

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

HENRY KUEHN and
JUNE P. KUEHN

PLAINTIFFS

VS.

CAUSE NUMBER:1:08CV577-LTS-RHW

STATE FARM FIRE AND CASUALTY COMPANY
and JOHN DOES 1 THROUGH 10

DEFENDANTS

**ANSWER AND DEFENSES OF
OF STATE FARM FIRE AND CASUALTY COMPANY**

Jury Trial Demanded

Defendant State Farm Fire and Casualty Company (“State Farm”), by and through its counsel of record, for its Answer and Defenses to the Complaint, states as follows:

FIRST DEFENSE

Plaintiffs’ Complaint should fail because some or all of the causes of action or requested remedies fail to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure Rule 12(b)(6).

SECOND DEFENSE - ANSWER

State Farm responds to the allegations of the Complaint, paragraph by paragraph, as follows:

General Statement

State Farm repeats the headings and subheadings of the Complaint for purposes of organization and reference only. No response is required to the Complaint's headings and subheadings; to the extent a response is required, those allegations are denied.

ANSWER TO PREAMBLE

The “Preamble” is an introductory comment that contains immaterial, impertinent, and scandalous matter, speculative statements, as well as purported conclusions of law to which no response is required; to the extent a response is required, those allegations are denied.

ANSWER TO I. PARTIES

1. State Farm is without knowledge of information sufficient to form a belief as to the truth of paragraph 1 of the Complaint.

2. To the extent the allegations contained in paragraph 2 of the Complaint constitute conclusions of law, no response is required; to the extent a response is required, State Farm denies the allegations as stated, excepts admits only that it is a corporation organized under the laws of the State of Illinois with its principal place of business in Illinois and that it is subject to service of process in Mississippi.

3. State Farm is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3.

4. State Farm is not required to answer the allegations contained in paragraph 4 of the Complaint which appear to be directed to another party; to the extent an answer is required, State Farm is without knowledge or information sufficient to form a belief as to the truth of those allegations.

ANSWER TO II. SUBJECT MATTER AND PERSONAL JURISDICTION

5. State Farm admits the allegations in paragraph 5.

ANSWER TO III. VENUE

6. State Farm admits the allegations in paragraph 6 but reserves and alleges herein all rights and defenses under the United States Constitution, including the rights protected by the Due

Process clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment, all applicable federal statutes and rules authorizing a change of venue for prejudicial pretrial publicity or bias which may arise as a result of any extra judicial interference with the judicial process.

ANSWER TO IV. FACTS AND GENERAL ALLEGATIONS

7. State Farm admits Plaintiffs had purchased a policy of insurance. State Farm affirmatively avers that said policy is the best evidence of its contents and is pled herein as though copied in its entirety. State Farm specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. State Farm denies, or denies as worded, any remaining allegations in paragraph 7.

8. State Farm admits Plaintiffs had purchased a policy of insurance. State Farm affirmatively avers that said policy is the best evidence of its contents and is pled herein as though copied in its entirety. State Farm specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. State Farm denies, or denies as worded, any remaining allegations in paragraph 8.

9. State Farm admits Plaintiffs had purchased a policy of insurance. State Farm affirmatively avers that said policy is the best evidence of its contents and is pled herein as though copied in its entirety. State Farm specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. State Farm denies, or denies as worded, any remaining allegations in paragraph 9.

10. State Farm admits Plaintiffs had purchased a policy of insurance. State Farm affirmatively avers that said policy is the best evidence of its contents and is pled herein as though

copied in its entirety. State Farm specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. State Farm denies, or denies as worded, any remaining allegations in paragraph 10.

11. State Farm admits Plaintiffs had purchased a policy of insurance. State Farm affirmatively avers that said policy is the best evidence of its contents and is pled herein as though copied in its entirety. State Farm specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. State Farm denies, or denies as worded, any remaining allegations in paragraph 11.

12. State Farm admits Hurricane Katrina made landfall along the Mississippi Gulf Coast on August 29, 2005, and varied in intensity at different times and locations. State Farm reserves its right to contest the extent, nature, and cause of any damage to Plaintiffs' insured property. State Farm denies, or denies as worded, any remaining allegations in paragraph 12.

13. State Farm admits Plaintiffs submitted a claim for benefits and that State Farm performed a reasonable and timely inspection of the loss. State Farm reserves its right to contest the extent, nature, and cause of any damage to Plaintiffs' insured property. State Farm denies, or denies as worded, any remaining allegations in paragraph 13.

14. State Farm admits that a letter, dated January 4, 2006 was attached to the Complaint as Exhibit "B". State Farm would state that the letter itself is the best evidence of its contents. State Farm affirmatively avers that the relevant policy of insurance is the best evidence of its contents and is pled herein as though copied in its entirety. State Farm denies, or denies as worded, any remaining allegations contained in paragraph 14.

15. State Farm denies paragraph 15 of the Complaint as worded.

16. State Farm admits that a letter, dated April 1, 2006 was attached to the Complaint as Exhibit “C”. State Farm would state that the letter itself is the best evidence of its contents.

