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

GEORGE AND CRISTINA FOWLER **PLAINTIFFS**

Versus **Civil Action No. 1:06CV489-HSO-RHW**

STATE FARM FIRE and CASUALTY COMPANY, HAAG ENGINEERING, and STEVE SAUCIER **DEFENDANTS**

PLAINTIFFS' CONSOLIDATED RESPONSE TO STATE FARM'S MOTIONS *IN LIMINE* NUMBERS 1 THROUGH 15 AND HAAG ENGINEERING'S MOTION TO EXCLUDE PRE-KATRINA EVIDENCE

INTRODUCTION

> *"State Farm actually instructs its attorneys and claim superintendents to employ mad dog defense tactics – using the company's large resources to wear out opposing attorneys by prolonging litigation, making meritless objections, claiming false privileges, destroying documents, and abusing the law and motion process."*[1]

That was the Utah Supreme Court's opinion of State Farm's standard litigation tactics. Plaintiffs' case is no exception. The well-oiled State Farm litigation machine churned out 169 pages of its form motions[2] between 10:07 p.m. and 11:09 p.m. on the night of the motion *in limine* deadline.[3] State Farm's co-conspirator, Haag Engineering, joined in the process by filing a motion rehashing the issues addressed in State Farm's Motions Numbers 7 and 8.

---

[1] *Campbell v. State Farm Mut. Auto. Co.*, 65 P.3d 1134 (Utah 2001), *rev'd on other grounds*, 538 U.S. 408 (2003).

[2] State Farm filed virtually all of the same motions in many Katrina cases (*see, e.g. McIntosh, et al. v. State Farm, et al.*, Civil Actions No. 1:06-cv-1080).

[3] Dkts. [238] – [267].

The plethora of motions filed were designed to accomplish one thing – "wear out" Plaintiffs by forcing them to incur additional and unnecessary legal expenses. Many of State Farm's motions fail to identify with any particularity the specific exhibits or testimony it objects to, and should be raised *ore tenus* at trial so that this Honorable Court could assess questions of foundation, relevancy, and prejudice within the context of trial.[4] Even though State Farm obviously knows that many of its objections necessarily must be handled during the trial, it opted to generate more motion practice asking for a blanket Order excluding any evidence that may fall within the purview of any of the broad categories of evidence it has objected to. In short, by painting with such broad strokes, it hopes to exclude otherwise admissible evidence by a sweeping order.

State Farm's motions attempt to force this case into its cookie-cutter litigation play book. But Plaintiffs' case is not the ordinary wind versus water case like so many Your Honor and this Court have heard. Plaintiffs' case is about more. Plaintiffs contend their homeowners policy claim was denied based on a longstanding conspiracy between State Farm and Haag Engineering and State Farm's pattern and practice of routinely using Haag Engineering to defraud policy holders. In spite of the fact Plaintiffs have plead pattern and practice fraud and an ongoing conspiracy, State Farm and Haag Engineering claim this Honorable Court should consider their actions in isolation, without reference to previous findings of fraud and identical post-Katrina conduct in other claims. Defendants mistakenly believe that just because evidence is prejudicial it is not admissible. Not so. All relevant evidence is necessarily prejudicial. "[E]vidence is not prejudicial in the sense of being inflammatory, even though it is prejudicial in the

[4] *Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F. Supp. 1398, 1401 (N.D. Ill. 1993)(if evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so that the questions of foundation, relevancy and prejudice can be resolved in context).

sense of giving support to a party's position, i.e., it is 'damning.'"[5] In short, Plaintiffs are free to introduce the types of evidence that lead the Utah Supreme Court to reach the following conclusions:

