

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

**MARK W. PALMER AND LESLIE G. PALMER** **PLAINTIFFS**

**V.** **CIVIL ACTION NUMBER: 1:07-cv-39-LG-JMR**

**STATE FARM FIRE AND CASUALTY COMPANY** **DEFENDANTS**

**MOTION TO DISMISS**

**COMES NOW** Defendant, State Farm Fire and Casualty Company, (hereinafter “State Farm”), by and through counsel, and for its Motion to Dismiss would show the Court as follows<sup>1</sup>:

**I. PLAINTIFFS ARE NOT ENTITLED TO RECOVERY UNDER THE HOMEOWNERS POLICY AND AS SUCH, DISMISSAL IS PROPER.**

- A. Plaintiffs have elected their remedy by claiming a total loss under the flood insurance policy and, therefore, cannot recover for a total loss under the homeowners policy.**

The Plaintiffs are estopped by the doctrine of election of remedies from pursuing further recovery under their homeowners policy. The Mississippi Supreme Court has observed that the “doctrine of election of remedies [is] defined as ‘the choosing between two or more different and co-existing modes of procedure and relief allowed by law on the same state of facts. *O’Briant vs. Hull* 208 So. 2d 784, 786 (Miss. 1968), *quoting Anaconda Aluminum Company v.Sharp* 243 Miss., 918, 136 So. 2d 585, 588 (Miss. 1962). This doctrine is applicable where an aggrieved party has two remedies by which he may enforce inconsistent rights growing out of the same transaction and being cognizant of his legal rights and of such facts as will enable him to make an intelligent

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<sup>1</sup>State Farm respectfully requests this Court waive the requirement of filing a separate brief in conjunction with the instant Motion as all authorities and arguments are cited herein.

choice, brings his action by one of the methods. *Id.* The *O'Briant* court further noted that certain conditions must exist before the election becomes operative: “(1) the existence of two or more remedies, (2) the inconsistencies between such remedies, and (3) a choice of one of them. 25 Am. Jur. 2d, *Election of Remedies* § 8 (1966)”. *Id.*

Plaintiffs’ property was fully insured for amounts known and accepted by the Plaintiffs under two separate contracts; the homeowners policy and the flood policy.

As can be seen by the attached policies, it is clear that one policy covers what the other excludes (i.e. the flood policy excludes among other things, loss caused “directly or indirectly by ... theft, fire, explosion, wind or windstorm” which are losses covered under the homeowner’s policy, and by contrast the homeowners policy specifically excludes losses that “would not have occurred in the absence of ...water damage,<sup>2</sup>” including flood which would clearly be covered by the flood policy). *See State Farm homeowners policy attached hereto as Exhibit “1”*. *See State Farm flood policy attached hereto as Exhibit “2”*.

Plaintiffs do not deny that they received the benefit of their choice of insurance coverage when their claim for proceeds as a result of a total loss by flood resulting from Hurricane Katrina was paid by State Farm pursuant to the flood policy. The flood and homeowners policies, by their terms, do not provide coverage for the same causes of loss, and therefore, recovery of policy limits under one of the policies requires Plaintiff to take a position that is irreconcilable to the recovery of policy limits under the other policy. This is particularly true here, when Plaintiffs’ position in regard to both policies is that of a total loss (i.e., in one instance Plaintiffs claim total destruction by flood, and in the next

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<sup>2</sup> This exclusion has been specifically upheld in *Tuepker v. State Farm and Casualty Company*, 2006 WL 1442489 (S.D. Miss. 2006) (slip copy).

instance Plaintiffs claim total destruction by wind). It is undisputed that Plaintiffs have in fact taken this inconsistent position. Plaintiffs have set forth in their Complaint that they are seeking to recover the full amount of coverage under the homeowners policy. *See Plaintiffs' Complaint, Docket No. [1]*. Thus, the fact that Plaintiffs seek to recover fully under the flood policy and fully the homeowners policy is improper as they are seeking to recover a windfall by attempting to recover twice for the same damage. *Id.*

Under Mississippi law, “where remedies pursued.... are repugnant and inconsistent, the election of one bars the other....” *Bunge Corp. vs. St. Louis Terminal Field Warehouse Co.*, 295 F. Sup. 1231, 1241 (N. D. Miss. 1969) *quoting* 28 C. J. S. Election of Remedies §8. Plaintiffs have, by claiming damages and accepting and retaining policy limits under the flood policy, taken the position that the total loss was a result of flood, a cause of loss expressly not covered by the homeowners policy. Consequently, because Plaintiffs have irrevocably elected to recover their total loss under the flood policy, they should be considered to have lost their alternative right to proceed with their claim under the homeowners policy against State Farm for the same loss.<sup>3</sup>

**B. Plaintiffs' claim for wind damage is a prior unrepaired loss and therefore is not recoverable under the homeowners policy.**

State Farm agrees that when there is a total loss which is covered pursuant to the terms and conditions contained in the policy that payment should be made pursuant to those same conditions. *Home v. Greene*, 229 So.2d 576 (Miss. 1969); *Britt v. Travelers Insurance Company*, 566 F 2d 1020 (5<sup>th</sup> Circuit 1978). What Plaintiffs' fail to consider, in their allegations against State Farm, is the fact that pursuant to the clear terms and

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<sup>3</sup> This finding is consistent with this Court's recent rulings in *Tejedor v. State Farm Fire and Casualty Company* Civil Action No. 1:05 CV 679-LTS-RHW (S. D. Miss) and *Sima Signature Lake L.P. v. Certain Underwriters at Lloyds London* Civil Action No. 1:06 CV 186 (S. D. Miss.).