17. State Farm affirmatively avers that, in the event such a conversation occurred, the allegations in paragraph 17 do not reflect the entirety of that conversation and are not the best evidence of its contents. State Farm denies, or denies as worded, any remaining allegations in paragraph 17.

18. State Farm admits that Plaintiffs filed a Complaint in the Chancery Court of Jackson County, Mississippi and that State Farm properly removed that action to the United States District Court for the Southern District of Mississippi, but states that the relevant docket and the documents filed in that matter are the best evidence of what transpired. State Farm denies, or denies as worded, any remaining allegations in paragraph 18.

19. State Farm admits that Plaintiffs filed a Motion to Remand and that an Order Staying Case was thereafter entered, but states that the relevant docket and the documents filed in that matter are the best evidence of what transpired. State Farm denies, or denies as worded, any remaining allegations in paragraph 19.

20. State Farm admits that requested and was granted time to conduct remand related discovery, but states that the relevant docket and the documents filed in that matter are the best evidence of what transpired. State Farm denies, or denies as worded, any remaining allegations in paragraph 20.

21. State Farm admits that discovery was conducted and that the case was remanded, but states that the relevant docket and the documents filed in that matter are the best evidence of what transpired. State Farm denies, or denies as worded, any remaining allegations in paragraph 21.

22. State Farm admits that an order was entered and that designations of appraisers were filed. State Farm denies, or denies as worded, any remaining allegations in paragraph 22.

23. State Farm denies, or denies as worded, paragraph 23.

24. State Farm denies, or denies as worded, paragraph 24.

25. State Farm admits that its policy, and Mississippi laws and/or regulations create certain rights, duties and obligations between parties to the insurance contract. As the allegations in paragraph 25 do not fully outline all of the corresponding rights and obligations of the parties, State Farm would object and deny as worded these allegations. State Farm would further aver that the relevant policy of insurance is the best evidence of its contents and specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. Finally, State Farm denies any inference or implication that it breached any duty owed to Plaintiffs.

26. State Farm admits Plaintiffs had purchased a policy of insurance. State Farm affirmatively avers that said policy is the best evidence of its contents and is pled herein as though copied in its entirety. State Farm specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. State Farm denies any inference or implication that it breached any duty owed to Plaintiffs and denies, or denies as worded, any remaining allegations in paragraph 26.

27. State Farm denies, or denies as worded, paragraph 27.

28. State Farm admits that its policy, and Mississippi laws and/or regulations create certain rights, duties and obligations between parties to the insurance contract. As the allegations in paragraph 28 do not fully outline all of the corresponding rights and obligations of the parties,

State Farm would object and deny as worded these allegations.

29. State Farm admits that its policy, and Mississippi laws and/or regulations create certain rights, duties and obligations between parties to the insurance contract. As the allegations in paragraph 29 do not fully outline all of the corresponding rights and obligations of the parties, State Farm would object and deny as worded these allegations.

30. State Farm admits that its policy, and Mississippi laws and/or regulations create certain rights, duties and obligations between parties to the insurance contract. As the allegations in paragraph 30 do not fully outline all of the corresponding rights and obligations of the parties, State Farm would object and deny as worded these allegations.

31. State Farm denies paragraph 31.

32. State Farm denies paragraph 32.

33. State Farm denies paragraph 33.

34. State Farm denies paragraph 34.

**ANSWER TO V. COUNT ONE: DECLARATORY JUDGMENT
AND INJUNCTION AS TO APPRAISAL**

35. State Farm re-alleges the text and content of each paragraph appearing in this Answer.

36. State Farm denies Plaintiffs are entitled to declaratory or injunctive relief.

37. State Farm denies paragraph 37.

38. State Farm denies paragraph 38.

39. State Farm State Farm admits that an order was entered and that designations of appraisers were filed.

40. State Farm admits there were documents attached to the Complaint as Exhibit “D” and “E”. State Farm denies, or denies as worded, any remaining allegations in paragraph 40.

41. State Farm admits Plaintiffs had purchased a policy of insurance. State Farm affirmatively avers that said policy is the best evidence of its contents and is pled herein as though copied in its entirety. State Farm specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. State Farm denies, or denies as worded, any remaining allegations in paragraph 41.

42. State Farm admits Plaintiffs had purchased a policy of insurance. State Farm affirmatively avers that said policy is the best evidence of its contents and is pled herein as though copied in its entirety. State Farm specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. State Farm denies, or denies as worded, any remaining allegations in paragraph 42.

43. State Farm denies paragraph 43.

44. State Farm denies paragraph 44.

45. State Farm denies paragraph 45.

ANSWER TO VI. COUNT TWO: DECLARATORY JUDGMENT AS TO THE POLICY

46. State Farm re-alleges the text and content of each paragraph appearing in this Answer.

47. State Farm denies Plaintiffs are entitled to declaratory relief.

48. State Farm admits Hurricane Katrina made landfall along the Mississippi Gulf Coast on August 29, 2005, and varied in intensity at different times and locations. State Farm reserves its right to contest the extent, nature, and cause of any damage to Plaintiffs' insured property. State Farm denies, or denies as worded, any remaining allegations in paragraph 48. The policy at issue speaks for itself.

