

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

<b>KATHLEEN SCHAFER</b>	:	<b>CIVIL ACTION NO. 06-8262</b>
<b>Wife of/and GORDON SCHAFER</b>	:	
	:	<b>SECTION "I" (5)</b>
<b>Versus</b>	:	
	:	<b>JUDGE AFRICK</b>
<b>STATE FARM FIRE &amp; CASUALTY</b>	:	
<b>COMPANY <i>et al.</i></b>	:	<b>MAGISTRATE JUDGE CHASEZ</b>

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**STATE FARM FIRE'S SUR-REPLY IN OPPOSITION TO  
PLAINTIFFS' MOTION TO DECLASSIFY**

Defendant State Farm Fire and Casualty Company ("State Farm Fire") respectfully submits this Response to Plaintiffs' Supplemental Memorandum (Docket No. 260).<sup>1</sup> In their latest submission, Plaintiffs argue that recent deposition testimony by State Farm witness Christopher Lapinskie in another individual Katrina case supposedly was so revealing as to State Farm Fire's statewide, post-Katrina estimating and claim handling practices in Louisiana that State Farm Fire has waived any right to ongoing protection of the Confidential Materials it

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<sup>1</sup> For ease of reference, Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Motion to Declassify Documents, Docket No. 260, is referred to herein as "Plaintiffs' Supplemental Memorandum."

previously produced under the Protective Order in this case (*see* Docket Nos. 111 and 120).<sup>2</sup> In fact, Mr. Lapinskie's deposition in that other matter is a non-event in respect to Plaintiffs' pending Motion to Declassify (Docket No. 224).

It is simply extraordinary that Plaintiffs are characterizing the recent Lapinskie deposition as revelatory of State Farm Fire's confidential practices and procedures in Louisiana. The Lapinskie deposition was taken in *Brown v. State Farm Fire and Casualty Company*, a state court action by an individual homeowner for insurance benefits following a Hurricane Katrina loss. As the attorney who deposed Mr. Lapinskie in *Brown*, Soren Gisleson (one of Plaintiffs' attorneys here) is well aware that under a pre-deposition discovery order in *Brown*, questioning "regarding State Farm's use of pricing programs and pricing information" throughout Louisiana was ruled to be irrelevant and off-limits. *See Brown v. State Farm Fire and Casualty Co.*, No. 2006-07269, Order dated June 4, 2009, attached hereto as Exhibit 1. Mr. Gisleson thus was obligated to restrict his questioning of Mr. Lapinskie in *Brown* to State Farm Fire's handling of the *Brown* plaintiffs' individual insurance claim and the specific pricing in the individual repair estimate that the Browns had received from State Farm Fire. *Id.*

If Mr. Gisleson had actually used the Lapinskie deposition in *Brown* to explore the extensive, detailed information that State Farm Fire has designated as Confidential in *this* case, he would have been doing so in flagrant violation of the *Brown* Court's discovery order.<sup>3</sup> Not

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<sup>2</sup> As used herein, the terms "Confidential Materials" or "Confidential Information" refer to documents, testimony, or other materials that were marked as "Confidential" or "Highly Confidential" pursuant to Paragraphs 4 and 5 of the Protective Order herein, Docket No. 111.

<sup>3</sup> Such a tactic would also have violated the clear procedure set forth in the Protective Order in this case as subsequently amended by this Court. *See* Dockets Nos. 111 and 120. Under that procedure, Plaintiffs are required to notify State Farm Fire *in advance* if they intend to use State Farm's Confidential Information in another matter and, if State Farm Fire objects, to present that dispute to the Court in the other matter *in advance* of any use of the Confidential Information. *See* Docket No. 120. At no time did this Court grant Plaintiffs permission to make

surprisingly, as it turns out, no such testimony was actually obtained during Mr. Lapinskie's deposition, and Plaintiffs have not tied a single supposed disclosure by Mr. Lapinskie in the *Brown* deposition to any specific State Farm Fire Confidential Information that Plaintiffs are attempting to declassify here. State Farm Fire's extensive evidentiary affidavits already have established the commercial value of State Farm Fire's designated Confidential Information and the measures that State Farm Fire has taken to maintain the confidentiality of that Information. *See* Docket No. 232 and Exhibits A-C (all filed under seal); Docket No. 247 and Exhibits 1-3 (all filed under seal). State Farm Fire's showing remains entirely uncontroverted by Plaintiffs, and Plaintiffs' Motion to Declassify should be denied for these reasons and for those provided in the parties' prior briefing and oral argument before the Court.