conditions contained in the policy, as has been upheld by *Rhoden v. State Farm*, 32 F. Supp.2d 907 (S.D. Miss. 1998) aff'd 200 F. 3d 865 (5<sup>th</sup> Circuit 1999), *Boteler v. State Farm*, 876 So.2d 1067 (Miss. Ct. App. 2004); *Eaker v. State Farm*, 216 F. Supp.2d 606 (S.D. Miss. 2001); *Tuepker v. State Farm Fire and Casualty*, 2006 WL 1442489 (S.D. Miss. 2006) (slip copy), they did not sustain a total loss which was covered pursuant to the terms and conditions contained in the homeowners policy of insurance issued to them by State Farm. See homeowners policy attached as Exhibit "1", Section I-Losses Not Insured, par. 2(c).

While State Farm is aware that this Court has recently ruled the anti-concurrent causation language found in Paragraph 2 of Section I-Losses Not Insured of the homeowners policy to be ambiguous, it should be noted that inasmuch as that decision is on appeal, that portion of the policy was in effect at the time Plaintiffs loss was adjusted and remains part of the policy at issue and according to Mississippi case law, is applicable and unambiguous until such time as all appeals related to this Court's decision in *Tuepker* are exhausted. *Leonard v. Nationwide*, 438 F. Supp.2d 684 (S.D. Miss. 2006); *Rhoden v. State Farm*, 32 F. Supp.2d 907 (S.D. Miss. 1998) aff'd 200 F. 3d 865 (5<sup>th</sup> Circuit 1999), *Boteler v. State Farm*, 876 So.2d 1067 (Miss. Ct. App. 2004); *Eaker v. State Farm*, 216 F. Supp.2d 606 (S.D. Miss. 2001); *Tuepker v. State Farm Fire and Casualty*, 2006 WL 1442489 (S.D. Miss. 2006) (slip copy).

In the present case, Plaintiffs have made a claim in their Complaint that Hurricane Katrina completely destroyed their home. Plaintiffs allege that they are entitled to recover fully under their homeowners policy for the total loss of their home. This is, of course, in addition to recovery of policy limits under the flood policy for a total loss to

the dwelling and contents resulting from flood. Plaintiffs' position is incorrect.

Even, assuming *arguendo*, that the home suffered wind damage prior to the total destruction of the home by flood water, Plaintiffs are still not entitled to recovery of the alleged wind damage. In *SCAC Transport (USA) Inc., v. Atlantic Mutual Insurance Co.*, 652 F. Supp. 1091 (S.D. N.Y. 1987), the court addressed a very similar situation as the one presented in this matter, albeit in a maritime context where the property at issue was a shipment of cargo. The shipper secured two policies of insurance with regard to the cargo, one which was billed as an "All Risks" policy and the other which was a "War Risks" policy. The "All Risks" policy included an exclusion titled "Free of Capture & Seizure Warranty", which exempted losses which resulted from capture, seizure, confiscation, et cetera. The "War Risks" policy provided similar exclusions, but also provided that it ceased all coverage with the exception of torpedo attacks or mine damage once the cargo was discharged from the vessel of transport. *Id.* at 1093. Due to the political climate which plagued the Middle East during this time, the subject cargo suffered an eventful trip which resulted in the cargo being lost, recovered and then severely damaged. Subsequently, there was some conversation between the shipper and the courier regarding the location and final destination of the cargo, however, ultimately, the cargo was confiscated by the Iranian Customs Authority. There is no dispute between the parties that the ultimate total loss of the property was due to an excluded event. Rather, the crux of the dispute is whether SCAC would be entitled to recover for the damage the cargo sustained for the covered loss prior to the total loss affected by the Iranian Customs.

The court found that SCAC would not be entitled to recover for the prior covered

loss. Interestingly, the court notes that this issue is a novel one, and thus, the United States District Court for the Southern District of New York consulted English law for guidance. Specifically citing *Livie v. Janson*, 12 East. 648 (1810) and *British and Foreign Insurance Co., Ltd. v. Shipping Co., Ltd.*, I.A.C. 188 (H.C. 1921), the court found a prior unrepaired loss merged into the total loss preventing recovery of the prior unrepaired loss. The court found this to be the law even in the event a covered loss was responsible for the final excluded event which resulted in the total loss.

The conclusion the court reaches in *SCAC*, based upon the cases cited therein, is that an insured is not entitled to recovery of a prior unrepaired loss, as that would result in a windfall for the insured. *Id.* at 1096. The court reasoned, that “whether or not” the partial damage would have occurred, the total loss event would have still occurred. *Id.* Thus, the insured **suffers no loss as a result of the prior loss** due to the fact that ultimately the property is totally lost to the subsequent event. “To allow (the insured) to recover...would, thus, be to award a windfall recovery to a plaintiff whose loss resulted from an uninsured risk.” *Id.*

In *State Farm Fire & Casualty Co. v. Griffin*, 888 S.W.2d 150 (Tex.App. 1994), the court addressed a situation wherein the plaintiffs’ home suffered first a flood loss and subsequently, a loss caused by fire. Plaintiffs recovered under their flood policy for the loss due to water damage, \$31,999.36. Nine months later, the plaintiffs’ home sustained a fire loss. The State Farm adjuster determined that the total loss to the house amounted to \$59,547.98. The adjuster deducted the prior unrepaired flood damage, which she calculated at \$16,978.75 and issued a check to the plaintiffs for the remainder. The subject lawsuit followed as plaintiffs asserted that they were entitled to the full amount of

damage to the home including the unrepaired flood damage.