49. State Farm admits some wind damage occurred but reserves its right to contest the

extent, nature, and cause of the damage to Plaintiffs' insured property. State Farm denies, or denies as worded, any remaining allegations in paragraph 48. The policy at issue speaks for itself.

50. State Farm admits Plaintiffs had purchased a policy of insurance. State Farm affirmatively avers that said policy is the best evidence of its contents and is pled herein as though copied in its entirety. State Farm specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. State Farm denies, or denies as worded, any remaining allegations in paragraph 50.

51. State Farm denies paragraph 51.

52. State Farm denies paragraph 52, including subparts (a) through (d).

**ANSWER TO VII. COUNT THREE:
NEGLIGENCE/GROSS NEGLIGENCE
RECKLESS DISREGARD FOR THE RIGHTS OF PLAINTIFFS**

53. State Farm re-alleges the text and content of each paragraph appearing in this Answer.

54. State Farm admits that its policy, and Mississippi laws and/or regulations create certain rights, duties and obligations between parties to the insurance contract. As the allegations in paragraph 54 do not fully outline all of the corresponding rights and obligations of the parties, State Farm would object and deny as worded these allegations. State Farm further denies any inference or implication that it breached any duty owed to Plaintiffs.

55. State Farm denies paragraph 55.

56. State Farm denies paragraph 56.

57. State Farm denies paragraph 57.

58. State Farm denies paragraph 58.

59. State Farm denies paragraph 59.

60. State Farm denies paragraph 60.
61. State Farm denies paragraph 61.
62. State Farm denies paragraph 62.
63. State Farm denies paragraph 63.
64. State Farm denies paragraph 64.
65. State Farm denies paragraph 65.
66. State Farm denies paragraph 66.
67. State Farm denies paragraph 67.
68. State Farm denies paragraph 68.
69. State Farm denies paragraph 69.
70. State Farm denies paragraph 70.

**ANSWER TO VIII. COUNT FOUR:
SPECIFIC PERFORMANCE OF INSURANCE CONTRACT**

71. State Farm re-alleges the text and content of each paragraph appearing in this Answer.
72. State Farm admits Plaintiffs had purchased a policy of insurance. State Farm affirmatively avers that said policy is the best evidence of its contents and is pled herein as though copied in its entirety. State Farm specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. State Farm denies, or denies as worded, any remaining allegations in paragraph 72.

73. State Farm denies paragraph 73.
74. State Farm denies paragraph 74.

**ANSWER TO IX. COUNT FIVE:
WAIVER AND ESTOPPEL**

75. State Farm re-alleges the text and content of each paragraph appearing in this Answer.

- 76. State Farm denies paragraph 76.
- 77. State Farm denies paragraph 77.
- 78. State Farm denies paragraph 78.
- 79. State Farm denies paragraph 79.

ANSWER TO X. COUNT SIX: INDEMNITY

80. State Farm re-alleges the text and content of each paragraph appearing in this Answer.

81. State Farm admits Plaintiffs had purchased a policy of insurance. State Farm affirmatively avers that said policy is the best evidence of its contents and is pled herein as though copied in its entirety. State Farm specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. State Farm denies, or denies as worded, any remaining allegations in paragraph 81.

- 82. State Farm denies paragraph 82.
- 83. State Farm denies paragraph 83.
- 84. State Farm denies paragraph 84.

**ANSWER TO XI. COUNT SEVEN:
UNJUST ENRICHMENT/CONSTRUCTIVE TRUST**

85. State Farm re-alleges the text and content of each paragraph appearing in this Answer.

86. State Farm admits Plaintiffs had purchased a policy of insurance. State Farm affirmatively avers that said policy is the best evidence of its contents and is pled herein as though copied in its entirety. State Farm specifically denies, or denies as worded, any allegations which tend to contradict, contravene or enlarge upon the terms, conditions, exclusions or limitations of said policy. State Farm denies, or denies as worded, any remaining allegations in paragraph 86.

- 87. State Farm denies paragraph 87 as worded.

- 88. State Farm denies paragraph 88.
- 89. State Farm denies paragraph 89.
- 90. State Farm denies paragraph 90.
- 91. State Farm denies paragraph 91.
- 92. State Farm denies paragraph 92.
- 93. State Farm denies paragraph 93.

ANSWER TO XII. COUNT EIGHT: BAD FAITH

- 94. State Farm re-alleges the text and content of each paragraph appearing in this Answer.
- 95. State Farm admits that its policy, and Mississippi laws and/or regulations create certain rights, duties and obligations between parties to the insurance contract. As the allegations in paragraph 95 do not fully outline all of the corresponding rights and obligations of the parties, State Farm would object and deny as worded these allegations. State Farm further denies any inference or implication that it breached any duty owed to Plaintiffs.

- 96. State Farm denies paragraph 96.
- 97. State Farm denies paragraph 97.
- 98. State Farm denies paragraph 98.

