. Fitzpatrick offers no mathematical approach for this conversion, only subjective hunches of whether the final numbers "give consistent answers" and whether they "make sense." (*Id.* at 91:7-21.) "And that's more or less how I approached this problem." *Id.* But "the 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, and this third step greatly increases the rate of error for his wind speed opinion.

These errors render his methodology unreliable and his conclusions inadmissible. Under *Daubert*, courts should consider "the known or potential rate of error" of a particular scientific technique. 509 U.S. at 594. Under Rule 702, "***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*, 35 F.3d at 745) (emphasis and omission in original). Here, Dr. Fitzpatrick takes multiple missteps that each introduce unadjusted error. The multiple layers of error in his opinion reveal a yawning gap between his data and conclusion, which require an analytical leap based solely on his *ipse dixit* and should be excluded.

VII. DR. FITZPATRICK'S OPINION REGARDING "POSSIBLE" TORNADOES IS INADMISSIBLE

Dr. Fitzpatrick's opinion regarding tornadoes is speculative, unreliable, and inadmissible. To begin with, he relied on radar to determine whether there were mesocyclones, "a small fraction" of which may produce tornadoes. (Fitzpatrick Rpt. [279-6] at 16.) "Unfortunately," his study of

mesocyclones is "fraught with uncertainties" because the "mesocyclone algorithm" software in the radar was not developed for use during hurricanes. (*Id.*) Relying on the admittedly flawed methodology, Dr. Fitzpatrick further supposes that tornadoes may have been present somewhere "in the region," but "it's not possible to pinpoint a tornado impact" at the McIntosh location. (*Id.*) Such "[o]pinions merely expressing 'possibilities' do not suffice to support the admissibility of expert testimony." *Dunn*, 275 F. Supp. 2d at 681; *see Hammond*, 61 F. Supp. 2d at 539, 541. These vague statements have no "fit" with the facts at issue. Abstract propositions, untethered to any admissible opinions addressed to the property at issue, do not and cannot assist the trier of fact. Such opinions should be barred.

Whether tornadoes simply existed somewhere along the Gulf Coast is unhelpful to the factfinder. But Dr. Fitzpatrick can go no farther. He has "never tried to state whether a tornado occurred in a particular region or not" without direct evidence of physical impact, which was never confirmed along the Mississippi Gulf Coast. (Ex. B at 38:8-39:8.) And he has "never been one to even dwell on whether tornadoes or mesovorticies cause damage at a particular property other than just to say that we know they existed." (*Id.* at 40:18-25.) Ultimately, Dr. Fitzpatrick's opinion regarding tornadoes amounts to a mere suspicion based on a methodology fraught with uncertainty. "The courtroom is not the place for scientific guesswork, even of the inspired sort." *Rosen*, 78 F.3d at 319. No expert, "no matter how good his credentials," is permitted to speculate. *Goebel*, 215 F.3d at 1088. Dr. Fitzpatrick's opinion regarding the possibility of tornadoes is inadmissible.

CONCLUSION

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

This the 6th day of May, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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