Ultimately, the court determined that an insurance contract is one of indemnity and under same, an insured is entitled only to receive coverage for the amount of his actual loss. *Id.* at 157; *see also Commercial Union Ins. Co. v. Stanmike Inv. Co.*, 475 S.W. 2d 295, 298 (Tex.Civ.App.-Waco 1971, *writ ref'd n.r.e.*). The court further noted that the plaintiffs failed to repair \$16,978.75 of the prior damage and as such, were not entitled to recover on that loss a second time as they did not lose that amount a second time. *Griffin* at 157. Specifically, the court said:

It was legally permissible for State Farm to subtract from the [total damage] the [prior unrepaired damage] as that figure represented the actual cash value of the unrepaired damage from the prior loss, and to tender the Griffins [the remaining amount]-because for State Farm to have offered the Griffins more would have exceeded the scope of State Farm's contractual obligations to the Griffins in two respects: it would have allowed the Griffins to recover twice for a loss they incurred only once, and would have allowed the Griffins to recover under the homeowners' policy for a flood loss, which was a type of loss expressly excluded from coverage under the homeowners' policy. *Id.*

Similarly, consider an event where the subsequent loss was not an excluded loss but rather that wind had damaged the home, and then prior to the damage from the wind being repaired, the home was completely destroyed by fire. In such an instance, the insured would not be entitled to recover for property that was wind damaged, and then to recover a second time for that same property which was destroyed by the subsequent fire loss which produced a total loss to the dwelling, including that property previously damaged by windstorm but never repaired. *State Farm Fire and Casualty Company v. Griffin* 888 S.W.2d 150, 156-157 (Ct.App.TX 1994); *Kuppersmith v. Delaware Ins. Co.*, 86 A. 399 (Crt. Errs. and App. N.J. 1913). In order to allow the insured to recover under

that principal would allow the insured to recover twice for the same loss. The only difference in the Plaintiffs' position, is that in Plaintiffs' case the total loss was caused by an excluded event. The fact that the total loss was caused by an excluded event does not entitle Plaintiffs to recover for the prior unrepaired damage. To allow such would set a precedent which would allow an insured to recover twice for the same loss. *Id.*

In the present case, Plaintiffs have recovered for the damage to their home under the flood policy for a total loss. Thus, the Plaintiffs are seeking to recover damages under their homeowners policy for a total loss for which they have already been compensated by their flood policy. Just as in *Griffin*, if State Farm were forced to pay Plaintiffs for a total loss to their home under the homeowners policy, Plaintiffs would receive a windfall in that they would receive a double recovery for a total loss only suffered once, and one for which they had been fully compensated under their flood insurance policy. Additionally, just as in *Griffin*, such a result would force State Farm to pay for a loss which Plaintiffs homeowners policy specifically excluded. State Farm maintains that Plaintiffs have recovered for their alleged total loss under their flood policy and therefore, cannot recover for the same total loss under the homeowners policy.

This result, and State Farm's position, is supported by the State Farm homeowners policy issued to Plaintiffs. *See homeowners policy attached as Exhibit "1", Section I-Losses Not Insured, par. 2.* The portion of the policy contained in Section I-Losses Not Insured Paragraph 2, is commonly referred to as the "anti-concurrent causation" language. It is clear that the policy contemplates a situation where there may be two or more losses to property. Pursuant to the terms and conditions of the policy, irrespective of the timing of the losses, or the number of said losses, if but one of those

causes of loss is excluded pursuant to Paragraph 2, then the entire loss is excluded. Here, the reality of Plaintiffs' allegations mean that even if Plaintiffs were successful in proving that a specific portion of their property was damaged by wind to a particular degree prior to the arrival of the water, because water was in the chain of causation of the destruction of the property, including that portion damaged by wind, then the loss is not covered.

It is clear that common law and common sense lend credence to State Farm's position here, and in *Tuepker*, that the anti-concurrent causation should both be upheld and applied, despite the fact that the result of doing so leads to a disagreeable conclusion to a very serious and unfortunate circumstance for the Plaintiffs, and many other Mississippians. Any other result is simply not logical under the insurance policy as written and under the applicable law. Thus Plaintiffs' claims regarding the prior wind damage are inapplicable under the law.

Furthermore, State Farm would assert that the real issue is the fact that Plaintiffs have elected their remedy when they claimed a total loss under their flood insurance policy, admitting that the home was a "total loss" as a result of flooding. This is evidenced by the claim made by Plaintiffs under their flood policy and their acceptance of their flood policy dwelling limits in the amount of \$191,500.00 and contents coverage in the amount of \$86,200.00. *See Exhibit "2."* According to Plaintiffs' actions with regard to acceptance of the flood insurance money, the home could not have been a total loss caused by wind. As a result of Plaintiffs' decision to accept the flood insurance proceeds as payment for the total loss of their home, they have chosen their remedy, electing that the primary cause of damage to their residence was water damage, as covered by the applicable flood policy, but however, excluded by the applicable

homeowners policy.

By virtue of this admission, Plaintiffs cannot recover for wind damage, as the total loss to the home was contributed to by an excluded event. State Farm would further assert under the above argument, that once State Farm has proven that Plaintiffs home was destroyed by water, which is a cause of loss not insured under the terms and conditions contained in the homeowners policy, that there is nothing further to litigate. Here, Plaintiffs have conceded that their home was destroyed by flood by claiming that they sustained a total loss by flood entitling them to payment pursuant to the flood policy. Therefore, State Farm respectfully requests that this Court enter Judgment in its favor, and dismiss this case in its entirety.