**ANSWER TO XIII. COUNT NINE:
FRAUDULENT CLAIMS PRACTICES**

- 99. State Farm re-alleges the text and content of each paragraph appearing in this Answer.
- 100. State Farm denies Plaintiffs' claim was a "slab case" and all remaining allegations in paragraph 100.
- 101. State Farm denies paragraph 101.
- 102. State Farm denies paragraph 102.

- 103. State Farm denies paragraph 103.
- 104. State Farm denies paragraph 104.
- 105. State Farm denies paragraph 105.
- 106. State Farm denies paragraph 106.
- 107. State Farm denies paragraph 107.

ANSWER TO XIV. REMEDIES

- 108. State Farm re-alleges the text and content of each paragraph appearing in this Answer.
- 109. State Farm denies paragraph 109.
- 110. State Farm denies paragraph 110.
- 111. State Farm denies paragraph 111.
- 112. State Farm denies paragraph 112.
- 113. State Farm denies paragraph 113.
- 114. State Farm denies paragraph 114.
- 115. State Farm denies paragraph 115.

ANSWER TO AD DAMNUM

116. State Farm denies the allegations in Plaintiffs' unnumbered *ad damnum* clause, beginning with the words, "WHEREFORE, PREMISES CONSIDERED," denies Plaintiffs were injured to the nature and extent claimed, and contests damages. State Farm further denies Plaintiffs are entitled to a judgment from or of State Farm in any amount whatsoever under any theory of recovery.

THIRD DEFENSE

Without waiving any other defenses elsewhere asserted herein, any allegation contained in

Plaintiffs' Complaint which has not been specifically admitted is hereby denied.

FOURTH DEFENSE

State Farm hereby incorporates and pleads any and all defenses listed in Federal Rule of Civil Procedure 12(b) which may be applicable to this matter and reserves the right to raise any objections and defenses stated therein.

FIFTH DEFENSE

Plaintiffs' Complaint should fail based on the failure to join all parties in interest and parties needed for just adjudication pursuant to Federal Rule of Civil Procedure 17 and 19 including, but not limited to, any and all mortgagees holding a lien on the subject property, appropriate representatives of the federal government and any other persons or entities which may claim any right, title or interest in or to the proceeds of any claim payable under Plaintiffs' insurance policy.

SIXTH DEFENSE

Plaintiffs' Complaint should fail because some or all of the claims are barred by applicable statutes of limitation or other prescriptive periods, whether general or specific.

SEVENTH DEFENSE

Plaintiffs' Complaint should fail because it does not present a justiciable case or controversy between Plaintiffs and State Farm.

EIGHTH DEFENSE

Plaintiffs are charged with knowledge of the terms, definitions, conditions, coverages and exclusions contained in their homeowner's policy, and State Farm hereby affirmatively pleads all such terms, definitions, conditions, coverages and exclusions, without limitation, including but not limited to Duties After Loss, Other Insurance and the Declarations Continued section of the policy

which states, “You agree, by acceptance of this policy, that: . . . 4. This policy contains all of the agreements between you and us and any of our agents.”

NINTH DEFENSE

The State Farm policy at issue excludes coverages for some or all of Plaintiffs’ claims. Among other provisions that bear on coverage, the policy excludes coverage for loss caused by “Water Damage,” meaning: “flood, surface water, waves, tidal water, tsunami, seiche, overflow of a body of water, or spray from any of these, all whether driven by wind or not” when such loss “would not have occurred in the absence of” the water damage. State Farm does not “insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these.”

TENTH DEFENSE

The transactions alleged in the Complaint were voluntarily undertaken. Plaintiffs had the opportunity and obligation to read all documents presented to or signed by them. The terms of the policies, contracts, or agreements were fully disclosed to them. Plaintiffs knowingly entered into the transactions, having either understood such transactions or having failed to take the opportunity to understand the transactions.

ELEVENTH DEFENSE

State Farm’s agent is not under an affirmative duty to advise any policyholder, including Plaintiffs herein, of the particular coverages provided by any policy of insurance, including the insurance policy at issue in this matter.

TWELFTH DEFENSE

Plaintiffs are charged with knowledge of the purpose of the National Flood Insurance Program, specifically that homeowner's policies do not provide coverage for "flood" damages.

THIRTEENTH DEFENSE

Plaintiffs have not been damaged as a result of any alleged wrongdoing on the part of State Farm or its agents or representatives, without limitation.

FOURTEENTH DEFENSE

State Farm has not breached its duty of good faith and fair dealing. As such, Plaintiffs may not assert a claim for extra-contractual damages, including punitive damages, as there is insufficient evidence to meet the burden of proof necessary to sustain the underlying claim for damages under the subject policy or otherwise, and where there is no entitlement to actual damages, extra-contractual damages, including punitive damages, are not recoverable.

FIFTEENTH DEFENSE

State Farm has not acted in bad faith in its dealings with the Plaintiffs and, at all times material herein, its conduct and actions were both reasonable and in compliance with all applicable contracts, laws, rules and regulations.