- "State Farm repeatedly and deliberately deceived and cheated its customers . . ."[6]
- "Agents changed the contents of files, lied to customers, and committed other dishonest and fraudulent acts in order to meet financial goals."[7]
- "[S]tate Farm's fraudulent practices were consistently directed to persons-poor, racial or ethnic minorities, women, and elderly individuals – who State Farm believed would be less likely to object or take legal action."[8]
- "State Farm engaged in deliberate concealment and destruction of all documents related to this profit scheme. State Farm's own witnesses testified that documents were routinely destroyed so as to avoid their potential disclosure through discovery requests."[9]
- "State Farm has systematically harassed and intimidated opposing claimants, witnesses, and attorneys."[10]
- "State Farm engaged in a pattern of trickery and deceit, false statements, and other acts of affirmative misconduct targeted at financially vulnerable persons."[11]
- "State Farm has strategically concealed evidence of [its] improper motive to shield itself from liability, which was furthered by State Farm's treatment of opposing witnesses and counsel. Such conduct is malicious, reprehensible, and wrong."[12]

---

[5] *Brink's Inc. v. City of New York*, 717 F.2d 700, 710 (2nd Cir. 1983) citing *United States v. Cirillo*, 468 F.2d 1233, 1240 (2nd Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *see also United States v. Danzey*, 594 F.2d 905, 910-15 (2nd Cir. 1979), *cert. denied*, 441 U.S. 951 (1979).

[6] *Campbell v. State Farm Mut. Auto. Co.*, 65 P.3d 1134, 1148 (Utah 2001), *rev'd on other grounds*, 538 U.S. 408 (2003).

[7] *Id*; *Cf.*, the testimony of Brian Ford that Lecky King was unhappy with his "methodology" used in reports concluding the predominate cause of losses was wind and wind-driven debris and the testimony of the Rigsby Sisters who saw Lecky King destroy reports and ordered reports be destroyed.

[8] *Id.*

[9] *Id*; *Cf.*, the testimony of the Rigsby Sisters concerning the actions of Lecky King, *infra* X.

[10] *Id.*

[11] *Id.*

[12] *Id*; *Cf.* evidence that Edward B. Rust, Jr. mislead the Court when he claimed he never received Plaintiff's letters or was involved in the handling of this claim, *infra* XIII.

- "No behavior by those parties operates to excuse State Farm's dishonest and illicit practices over the course of many years …"[13]
- "The facts and circumstances surrounding State Farm's misconduct all point to a scheme motivated by the goal of making a profit by any means necessary."[14]

RESPONSE TO MOTIONS *IN LIMINE* NUMBERS 1 THROUGH 15 AND HAAG ENGINEERING'S MOTION TO EXCLUDE PRE-KATRINA CONDUCT

I. Opposition to State Farm's Motion *in Limine* No. 1: For Phased Trial

1. As detailed above, this is a breach of contract *and* tort action whereby Plaintiffs allege State Farm wrongfully withheld coverage under Plaintiffs' homeowners policy and, conspiring with Haag Engineering, fraudulently denied Plaintiffs' homeowners policy claim.[15]

2. State Farm claims Plaintiffs' breach of contract claim must be tried separately from Plaintiffs' claims for fraud, misrepresentation and punitive damages.[16] State Farm further contends Plaintiffs' cannot put on their fraud or misrepresentation claims unless and until such time as the trier of fact finds coverage under the policy.[17] Essentially, State Farm claims Plaintiffs' fraud and misrepresentation claims are conditioned on a finding of liability under the policy.[18] State Farm's motion *in limine* should be denied; there should be a compensatory phase including all of the evidence relevant to Plaintiffs fraud claim and thereafter a punitive damages case if warranted.

---

[13] *Id.* at 1149.

[14] *Id.*

[15] Plaintiffs have also asserted a cause of action against State Farm agent Steve Saucier for negligently procuring and misrepresenting the amounts of insurance coverage available to Plaintiffs.

[16] State Farm's purported authority for its position is *Hartford Underwriters, Ins. Co. v. Williams*, 936 So.2d 888 (Miss. 2006), a breach of contract and bad faith denial action where Plaintiffs did not plea fraud or fraudulent conspiracy.

[17] *See* Defendant State Farm Fire and Casualty Company's Memorandum in Support of Motion *in Limine* No. 1: For Phased Trial, Dkt. 239, at pp. 3 – 5 & 10.