**IV. PLAINTIFFS ARE EQUITABLY ESTOPPED FROM ASSERTING A CLAIM UNDER THEIR HOMEOWNERS POLICY AS A RESULT OF THEIR ACCEPTANCE OF THE FLOOD INSURANCE PROCEEDS.**

Plaintiffs are equitably estopped from asserting that their total loss was the result of any occurrence other than flood as that term is defined in their flood policy. "Equitable estoppel requires three elements: '(1) Belief and reliance on some representation; (2) Change of position as a result thereof; (3) Detriment or prejudice caused by the change of position.'" *Lauderdale County School District*, 24 F. 3d 671 (5<sup>th</sup> Cir. 1994) (quoting *Suggs v. Town of Caledonia*, 470 So.2d 1055, 1057 (Miss.1985) (cite omitted)). Under Mississippi law, equitable estoppel is "defined generally as the principle by which a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed." *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483, 492 (Miss. 2005)

(quoting *Dubard v. Biloxi H.M.A., Inc.*, 778 So.2d 113, 114 (Miss. 2000)). “Equitable estoppel applies to parties who take inconsistent positions.” *Lauderdale County School District*, at 692. Plaintiffs have taken the position that their total loss following Katrina was a result of flood by accepting and retaining from the United States, the flood policy limit for dwelling. Plaintiffs now claim that they are entitled to policy limits for both dwelling and contents under their homeowners policy for the same damages. *See Plaintiffs’ Complaint, previously filed with this Court, Docket No. [1]*. Under the law, the Plaintiffs are estopped from taking the position that their loss was not the result of flood for the following reasons.

**A. Plaintiffs’ position is against the federal mandate of the NFIP and the SFIP.**

Plaintiffs are equitably estopped from taking such a position because to do so would affect a recovery from the United States Treasury based on a cause of loss for which Congress did not appropriate funds. If Plaintiffs are allowed to maintain this position, they void the basis for their recovery of policy limits under their flood policy, specifically, that their loss was a direct physical loss resulting by or from flood. The ramifications of allowing Plaintiffs to maintain that their home was destroyed by “violent and tornadic winds associated with Hurricane Katrina,” are serious and affect numerous parties. *See Plaintiffs’ Complaint ¶¶ 8, Docket No. [1]*.

First, the United States Government would be compelled to seek recoupment of the erroneous payments under the flood policy from Plaintiffs. There is no question that the United States government is entitled to recover amounts erroneously paid under the

National Flood Insurance Program.<sup>7</sup> *See United States v. Fowler*, 913 F.2d 1382, 1385-1386 (9th Cir. 1990); (United States entitled to recover NFIP policy proceeds payments erroneously paid to insured whose property was ineligible for NFIP coverage; neither estoppel nor waiver applied because "if we were to permit [the insureds] to estop the United States, we would be permitting them to retain public funds that Congress had not appropriated" and "[u]nder federal law, it is clear that the flood examiner's error did not waive the United States right to reimbursement"); *Borges v. FEMA*, 1992 WL 425238, at \*2-4 (D.P.R. Oct. 19, 1992) (in insured's action contesting denial of coverage under NFIP policy, FEMA counterclaimed to recover funds mistakenly paid on prior loss; held: "the United States has a right to reimbursement for payments made erroneously to a claimant under a NFIP policy" (citing *Fowler*) and therefore erroneous payments must be offset against other payable losses). Also, recoupment would be had against State Farm for its 3.3% commission on the flood payment. 44 C.F.R. pt. 62, App. A., Art. III (1).

The second ramification resulting from allowing Plaintiffs to maintain that their total loss was neither caused by nor contributed to by storm surge concerns the following language contained in Plaintiff's flood policy (as in all SFIP policies):

....

**VII. General Conditions**

....

- B. Concealment or Fraud and Policy Voidance**
  - 1. With respect to all insureds under this policy, this policy:**
    - a. Is void;**

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<sup>7</sup>Apparently it is common for the government to do so in appropriate cases. *See The News-Press v. United States Dep't of Homeland Security*, 2005 WL 2921952, at \*18 (M.D. Fla. Nov. 4, 2005) (noting that "FEMA records show more than 6,500 recoupment letters seeking to recover more than \$27 million in benefits mistakenly paid by FEMA" following 2004 Florida hurricanes.)

- b. Has no legal force or effect;
- c. Cannot be renewed; and
- d. Cannot be replaced by a new **NFIP policy**;

if, before or after a loss, you or any other insured or your agent have at any time:

- (1) intentionally concealed or misrepresented any material fact or circumstance;
- (2) Engaged in fraudulent conduct; or
- (3) Made false statements;

relating to this policy of any other **NFIP** insurance.

- 2. This policy will be void as of the date the wrongful acts described in **B.1.** above were committed.
- 3. Fines, civil penalties, and imprisonment under applicable Federal laws may also apply to the acts of fraud or concealment described above.
- 4. This **policy** is also void for reasons other than fraud, misrepresentation, or wrongful act. This **policy** is void from its inception and has no legal force under the following conditions:
  - a. If the property is located in a community that was not participating in the **NFIP** on the **policy's** inception date and did not join or reenter the program during the **policy** term and before the loss occurred; or
  - b. If the property listed on the **application** is otherwise not eligible for coverage under the **NFIP**.

....