SIXTEENTH DEFENSE

State Farm has not engaged in any conduct which entitles the Plaintiff to recover punitive, exemplary or extra-contractual damages of any kind.

SEVENTEENTH DEFENSE

An award of punitive, exemplary or extra-contractual damages of any kind, whether compensatory or otherwise, is precluded because State Farm clearly had, at a minimum, legitimate

and arguable reasons for its relevant conduct and decisions.

EIGHTEENTH DEFENSE

No fiduciary duty exists under Mississippi law between State Farm and Plaintiffs.

NINETEENTH DEFENSE

Plaintiffs have only sued for damages arising from Hurricane Katrina. No claims can be made for any prior unrepaired damages or for any subsequent damages caused by an event after Hurricane Katrina. Furthermore, each separate insured loss, dwelling and contents, is subject to its own separate deductible, and Plaintiffs' burden of proof includes establishing the existence and amount of each separate loss prior to and/or subsequent to Hurricane Katrina, if any.

TWENTIETH DEFENSE

Plaintiffs have the burden of proving an accidental direct physical loss occurred which caused damage to property insured by the subject policy of insurance, and the amount of the loss.

TWENTY-FIRST DEFENSE

To the extent Plaintiff has received funds from any other source as a result of the Hurricane Katrina damages claimed herein, and to the extent the same may be required to be repaid as a result of any recovery hereunder, State Farm is not required to make any such payments on behalf of Plaintiffs, or is entitled to a set-off for the same.

TWENTY-SECOND DEFENSE

Some or all of Plaintiffs' claims or requested remedies are or may become barred by the principles of res judicata, collateral estoppel, judicial estoppel, equitable estoppel, discharge in bankruptcy and/or judicial comity.

TWENTY-THIRD DEFENSE

Some or all of Plaintiffs' claims are barred by the parol evidence rule or the Statute of Frauds.

TWENTY-FOURTH DEFENSE

Some or all of Plaintiffs' claims or requested remedies are barred by the failure of conditions precedent and/or conditions subsequent.

TWENTY-FIFTH DEFENSE

Some or all of Plaintiffs' claims or requested remedies are barred by lack of standing, by public policy or by documents and information which are of public record.

TWENTY-SIXTH DEFENSE

Some or all of Plaintiffs' claims or requested remedies are barred by the doctrines of ratification, merger, waiver, discharge, recoupment, payment, accord and satisfaction, set-off, release and/or election of remedies.

TWENTY-SEVENTH DEFENSE

Some or all of Plaintiffs' claims or requested remedies are barred by the doctrine of consent, the voluntary payment rule, the economic loss rule and/or the impact rule.

TWENTY-EIGHTH DEFENSE

Some or all of Plaintiffs' claims or requested remedies are barred by Mississippi Department of Insurance regulations.

TWENTY-NINTH DEFENSE

Some or all of Plaintiffs' claims or requested remedies are barred by the doctrine of laches, by a failure to mitigate damages and/or because they would result in unjust enrichment or double recovery for Plaintiffs. Without in any way limiting the foregoing, the relief sought by Plaintiffs

would result in unjust enrichment where the contract language excludes the losses claimed.

THIRTIETH DEFENSE

Some or all of Plaintiffs' claims or requested remedies are barred by federal preemption including, but not limited to, the National Flood Insurance Act, 42 U.S.C. §§ 4001, *et seq.*, and the Supremacy Clause of the United States Constitution.

THIRTY-FIRST DEFENSE

Some or all of Plaintiffs' claims or requested remedies are barred because State Farm complied with all applicable statutes and with the requirements and regulations of the appropriate regulatory agencies.

THIRTY-SECOND DEFENSE

Some or all of Plaintiffs' claims are not ripe for adjudication at this time.

THIRTY-THIRD DEFENSE

Some or all of Plaintiffs' claims or requested remedies improperly seek to effect a deprivation of liberty and property in contravention of rights guaranteed State Farm by the Due Process Clauses of the Constitutions of the United States and the State of Mississippi.

THIRTY-FOURTH DEFENSE

Some or all of Plaintiffs' claims or requested remedies improperly seek to effect a taking without just compensation in contravention of rights guaranteed to State Farm by the Constitutions of the United States and of the State of Mississippi.

THIRTY-FIFTH DEFENSE

Some or all of Plaintiffs' claims or requested remedies improperly seek to interfere with interstate commerce in contravention of the Commerce Clause of the United States Constitution.

THIRTY-SIXTH DEFENSE

Some or all of Plaintiffs' claims or requested remedies improperly attempt to require State Farm to provide benefits under a homeowner's policy for flood losses for which State Farm received no premiums, in violation of protections afforded State Farm under the United States Constitution and the Constitution of the State of Mississippi.

THIRTY-SEVENTH DEFENSE

Some or all of Plaintiffs' claims are barred by the Rooker-Feldman Doctrine.

THIRTY-EIGHTH DEFENSE

Plaintiffs' Complaint fails to comply with Federal Rule of Civil Procedure 9(b), as certain matters have not been pled with the requisite particularity.