### Argument

**I. There is No Bell to be "Un-Rung" as to State Farm Fire's Confidential Information in This Case.**

**A. Mr. Lapinskie Did Not Disclose Confidential Information Regarding State Farm Fire's Louisiana Claim Handling and Estimating Practices.**

In their Supplemental Memorandum, Plaintiffs describe Mr. Lapinskie's deposition testimony in *Brown* as nothing less than "explosive," and contend that he testified "as to all manner of topics and areas of inquiry that are the subject of Plaintiffs' Motion to Declassify." *See* Docket No. 260 at p. 2. They then offer a laundry list of topics as to which Mr. Lapinskie supposedly revealed State Farm Fire's Confidential Information. When one reads Mr. Lapinskie's actual testimony in *Brown*, however, it is immediately apparent that his deposition is not remotely what Plaintiffs describe it to be, and that to the extent he addressed the topics that Plaintiffs now purport to celebrate, the information he gave was generalized and generic:

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unfettered use of State Farm Fire's Confidential Information in other cases without affording State Farm Fire its Due Process right to object and be heard.

- **The “Explosive” Disclosure Regarding State Farm Laptops:** Mr. Lapinskie testified that he has a State Farm-issued laptop computer, and that he can access claim files using that laptop through wireless connection.<sup>4</sup>
- **The “Explosive” Disclosure Regarding Format and Maintenance of State Farm Claim Files:** Mr. Lapinskie testified that during Hurricane Katrina, some homeowners claim file records were maintained in paper format, while other records were maintained in electronic format.<sup>5</sup>
- **The “Explosive” Disclosures Regarding Use of Xactimate and Uploading Estimates:** During Hurricane Katrina, claim representatives would print estimates for insureds in the field, and a printed copy and/or image of the estimate later would be added to the claim file by a State Farm employee.<sup>6</sup>
- **The “Explosive” Disclosure Regarding Base Service Charges:** The State Farm estimate for the claim at issue in *Brown* added amounts to cover the estimated cost of travel time and set up time for certain covered repairs for the Brown’s home, and those “base service charge” amounts were shown on the estimate as separate line items.<sup>7</sup>
- **The “Explosive” Disclosure Regarding State Farm’s Claim Service Record:** Mr. Lapinskie testified that a claim representative can retrieve information about a particular claim that is stored electronically in State Farm’s “CSR” by inputting the insured’s name, the insured’s address, the applicable claim number, or the insured’s policy number.<sup>8</sup>

Meanwhile, the State Farm Fire materials that Plaintiffs are seeking to declassify in this case are of an entirely distinct, comprehensive and different order, and include such materials as (i) sworn testimony from State Farm employees addressing proprietary and trade secret aspects of State Farm’s customized software and internal program for preparing computerized dwelling repair estimates, as well as the structure and operation of State Farm’s internal computer systems and databases; (ii) internal and proprietary Operations Guides regarding the customized repair

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<sup>4</sup> Compare Docket No. 260 at 4 with Lapinskie Dep. at 70-71.

<sup>5</sup> Compare Docket No. 260 at 4 with Lapinskie Dep. at 58-60.

<sup>6</sup> Compare Docket No. 260 at 3-4 with Lapinskie Dep. at pp. 77-80.

<sup>7</sup> Compare Docket No. 260 at 3-4 with Lapinskie Dep. at 170-73.