Consequently, Plaintiffs' current position would void their flood policy and violate federal laws including the SFIP itself. *See* 44 C.F.R. Pt. 61 A. pp. A (all terms and conditions of an SFIP are mandated and controlled by the NFIA and Federal regulations); *see also*, Federal False Claims Act, 31 U.S. C. §§ 3729-3333; *see also*, 18 U.S.C.A. §1001 (providing federal criminal penalties for false statements).

**B. Plaintiffs' position results in a windfall in Plaintiffs' favor which is not acceptable under Mississippi law.**

Plaintiffs are also equitably estopped from asserting that their total loss was the result of any occurrence other than flood because to allow otherwise could result in a

recovery well in excess of the value of the insured property.<sup>8</sup> The property was insured under Plaintiffs' homeowners policy for \$231,500.00 and under the flood policy for \$173,625.00. Plaintiffs have received the flood policy limit for the home. Thus, it is a well acknowledged principle of general insurance law that a contract of indemnity such as a homeowners insurance policy does not entitle the insured to recover in excess of the actual value for the loss sustained so as would place him or her in a better financial condition as he or she would have been in if there had been no loss. *Couch on Insurance* 3<sup>rd</sup> Ed. § 175; 6 (2005).<sup>4</sup> Based upon this well established principle Plaintiffs cannot recover fully under both policies.

This Court has recently considered the effect of a plaintiff receiving policy benefits under a flood policy and the plaintiff's contractual claims for policy limits under his homeowners policy. In *Tejedor v. State Farm Fire and Casualty Company*, Civil

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<sup>8</sup> "The law abhors duplicity of recoveries, and a Plaintiff.... is, for the most part, entitled to be made whole, not enriched." *Am Jur 2d Ed. May 2006 Compensatory Damages. See EEOC v. Waffle House, Inc.* 122 S. Ct. 754, 766 (2002) ("goes without saying that the courts can and should precluded double recovery by an individual"). In fact, it is well understood that (aside from the issue of punitive or additional statutory damages) a Plaintiff is entitled only to be made whole for the losses actually suffered-not to be enriched. *Il. C. Rail Road Company v Crial* 50 S. Ct. at 181; *MO Pac. R. Comp. v. H. Rouw Comp.* 258 F. 2d 445, 446-447 (5<sup>th</sup> Cir. 1958)(recovery should not exceed indemnity). "A party is not entitled to a recovery of damages if it would constitute a windfall or 'double recovery'" *CIBA- GEIGY Corp. v. Murphree* 653 So. 2d 857, 873 Ms. 1994.

The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an injured party for a loss and, therefore, that the judicial machinery should not be engaged in shifting a loss in order to create such a economic waste. *See, eg., 4 G. Palmer, Law of Restitution*(1978 and Sup. 1997) §23.15, p. 147.

<sup>4</sup> *See also, Lee v. Royal indemnity Company* 108 F. 3d 651, 656(6th Cir. 1997) (insured is limited to one recovery where insured has bought two insurance policies covering the same risk or property); *Buell v. American Universal Insurance Comp.* 224 Conn. 766, 774, 621 A. 2d 262, 267 (1993) ("It is a time honored rule that an injured party is entitled to full recovery only once for the harm suffered. An insured may not recover double payment of damages under over lapping insurance coverage."); *Sharpe v. Nationwide Mutual Fire Insurance Comp.* 62 N. C. App. 564, 567 302 SE 2d 893, 895 (N.C. Ct. App. 1983), Cert. Denied, 309 N. C. 823, 310 SE. 2d 353 (1983) (Plaintiff who had paid premiums on two policies covering the same property was only entitled to recover the actual value of the property); *American Dredging Comp. v. Federal Insurance Comp.* 309 F. Supp. 425, 428 (So. D. NY. 1970) ("the insured is entitled to recover only once for the same loss").

Action No. 1:05cv679, this Court observed that where the plaintiff received \$200,000.00 in flood limits for his residential dwelling which appraised at a value of \$280,000.00 to \$285,000.00 prior to Katrina, “his maximum loss is measured by the difference between the pre-storm value and the insurance benefits he has collected to compensate him for the loss of his dwelling...These same indemnity principles would govern the maximum amount the Plaintiff may recover for the loss or destruction of his personal property during the storm.” This Court further opined:

The Court uses this occasion to rule that the Plaintiff’s actual loss is the maximum recovery he may receive from all applicable policies of insurance for both his dwelling and personal property. Insurance contracts insure only against covered losses, and it is a basic proposition that “[i]nsurance law is based on the principle of indemnification and is aimed at reimbursement. The benefit derived from insurance should be no greater in value than the loss.” *Estate of Murrell v. Quin*, 454 So.2d 437, 444 (Miss. 1984)(Prather, J., dissenting)(general discussion in case dealing with insurable interests; citations omitted). These well-established principles of indemnity and insurable interests apply to all insurance claims under policies that are not “valued policies.” *See, e.g., Miss. Code Ann. § 83-13-5. Cf. Chauvin v. State Farm Fire and Casualty Co.*, 2006 WL 2228946 (E.D. La. 2006); *State Farm Fire & Casualty Co.*, 888 S.W.2d 150 (Tex.App. 1994).<sup>9</sup>

*Id.*

Subsequently, this Court reiterated that “a policyholder’s right to recover insurance proceeds is always limited, by the indemnity principal [sic], to his actual covered losses.” *Sima Signature Lake L.P. v. Certain Underwriters at Lloyds London* Civil Action No. 1:06 CV 186 (*slip opinion*)(citing *Tejedor v. State Farm Fire and Casualty Company*, Civil Action No. 1:05cv679; *Gemmill v. State Farm Fire and Casualty Company*, Civil Action No. 1:05cv692). To allow Plaintiffs to maintain the

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<sup>9</sup>Even following the clear language from this Court’s ruling in the *Tejedor* matter, the persistent and obstinate claims of entitlement to full policy limits under homeowners policies when policy limits under a corresponding flood policy have already been paid has and will continue to unnecessarily stymie efficient handling of the numerous cases before the Court as has already been shown through unsuccessful court ordered mediations.

current position would in essence allow them to recover for the same damages twice. Under the law, this is not allowed.