THIRTY-NINTH DEFENSE

Plaintiffs' claims for special damages, if any, have not been specifically stated, as required by Federal Rule of Civil Procedure 9(g), thus barring recovery for any such damages.

FORTIETH DEFENSE

Plaintiffs' claims for special damages are not recoverable under the common law as stated in *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854).

FORTY-FIRST DEFENSE

Plaintiffs' claims for punitive damages are unconstitutional insofar as they violate the Due Process protections afforded by the United States Constitution, the Excessive Fines clause of the Eighth Amendment to the United States Constitution, the Commerce Clause of the United States Constitution, the Full Faith and Credit Clause of the United States Constitution, the Equal Protection clause of the United States Constitution, and applicable provisions of the Constitution of the State

of Mississippi including, without limitation, Article 3, §§ 14, 17, and 28. Any law, statute or other authority purporting to permit the recovery of punitive damages in this case is unconstitutional, facially and as applied, to the extent that, without limitation, it: (1) lacks sufficient standards to guide and restrain the jury's discretion in determining whether to award punitive damages and/or the amount, if any; (2) is void for vagueness in that it fails to provide adequate advance notice as to what conduct would result in punitive damages; (3) may permit recovery of punitive damages based on out-of-state conduct, conduct that complied with applicable law, or conduct that was not directed, or did not proximately cause harm, to Plaintiffs; (4) may permit recovery of punitive damages in an amount that is not both reasonable and proportionate to the amount of harm, if any, to Plaintiff and to the amount of compensatory damages, if any; (5) may permit a jury to award punitive damages for harm to non-parties; (6) may permit jury consideration of net worth, wealth, surplus, reserves, or other financial information relating to defendants; (7) lacks sufficient standards to be applied by the trial court in post-verdict review of any punitive damages award; (8) lacks sufficient standards for appellate review of punitive damages awards; and (9) otherwise fails to satisfy United States Supreme Court precedent, including, without limitation, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Production Corp. v. Alliance Resources, Inc.*, 509 U.S. 443 (1993), *BMW of North America, Inc. v. Gore*, 517 U.S. 599 (1996), *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

FORTY-SECOND DEFENSE

No act or omission of State Farm was malicious, willful, wanton, reckless or grossly negligent and, therefore, any award of punitive damages is barred. Additionally, because of the lack of clear standards, the imposition of punitive damages against State Farm is unconstitutionally vague

and/or over-broad.

FORTY-THIRD DEFENSE

Plaintiffs' claims for punitive damages cannot be sustained because an award of punitive damages under Mississippi law subject to an excessive pre-determined upper limit would violate State Farm's due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article 3, § 14 of the Constitution of the State of Mississippi, and may result in a violation of State Farm's right not to be subjected to an excessive award in violation of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution and Article 3, § 28 of the Constitution of the State of Mississippi.

FORTY-FOURTH DEFENSE

Plaintiffs' claims for punitive damages cannot be sustained because an award of punitive damages under Mississippi law by a fact finder that is not instructed on the limits of punitive damages imposed by the applicable principles of deterrence and punishment and is not instructed to award only that amount of punitive damages as reflects a necessary relationship between the amount of punitive damages and the actual harm in question would violate State Farm's due process and equal protection rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article 3, § 14 of the Constitution of the State of Mississippi.

FORTY-FIFTH DEFENSE

Plaintiffs' claims for punitive damages are barred by Miss. Code Ann. § 15-1-33 (1972), requiring that any suit for penalty be brought within one year from the date of the alleged offense.

FORTY-SIXTH DEFENSE

A jury award of mental anguish damages in this case would violate due process and equal

protection rights guaranteed to State Farm by the Fifth and Fourteenth Amendments to the United States Constitution, and Article 1, §§ 1, 6 and 22 of the Constitution of the State of Mississippi. A mental anguish damage award will violate these provisions because Mississippi jurors are given no rule, standard or guideline upon which to rely in calculating such an award.

FORTY-SEVENTH DEFENSE

State Farms' rate structure and policy forms were properly filed with and approved by the Mississippi Commissioner of Insurance in accordance with Miss. Code Ann. § 83-2-31, *et seq.* Judicial review of the Commissioner's decisions is permitted only as provided by Miss. Code Ann. § 83-2-31 or § 11-51-95, and other applicable law. The time for appeal or to petition for writ of certiorari under has expired. Accordingly, the Commissioner's prior decision is no longer subject to judicial review.

FORTY-EIGHTH DEFENSE

Plaintiffs' claims constitute an improper attempt to achieve *de novo* judicial review or otherwise collaterally attack the Mississippi Commissioner of Insurance's prior decisions contrary to procedures established by settled Mississippi law. Plaintiffs' claims, therefore, are barred by the separation of powers provisions of the Constitution of the State of Mississippi.

FORTY-NINTH DEFENSE

Plaintiffs' attempts to rewrite a binding contract to cover damages which are excluded seeks to impose a premium rate structure that has not been filed with or approved by the Mississippi Commissioner of Insurance in accordance with Miss. Code Ann. § 83-2-1, *et seq.* and, as such, violates Mississippi law.