[18] *Id.*

3. First, this Court has already ruled Plaintiffs are entitled to present their fraud count. The fraud count is in the compensatory phase of the case, not in the punitive damages phase of the case. No doubt there will be prejudicial evidence in the presentation of the fraud count against State Farm and that is because the Plaintiffs intend to prove that they committed a fraud and that they had a corporate-wide scheme to defraud policyholders.

4. The issues of coverage under the policy and Plaintiffs' claim for fraud are inexorably intertwined. State Farm did not pay the wind claim and breached the insurance contract because they had in place a well established team of adjusters and engineers ready, willing and able to distort the truth and issue biased reports to support the denial of the wind claims. It will be virtually impossible to segregate the compensatory phase of the case from the fraud count because Plaintiffs are alleging their claim was denied precisely because a fraud was perpetrated through a company-wide established corporate scheme. In fact, during the early stages of Plaintiffs' claim, Mr. Fowler wrote letters to Mr. Rust specifically advising him that the procedures being employed by State Farm were improper. The letters detailed the fact State Farm was tendering Plaintiffs flood money in the hopes they would accept that money and not insist on the wind money. Related thereto is the notion that Mr. Fowler was warning Mr. Rust, the head of the company, and through him the executive branch, Mr. C.S. Boydton (who sits on the Chairman's Circle) and is in charge of claims, and Susan Hood, Head of Claims for State Farm (responsible for 3900 claims people), that effectively a fraud was being perpertrated on the people of Mississippi. Because these people were knowingly

executing the scheme, they chose to ignore Mr. Fowler's letters and proceed with the use of Haag Engineering and otherwise insist that only flood money was due.

Furthermore, Plaintiffs should not be made to segregate their claim at trial because they intend to show that, as part of the fraud, State Farm approached FEMA to get authority for State Farm to pay flood monies wherever a surge occurred. This was part of State Farm's scheme to not pay wind damages to the policyholders and explains how State Farm was able to issue flood checks without adjustment in the hopes of not paying the wind claim.

5. State Farm suggests that "evidence of claim handling and or why or on what basis any decision by State Farm was made has no relevance to whether Plaintiffs' loss is covered."[19] However, such evidence will also serve to undermine State Farm's credibility and their reasoning in denying the claim. If State Farm's adjusters Lecky King, Brenda Emmons, Dian Carpenter, Mark Drain and Susan Hood were operating under a well established corporate scheme to defraud policyholders, including the use of biased engineers such as Haag Engineering, this would explain the illogical reasoning in their letters, the contradictions therein, and the lack of foundation in the Haag report. Plaintiffs will show at trial that, contrary to what State Farm told Plaintiffs, they never sent and Haag never went to Plaintiffs' property for the purposes of examining the extent of wind damage. They were sent there to issue a biased report without conducting a thorough search of the premises for the debris and other forensic evidence. Simply put, Plaintiffs intend to show that State Farm never intended to and did not adjust the claim in good faith.

---

[19] *Id.* at 3.

6. Furthermore, a phased trial with fraud separated from the other compensatory counts would be a waste of judicial resources and the court's time and an undue prejudice to the Plaintiffs who have, by the time of this trial, been subjected to over 80 motions.

7. State Farm argues that they would be subject to unfair prejudice if the counts are tried at the same time because of the "community saturation with negative publicity." All of the negative publicity was in fact earned by State Farm and it should not now be seen to complain of it. It happens to be the truth; if it isn't they will have the opportunity to disprove it at trial.

8. While Plaintiffs concede that this Honorable Court regularly conditions the award of punitive damages on a finding of liability under the policy in a breach of contract case, issues of "core liability" (including fraud) should be tried in phase one of a phased trial. *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *see also Conkling v. Turner*, 138 F.3d 577, 579 (5th Cir. 1998)(Civil RICO and breach of contract claim tried in phase one of a phased trial).