**C. Plaintiffs' are estopped from recharacterizing their previously determined flood damage as wind damage.**

Additionally, Plaintiffs are equitably estopped from asserting that their total loss was the result of any occurrence other than flood because to allow Plaintiffs to claim otherwise would be tantamount to allowing them to re-characterize as wind damage those losses for which they accepted the dwelling policy limit under their flood policy. This Court created this estoppel argument in *Sima Signature Lake, supra*, “[w]here one insurer, in this instance the flood insurer, has settled an insured’s claim by paying policy limits, the insured may be estopped from recharacterizing, as wind damage, losses for which he has excepted flood insurance compensation.” *SIMA/Signature Lake, L.P. v. Certain Underwriters at Lloyds London*, 1:06cv186-LTS-RHW, Mem. Opinion [34], p. 3.

Plaintiffs are equitably estopped from asserting that their dwelling loss was a result of any occurrence other than flood because they have received the dwelling policy limit under their flood policy which can only be paid for losses covered by said policy, because they have been indemnified for their total loss and because it would result in Plaintiffs re-characterizing as wind damage losses for which they have already been compensated as flood damage. As a result, Plaintiffs are estopped from asserting a claim for coverage under their homeowners policy.

**V. PLAINTIFFS ARE NOT REAL PARTIES IN INTEREST DUE TO THEIR ASSIGNMENT OF PROCEEDS TO THE SBA.**

Plaintiffs filed for a disaster loan with the Small Business Administration (hereinafter “SBA”). As part of the SBA loan process, the Plaintiffs executed an assignment which assigned “any and all moneys now due or to become due to me from State Farm (Home) under Policy No. 24-14-3005-3 for damages occurring on or about August 29, 2005 as a result of a (an) Hurricane Katrina.” *See Exhibit “3” – Assignment of Proceeds*. Accordingly, Plaintiffs agreed to remit and assign compensation from other sources to the SBA which includes “proceeds of policies of insurance or other indemnifications” and “claims for civil liability against other individuals, organizations or governmental entities.” This includes past and future compensations for disaster damage. The SBA further requires that the borrower notify SBA of the existence of any claim or application for compensation, and of the receipt of any such compensation and further requires that the borrower assign to the SBA the proceeds of any such compensation. *See Loan Authorization and Agreement attached hereto as Exhibit “4”<sup>5</sup> and, the United States Statement of Interest filed in Woullard v. State Farm Fire and Casualty Company, attached hereto as Exhibit “5.”* This effectively assigned the Plaintiffs’ rights to insurance proceeds under their State Farm homeowner’s policy to the Small Business Administration.

This assignment of insurance proceeds is required by the federal law which governs the SBA Home Disaster Loan program. *See* 15 U.S.C. §636(b) (the SBA is authorized to make loans that are necessary and appropriate to repair and replace property which is damaged or destroyed by a disaster if the damage or destruction is not covered

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<sup>5</sup> State Farm has attached a redacted version of the Loan Authorization and Agreement, as currently it is not in possession of the documents executed by Plaintiffs. However, it is standard SBA procedure to require that the attached documents are completed along with the Assignment of Proceeds, and therefore, upon information and belief, State Farm asserts Plaintiffs executed documents identical to the ones produced herein.

by insurance) and 13 CFR Ch. 1 Subpart B – Home Disaster Loans §123.101 (an individual is not eligible for a home disaster loan if the damaged property may be repaired or replaced with the proceeds of insurance – the amount must be deducted from the claimed loss or the proceeds must be repaid as principal payments).

It appears the assignment was determined not to apply to the recovery of Additional Living Expenses that were disbursed to the Plaintiffs by State Farm. *See Exhibit “3” – Assignment of Proceeds*. The Parties did not, however, except any other claim from the assignment.

On January 16, 2007, the Plaintiffs filed the present action against State Farm to recover moneys they claim are due to them under the Homeowners Policy. Specifically, Plaintiffs claim that they are the maximum amount of coverage under the homeowners policy for both dwelling coverage and contents coverage. *See Plaintiffs’ Complaint, [Docket No. 1]*.

Plaintiffs are precluded from bringing any claim against State Farm because Plaintiffs have assigned the allegedly due benefits, i.e. additional payments under their State Farm policy for Katrina-related property damage, to the United States Small Business Administration (“SBA”). Plaintiffs’ SBA assignment means that they are not a real party in interest under Federal Rule of Civil Procedure 17 (“every action shall be prosecuted in the name of the real party in interest”) and deprives them of the requisite standing to bring this claim against State Farm. Therefore, Defendant would assert that this Court lacks **subject matter jurisdiction** and that dismissal of this action is proper.