<sup>8</sup> Compare Docket No. 260 at 4 with Lapinskie Dep. at 60-65.

estimating software used by State Farm Fire and internal procedures for preparing computer-generated dwelling repair estimates; and (iii) a multi-year proprietary database and accompanying spreadsheets that contain State Farm Fire statewide data relating to Louisiana claims for dwelling damage.<sup>9</sup> To demonstrate that any of Mr. Lapinskie's testimony in *Brown* actually constituted a waiver by State Farm Fire, it was incumbent upon Plaintiffs to identify the particular document or testimony as to which a waiver supposedly occurred. *See, e.g., Asset Funding Group, LLC v. Adams & Reese, LLP*, No. 2008 WL 9727937 at \*6 (E.D. La. April 4, 2008). Plaintiffs did not even attempt to carry that burden here, nor could they. Mr. Lapinskie's testimony in *Brown* did not remotely address the practices or procedures that State Farm Fire has properly designated as Confidential under the Protective Order in this case.

**B. Mr. Lapinskie Did Not Disclose State Farm Fire's Confidential Information Regarding its Pricing Data and Price Lists.**

For example, according to Plaintiffs, Mr. Lapinskie's deposition supposedly establishes that State Farm Fire "reduced the price for repairing and replacing 20-25 year tab roofing - one of the single largest line items on a Katrina wind claim." *See* Docket No. 260 at 3. This sensationalized characterization is entirely unfounded. Mr. Lapinskie was not asked, and did not testify, that removal and replacement of 20-25 year shingles was "one of the single largest line items on a Katrina wind claim." To the contrary, Mr. Lapinskie actually testified that wind damage to the Browns' roof was so minor that it only required *a single square* of roofing for repair. *See* Lapinskie Dep. at 43-45. Similarly, Mr. Lapinskie was not asked, and did not testify, that State Farm Fire had used "reduced" prices for 20-25 year shingles statewide in Louisiana.

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<sup>9</sup> In response to Plaintiffs' Motion to Declassify, State Farm Fire previously has summarized the documents and testimony regarding its Louisiana claim handling practices that have been designated as Confidential in this case, as well as the bases supporting those claims of confidentiality, at Docket No. 232 (including Exhibits A-C) and Docket No. 247 (including Exhibits 1-3).

See Docket No. 260 at 2. Instead, Mr. Lapinskie was asked about two specific unit prices for roofing (for removal and replacement of 20-25 year shingles) that came from one price list that State Farm Fire had issued for a particular pricing territory for a defined period of time, and he testified that those two discrete unit prices in that particular list were lower than the two Xactware unit prices for that time period and pricing territory. *Id.* Mr. Lapinskie did not even quantify the difference between State Farm Fire's two unit prices and Xactware's. Placing that testimony in context, one must recall that State Farm Fire issued more than 200 different price lists for its claim handlers' use during the relevant period; that each price list contained approximately 10,000 separate unit prices; and there were so many unit prices for roofing and roof repair that those prices spanned approximately 25 pages of each list. See Docket No. Docket No. 232 at Ex. A; Docket No. 247 at Ex. 2. Moreover, to this day, Plaintiffs have yet to present any evidence at all that *any* unit price in *any* State Farm Fire Louisiana price list was too low to fairly be used when estimating the cost to repair a damaged home, whether it was above, equal to, or below an Xactware unit price for the same time period and territory.<sup>10</sup>

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<sup>10</sup> Indeed, the absence of any such evidence – or any reasonable plan by which Plaintiffs believed they could develop such evidence – was one of the principal reasons for Judge Duval's Order denying class certification in this case. See Docket No. 222 (Order dated August 3, 2009) at p. 9. As the Court stated:

Xactware produced a total of 153 [price] lists during the class period (17 lists for each of Louisiana's nine regions.) Each list contains roughly 10,000 different line items. Accordingly, Xactware made over 1,500,000 line item estimations over the class period. In order to prove liability, Plaintiffs would have to determine the accuracy of each individual line item, *i.e.*, the actual fair market value of each item on each list. However, Plaintiffs provided no expert testimony concerning how these fair market values would be calculated efficiently on a class-wide basis. Because Plaintiffs have not carried their burden of proof, this Court is persuaded that the calculation of the fair market value of over 1,500,000 line items would be an incredibly particularized assessment that would predominate over any common issues.