FIFTIETH DEFENSE

Some or all of Plaintiffs' claims or requested remedies interfere with the exclusive or primary jurisdiction of the Mississippi Commissioner of Insurance, including his jurisdiction over forms, rates, and penalties. Without in any manner limiting the foregoing, Plaintiffs' attempt to bridge and/or rewrite a binding insurance contract would interfere with the exclusive or primary jurisdiction of the Commissioner and, as such, violates Mississippi law.

FIFTY-FIRST DEFENSE

State Farm has relied upon prior approval of its premium rates and policy forms by the Mississippi Commissioner of Insurance and upon acceptance by its policyholders of policies offered in accordance with those approved rates and forms, and specifically pleads the filed rate doctrine.

FIFTY-SECOND DEFENSE

Some or all of Plaintiffs' claims or requested remedies constitute attempts to circumscribe or abridge State Farm's freedom of speech and right to petition the government; therefore, those claims are barred by the United States Constitution and the Constitution of the State of Mississippi.

FIFTY-THIRD DEFENSE

Some or all of Plaintiffs' claims or requested remedies are an attempt to rewrite or abridge the clear and unambiguous policy language contained in the policy issued by State Farm to Plaintiffs in violation of the prohibition against laws that impair the obligations of contracts; Article 3, § 16 of the Constitution of the State of Mississippi; and similar protections contained in the United States Constitution.

FIFTY-FOURTH DEFENSE

State Farm invokes all rights afforded under Mississippi's 1993, 2002 and 2004 Tort Reform

Acts, including but not limited to Miss. Code Ann. § 11-1-65.

FIFTY-FIFTH DEFENSE

Plaintiffs' recovery, if any, should be barred or reduced by Plaintiffs' own comparative negligence or fault or the failure to exercise ordinary care and caution to protect against damage. State Farm invokes the provisions of Miss. Code Ann. § 85-5-7 on apportionment of fault as to all parties and non-parties who may be jointly or severally liable for Plaintiff's alleged injuries.

FIFTY-SIXTH DEFENSE

Damages that Plaintiffs may have suffered, if any, are the result of acts or omissions of parties other than State Farm, for which State Farm has no legal responsibility.

FIFTY-SEVENTH DEFENSE

Plaintiffs did not rely upon and/or could not have reasonably relied upon any of the putative fraudulent acts allegedly committed by State Farm.

FIFTY-EIGHTH DEFENSE

A Standard Flood Insurance Policy (SFIP) limits liability with respect to other policies of flood insurance. If a loss covered by a SFIP is also covered by other flood insurance whether collectible or not, State Farm will pay only that proportion of the loss that the limit of liability applicable under the SFIP bears on the total amount of flood insurance covering the loss, as per Article VII(C). State Farm, as homeowner's insurance carrier, pleads all rights and defenses arising from the existence of any payment to Plaintiffs under a flood insurance policy.

FIFTY-NINTH DEFENSE

No part, provision or requirement of a Standard Flood Insurance Policy (SFIP) can be waived by State Farm. See 44 C.F.R. §61.13(d) and Article VII(D) of the SFIP. State Farm is a signatory

to the National Flood Insurance Act of 1968, and applicable federal regulations in Title 44 of the Code of Federal Regulations, Subchapter B, and is authorized by the Federal Insurance Administration to issue a SFIP on behalf of the federal government under State Farm's logo. State Farm agrees to abide by all rules and regulations promulgated by the Federal Insurance Administration and the Federal Emergency Management Agency when it issues a SFIP. State Farm does not have the authority to change, alter or interpret the underwriting or claims guidelines of the flood program. The Federal Insurance Administrator is the sole authority.

SIXTIETH DEFENSE

There are no oral binders and no written binders may be issued by State Farm in the National Flood Insurance Program. See 44 C.F.R. § 61.13(e).

SIXTY-FIRST DEFENSE

Only the application and renewal application forms used by the National Flood Insurance Program may be utilized in procuring a Standard Flood Insurance Policy, and no such forms were completed or submitted by the Plaintiffs in this matter. See 44 C.F.R. 61.13(c).

SIXTY-SECOND DEFENSE

Where there has been no application and no premiums paid for contents coverage under a Standard Flood Insurance Policy (SFIP), federal statutory, regulatory and constitutional law prohibit issuance of a flood policy that provides contents coverage until the necessary conditions precedent are met. See 44 C.F.R. §§ 61.5(b) and 61.11(c). See also Article I of the SFIP and Article II, definition of "application," codified at 44 C.F.R. Part 61, Appendix A(1) (2004 edition). Federal law provides that for a person to obtain a SFIP and thereby become a participant in this program, they must submit an application on a form approved by FEMA, and pay the full amount of the

premium in advance of the policy term. In addition, except in limited circumstances provided for by federal law, all of this must happen more than 30 days before the loss. In the event Plaintiffs cannot prove compliance with these conditions precedent, they can establish no claim whatsoever, regardless of whether it is couched in tort or in contract.