**A. PLAINTIFFS ARE NOT REAL PARTIES IN INTEREST.**

All claims against State Farm are derived from the breach of contract claim. There was no specific reservation of any rights under the assignment to the SBA except that of Additional Living Expenses and the aforementioned real property claim. If the claim is assigned, State Farm does not owe the Plaintiffs any duties which are based on that claim. *See EB, Inc. v. Allen*, 722 So.2d 555, ¶ 33 (Miss.1998) (“the only way [Plaintiff] can claim he is owed anything on the Allen note is if he can show that his assignment was only a partial or collateral assignment and that therefore he retained some interest in the note on which to be paid . . . there is no limiting or qualifying language in this assignment that indicates it is a partial assignment intended only as collateral security”), and *Great Southern National Bank v. McCollough Environmental Services, Inc.*, 595 So.2d 1282, 1287 (Miss. 1992) (citing 6A C.J.S. Assignments §73 saying “[a]s a general rule, a valid and unqualified assignment operates to transfer to the assignee all the right, title, or interest in the thing assigned.”).

Plaintiffs have ceded their alleged rights to further proceeds under the insurance policies covering damage to their house. Specifically, the assignment executed by Plaintiffs, would have assigned to the SBA any and all monies now due or to become due to Plaintiffs for damages occurring on or about August 29, 2005 as a result of Hurricane Katrina under the applicable policies of insurance excepting only recoveries for additional living expenses and the noted \$17,000.00 payment already made.<sup>6</sup> *See*

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<sup>6</sup> Because this motion challenges Plaintiffs’ standing to bring a claim against State Farm, this Court may properly go beyond the pleadings in addressing it. As the Fifth Circuit has recognized, standing “goes to the ‘case or controversy’ limitation on federal court jurisdiction.” *Barrett Computer Services v. PDA, Inc.* 884 F.2d 214, 218 (5<sup>th</sup> Cir. 1989). In examining a factual challenge to subject matter jurisdiction, the court may properly “weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case” and “may consider matters outside the pleadings, such as testimony and affidavits.” *Krim v. pcOrder.Com, Inc.* 402 F.3d 489, 494 (5<sup>th</sup> Cir. 2005); *Seal v. Gateway Companies, Inc.*, No. 01-1322, 2001 WL 1018362 at \*4 (E.D. La. Sept. 4, 2001). In the alternative, the Court may address real party in

*generally, SBA assignment.* Further, the SBA loan received by Plaintiffs “is limited to disaster loans that are not compensated by other sources.” *See* Exhibit “4”, ¶ 7(A). Those “sources” include, but are not limited to, “proceeds of policies of insurance or other indemnification. . . [and] claims for civil liability against other individuals, organizations or governmental entities.” *See* Exhibit “4”, ¶ 7(A). Plaintiffs have assigned any rights to their claim(s) to the SBA and therefore have no standing to bring the current action, and as such, Plaintiffs’ claims against the Defendant should be dismissed. Federal Rule of Civil Procedure 17 provides in pertinent part that “every action shall be prosecuted in the name of the real party in interest.” *Fed. R. Civ. P.* 17(a). The “real party in interest” is the person holding the substantive right sought to be enforced.” *Wieburg v. GTE Southwest, Inc.*, 272 F.3d 302, 306 (5<sup>th</sup> Cir. 2001). It is elemental that “[i]f a plaintiff lacks Article III standing, then a federal court lacks jurisdiction to hear the complaint.” *Delta Commercial Fisheries Assn. v. Gulf of Mexico Fishery Mgmt. Council*, 364 F.3d 269, 272 (5<sup>th</sup> Cir. 2004). Moreover, “[t]he Article III doctrine of standing exists, in part, to prevent a litigant from raising another’s legal rights.” *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). Accordingly, a person who is not a real party in interest has no right of his own to assert and lacks standing to prosecute a suit. *See United States v 936.71 Acres of Land*, 418 F.2d 551, 556 (5<sup>th</sup> Cir. 1969).

A right to receive money due or to become due under an existing contract may be assigned but it has been long held that a valid assignment of a debt or contract conveys the entire interest of the assignor to the assignee and thereafter the assignor has no

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interest issues by converting the motion to one for summary judgment. *See Delor v. Intercosmos Media Group, Inc.*, 232 F.R.D. 562, 563 (2005) (Barbier, J.)

interest therein. *Merchants and Farmers Bank of Meridian v. McClendon*, 220 So.2d 815, 821 (Miss. 1969); *International Harvest Co. v. Peoples Bank & Trust Co.*, 402 So.2d 856, 861 (Miss. 1981).

The SBA has the right to assert the assignment as the SBA “stands in the shoes” of the assignor and acquires all rights, interests, and remedies available to the assignor. *Southern Miss. Planning and Development District v. Alfa General Insurance Corp.*, 790 So.2d 818, 820 (Miss. 2001); *see also Allianz Life Ins. Co. of North America v. Riedl*, 444 S.E.2d 736 (Ga. 1994) (insureds assigned to medical providers of right to recover benefits under policy divested insured of right to bring action against insurer); *Steven R. Ward, Inc. v. United States Fidelity & Guaranty Co.*, 681 F.Supp. 389, 397 (S.D. Miss. 1988) (mortgagee had no interest in litigation after assigning interest and claims to plaintiff).

Here, the plaintiffs seek to prosecute an action for a potential recovery that is currently assigned to the SBA. Plaintiffs are not “a real party in interest”, thus this Court does not possess jurisdiction to render judgment in this action for the damages Plaintiffs seek from State Farm. Plaintiffs’ claim must be dismissed.

**B. PLAINTIFFS’ MISTAKE WAS NOT REASONABLE.**

*Fed. R. Civ. P. 17* requires this Court dismiss this action if not brought in the name of the real party in interest after reasonable time has passed to join the real party in interest, here the SBA, or have the SBA ratify. Rule 17 provides “[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.” However, this

provision is only applicable when the plaintiff's choice to bring suit in its own name is "the result of an understandable mistake, because the determination of the correct party to bring the action is difficult." *Wieburg*, 272 F.3d at 308.