Docket No. 222 at p. 9.

Plaintiffs have also grossly overstated the record in proclaiming that “Mark Richter, the pricing specialist for State Farm Fire, was the one who suggested decreasing the unit price for roofing prices in Louisiana.” *See* Docket No. 260 at 2. As noted above, Mr. Lapinskie was not asked, and did not testify, that State Farm Fire had generally “decreased the unit price for roofing prices in Louisiana” when preparing repair estimates, nor did he attribute any such supposed state-wide reduction to Mark Richter. Mr. Lapinskie merely testified that Mr. Richter was a Pricing Specialist who had handled some Louisiana pricing issues following Hurricane Katrina, and that according to Mr. Richter, the two State Farm unit prices in the Browns’ estimate for removal and replacement of 20-25 year shingles were based on pricing information that Richter had received from various sources in the field for that area and in that timeframe. *See* Lapinskie Dep. at 30-32.

As for the remaining portions of Mr. Lapinskie’s testimony that Plaintiffs have hyped as a supposed waiver of confidentiality by State Farm Fire, those statements again consist of purely generic information. For example, Mr. Lapinskie stated that XacTotal provides more streamlined estimates than Xactimate, and that XactAnalysis allows one to see when an estimate was created and whether additional items later were added to the estimate. *Compare* Docket No. 260 at p. 4 *with* Lapinskie Dep. at pp. 5, 84-87, 210-12, and 231-32. He also testified to the unremarkable facts that at the time the *Brown* claim was handled, State Farm Fire had the ability to modify pricing information that it received from Xactware, and that when the *Brown* estimate was prepared, State Farm Fire’s claim representative referred to the State Farm Fire price list then in effect for the applicable pricing territory for the Browns’ home and used some of that pricing when estimating the cost to repair wind damage to the Browns’ home. *See* Docket No. 260 at 3 and 4 (citing Lapinskie Dep. at 30-31, 170-73). *Mr. Gisleson himself* characterized this

information as mere “foundation” to provide a general context for his later questioning regarding the *Brown* plaintiffs’ individual repair estimate. *See* Lapinskie Dep. at 29.

The pricing information that State Farm Fire designated as Confidential in this case includes (i) the 200 or so State Farm price lists for Louisiana that were issued during the previously asserted “class” period in this case; (ii) the contracts between State Farm Fire and Xactware for State Farm Fire’s purchase of pricing information and support services for its customized version of Xactimate; (iii) the details relating to State Farm Fire’s specialized version of the Xactimate software and its internal training materials and guidelines for claim handlers using the software; and (iv) guidelines and testimony discussing the processes and procedures by which State Farm Fire’s Pricing Specialists would gather local market information and occasionally modify a particular unit price in a specific price list above or below the unit price received from Xactware.<sup>11</sup> Plaintiffs have not shown that *any* such information was publicly disclosed through during Mr. Lapinskie’s testimony, and they accordingly have not carried their burden to demonstrate any waiver of confidentiality by State Farm Fire.

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<sup>11</sup> The pricing information that Plaintiffs seek to declassify and the evidentiary bases supporting State Farm’s claims of confidentiality as to that information are set forth in detail in State Farm’s prior submissions opposing Plaintiffs’ Motion to Declassify. *See* Docket No. 232 (including Exhibits A-C) and Docket No. 247 (including Exhibits 1-3).

**Conclusion**

For all of the foregoing reasons, and for those set forth in State Farm Fire's prior briefing as to Plaintiffs' Motion to Declassify, State Farm Fire's supporting factual affidavits, and State Farm Fire's arguments before the Court, State Farm Fire respectfully requests that Plaintiffs' Motion to Declassify be denied in its entirety.

Dated: January 21, 2010

/s/ J. Dalton Courson

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**CERTIFICATE**

I hereby certify that a copy of the above and foregoing State Farm Fire's Supplemental Memorandum in Opposition to Plaintiffs' Motion to Declassify has been served on all counsel of record by CM/ECF filing, this 21st day of January, 2010.

*/s/ J. Dalton Courson*

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