SIXTY-THIRD DEFENSE

The declarations page constitutes part of the Standard Flood Insurance Policy (SFIP) as per Article II of the SFIP, definition of “declarations page.” Furthermore, the declarations page constitutes representations made by the insureds (the Plaintiffs) to the Write Your Own Carrier (State Farm), not the other way around. Additionally, the available contents coverage limits of \$100,000 is codified at 44 C.F.R. §61.6. As such, Plaintiffs are charged with knowledge of the available coverage limits for contents and whether they had contents coverage under an SFIP for damages caused by or from a flood.

SIXTY-FOURTH DEFENSE

By statute, State Farm is the fiscal agent of the United States for purposes of the National Flood Insurance Program and Standard Flood Insurance Policy. 42 U.S.C. §4071(a)(1). By regulation, State Farm’s fiduciary duty is to FEMA, and is “to assure that any taxpayer funds are accounted for and appropriately expended.” 44 C.F.R. Pt. 62.23(f). Also by regulation, all company claim standards are subordinate to nationally uniform and preset claim standards FEMA has devised on authority of 42 U.S.C. §4019. Those standards govern all of the Write Your Own Program companies and all of the insureds in a nationally uniform manner.

SIXTY-FIFTH DEFENSE

Plaintiffs did not rely on any alleged statements of either State Farm or anyone for whom it

might be legally responsible. Further, no theory of detrimental reliance upon any alleged statements can possibly succeed as a matter of law because Supreme Court precedent bars such claims in the context of federal insurance programs. According to the Supreme Court, all participants in such programs are charged with constructive knowledge of the law; they participate taking the risk that someone might misstate exactly how some aspect of such a program properly operates; and they participate under an affirmative legal duty to become personally familiar with how such programs actually work in practice. Moreover, FEMA's regulations expressly provide that any misrepresentation as to the scope of coverage afforded by a Standard Flood Insurance Policy is void as a matter of federal law. 44 C.F.R. Pt. 61.5(e). Similarly, the SFIP bars all claims of reliance in the context of claims issues. 44 C.F.R. Pt. 61, App. A(1), Art. VII(J)(5), (7), and (8).

SIXTY-SIXTH DEFENSE

Analysis of this lawsuit must be accomplished within the confines established by several distinct constitutional provisions and doctrines. First, pursuant to the Appropriations Clause, no recovery may be allowed Plaintiffs beyond recoveries that are authorized and sanctioned by the Congress via the express statutes and regulations of the National Flood Insurance Program (NFIP). Second, pursuant to the Supremacy Clause, all federal rules and regulations preempt and displace any rule or regulation of the states bearing upon the same subject matter or that conflict with the federal rules and goals of the NFIP. Third, as the states have no power to regulate the NFIP via the congressional tender found in the McCarren-Ferguson Act, State Farm asserts under the Commerce Clause that the states have no regulatory authority over the NFIP operations of FEMA's Write Your Own Program carriers. Finally, pursuant to the Separation of Powers Doctrine, State Farm respectfully submits that the role of the courts in a dispute of this type is limited by the principles

set forth by the Supreme Court in the section on “policy” in *Chevron v. Natural Resources Defense Council*, 104 S.Ct. 2778 (1984).

SIXTY-SEVENTH DEFENSE

It is unreasonable for Plaintiffs to assert that they believed that there would be absolutely no exclusions or limitations for any damages they suffered as a result of a hurricane between their homeowner’s policy and their Standard Flood Insurance Policy.

SIXTY-EIGHTH DEFENSE

State Farm cannot and should not be held liable under state law for obeying and enforcing the mandates of federal law.

SIXTY-NINTH DEFENSE

State Farm affirmatively pleads Federal Rule of Civil Procedure 11 and the Mississippi Litigation Accountability Act as Plaintiffs’ claims against State Farm have no factual or legal basis under Mississippi law.

SEVENTIETH DEFENSE

State Farm reserves the right to move for transfer of venue in the event it is determined a fair and impartial trial cannot be had in this location including, but not limited to, all rights and defenses under the United States Constitution, including rights protected by the Due Process Clause of the Fifth and Fourteenth Amendments, all applicable federal statutes and rules authorizing a change of venue for prejudicial pretrial publicity or bias which may arise as a result of extra-judicial interference with the judicial process.

SEVENTY-FIRST DEFENSE

State Farm reserves the right to assert any further or additional defenses that may be

developed during the course of discovery in this matter.

AND NOW, having answered the allegations of the Complaint and having pled its defenses, State Farm denies that it is liable to Plaintiffs in any amount and that Plaintiffs are entitled to any recovery whatsoever. State Farm demands that the Complaint be dismissed with prejudice at Plaintiffs' cost.

RESPECTFULLY SUBMITTED,

STATE FARM FIRE AND CASUALTY
COMPANY

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BY: /s/ H. Scot Spragins
H. SCOT SPRAGINS, MSB # 7748

CERTIFICATE OF SERVICE

I, **H. SCOT SPRAGINS**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that I have on this date electronically filed the foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

DATED: October 9, 2008.

/s/ H. Scot Spragins

_____ **H. SCOT SPRAGINS**

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