Here there is no basis for finding that Plaintiffs' action has continued as a result of a reasonable mistake. Plaintiffs filed this action against State Farm in December of 2006. Plaintiffs had previously, presumably, assigned to the SBA, willingly and knowingly, "all moneys now due or to become due to [Plaintiffs] from State Farm..." under Plaintiffs' policy. Plaintiffs have continued to prosecute this action despite the SBA assignment it knowingly made. This is no mistake and warrants dismissal of the action.

Plaintiffs cannot rest their claim to relief on the legal rights or interests of third parties. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The decision to assign the insurance proceeds to the SBA was a personal choice of the Plaintiffs and where a personal choice "occasion[s] [Plaintiffs] standing problems" and was not the result of reasonable mistake this Court, under Rules 17 and 19 has the discretion and authority to dismiss this action. *Lans v. Digital Equipment Corp.*, 252 F. 3d 1320, 1328-29 (Fed. Cir. 2001). In fact, because the mistake was not reasonable and the real party in interest has not ratified nor joined this Court does not possess subject matter jurisdiction and the action **must** be dismissed.

### C. **ADDITIONAL LIVING EXPENSES CANNOT BE COLLECTED.**

Additionally, the Plaintiffs have made a claim for Additional Living Expenses. Though Plaintiffs' SBA assignment reserves payments for ALE<sup>7</sup>, Plaintiffs' insurance contractual right to pursue a claim for ALE does **not** exist absent Plaintiffs' right to

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<sup>7</sup> The "Assignment of Insurance Proceeds" states "The insured and SBA agree that this assignment shall not apply to recoveries for additional living expenses, and checks issued solely for this purpose need not name the SBA as payee." See *Assignment of Insurance Proceeds, Exhibit "3"*.

pursue a claim for a covered loss. Plaintiffs are barred from pursuing a claim for a covered loss because Plaintiffs are not the real parties in interest.

Under the policy terms ALE is due, “[w]hen a Loss Insured causes the residence premises to become uninhabitable...” *See Exhibit “1”, State Farm Insurance Policy, COVERAGE C – LOSS OF USE, ¶ 1.* In other words, to be eligible for ALE, Plaintiffs must prove they have a “Loss Insured”. This Court does not possess jurisdiction to hear evidence from Plaintiffs purporting to prove a “Loss Insured” because Plaintiffs are not the real parties in interest to this action. Since Plaintiffs are not the real parties in interest to payment for a “Loss Insured”, Plaintiffs’ ALE claim, likewise, must be dismissed.

**D. PLAINTIFFS ARE NOT ENTITLED TO A PUNITIVE DAMAGES CLAIM OR ATTORNEYS’ FEES.**

Mississippi law is clear that the plaintiff must have suffered some actual damages for punitive damages to be awarded. *See Ross v. Deposit Guaranty National Bank of Jackson, Miss.*, 400 F.Supp. 45 (S.D.Miss. 1974); *T.G. Blackwell Chevrolet Co. v. Eshee*, 261 So.2d 481, 485 (Miss. 1972); *Defenbaugh & Co. of Leland, Inc. v. Rogers by and through Thompson*, 543 So.2d 1164 (Miss. 1989). Furthermore, in the absence of an award of actual and punitive damages, there exists no basis for an award of attorneys’ fees and expenses. *See Soblely v. Southern Natural Gas Company*, 302 F.2d 325, 343 (5<sup>th</sup> Cir. 2002).

As the Plaintiffs have assigned their interests to the SBA, they no longer have an interest in the action and absent an interest in the filed action against State Farm, the Plaintiffs are not entitled to actual damages as a result of the storm. *Indiana Lumbermens’ Mutual Ins. Company v. Curtis Mathes Manufacturing Company*, 456 So.2d 750 (Miss. 1984) (assignee steps into the shoes of the assignor and acquires the

assignor's rights); *Southern Miss. Planning and Development District v. Alfa General Insurance Corp.*, 790 So.2d 818, 820 (Miss. 2001); *see also Allianz Life Ins. Co. of North America v. Riedl*, 444 S.E.2d 736 (Ga. 1994) (insureds assigned to medical providers of right to recover benefits under policy divested insured of right to bring action against insurer); *Steven R. Ward, Inc. v. United States Fidelity & Guaranty Co.*, 681 F.Supp. 389, 397 (S.D. Miss. 1988) (mortgagee had no interest in litigation after assigning interest and claims to plaintiff). Thus, the Plaintiffs cannot be entitled to punitive damages and/or attorneys fees and expenses. *See Sobley, supra*.

**WHEREFORE, PREMISES CONSIDERED**, State Farm respectfully requests this Court dismiss Plaintiffs' Complaint in its entirety as Plaintiffs have failed to name necessary and indispensable parties and further because Plaintiffs have no basis for recovery against State Farm. State Farm requests all other relief to which it is entitled.

**RESPECTFULLY SUBMITTED**, this the 22<sup>nd</sup> day of March, 2007.

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**BY:** /s/ Paige C. Bush  
**PAIGE C. BUSH**

**CERTIFICATE OF SERVICE**

This is to certify that I, Paige C. Bush, the undersigned attorney for Defendant, State Farm Fire and Casualty Company, have this day electronically filed the above and foregoing *Motion to Dismiss* which sent electronic notification to the following ECF participants:

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THIS, the 22<sup>nd</sup> day of March, 2007.

/s/ Paige C. Bush  
**PAIGE C. BUSH**