9. As detailed in the Complaint,[20] Plaintiffs have pled and are seeking to recover in the first phase only compensatory damages for breach of contract, fraud and misrepresentation claims. Aside from the loss claim, Plaintiffs seek reimbursement of all policy premiums because at the time Plaintiffs paid their premiums to State Farm, it had a corporate scheme in place to defraud policyholders of premiums by never intending to adjust claims in good faith.[21] This recovery is not conditioned on a finding of liability

[20] *See* Plaintiff's Complaint [1].
[21] *Id.* at ¶ 102.

under the policy.[22] Moreover, the elements of proving a fraud are obviously different than those to obtain a punitive damages award. Finally, different evidence is admissible in the compensatory than in the punitive phase.

10. There is no case law holding that Plaintiffs' fraud-based and misrepresentation claims have to be tried separately from the other compensatory claims. In *Nichols v. Shelter Life Ins. Co.*, 694 F.Supp. 218 (N.D. Miss. 1998). The court denied another insurer's motion to bifurcate, noting that the jury could award punitive damages on the fraud claim even if the insurer had an arguable reason for denying the claim.

> The court is of the opinion that in the interest of fairness to both parties, prejudice to the defendant can best be avoided in this case by proceeding as follows:
>
> (1) Hear all evidence relevant to the fraud and contract claims;
>
> (2) Determine whether there was a legitimate reason for denying the claim;
>
> (3) If the plaintiff is entitled to a directed verdict as to contract damages, allow the plaintiff to present his punitive damages evidence at the close of the defendant's case, with any rebuttal by defendant to follow;
>
> (4) If the plaintiff is not entitled to a directed verdict, submit the contract and fraud claims to the jury on special interrogatories asking the jury to determine whether punitive damages are appropriate. FN1 If the jury determines that they are, then evidence relevant to the determination of the amount can be presented.
>
> > FN 1. A jury could award punitive damages for fraud even if the court determined that the company had an arguable reason for denying the claim.

[22] This Honorable Court has already ruled that Plaintiffs are entitled to present their fraud-based and misrepresentation claims against State Farm and Steve Saucier [289] and their fraud-based claims against Haag Engineering [288].

11. Judge Senter's opinion in *Nichols* and the underlying reasoning is sound. The issues in this case are the same. There is no reason for this Honorable Court to bifurcate this trial as requested by State Farm.

II. Opposition to State Farm's Motion *in Limine* No. 2: To Preclude Evidence of or Reference to Fraud Claims and Claims for Extra-Contractual or Punitive Damages Prior to a Finding of Coverage Under the Policy

1. State Farm asks this Honorable Court to issue a blanket order "exclud[ing] any evidence, testimony, or argument relating or referring to Plaintiffs' claims for fraud and extra-contractual and punitive damages prior to a determination that coverage exists for Plaintiffs' claimed losses."[23] State Farm contends that "evidence regarding [its] conduct in denying Plaintiffs' claim is irrelevant to the threshold question of whether coverage exists for that claim ...."[24] According to State Farm, for example, "the two conflicting engineering reports obtained by State Farm during the claims handling process ..."[25] are irrelevant to the contract claim. The fact State Farm tries to exclude conflicting engineering reports is evidence, in and of itself, of the corporate fraud being perpetrated on the policyholders including the Plaintiffs.

2. In *Broussard v. State Farm,* 1:06cv006-LTS-RHW [91] and *Tejedor v. State Farm,* 1:05cv00679-LTS-RHW [105], this Honorable Court held that plaintiffs could introduce testimony and other evidence on the investigation, process and denial of the claim in a breach of insurance contract suit. The admissibility of such evidence is not conditioned on a finding of liability under the policy.

---

[23] *See* Defendant State Farm Fire and Casualty Company's Memorandum in Support of Motion *in Limine* No. 2: To Preclude Evidence of or Reference to Fraud Claims and Claims for Extra-Contractual or Punitive Damages Prior to a Finding of Coverage Under the Policy, Dkt. 241, at p. 1.

[24] *Id.* at 3.

[25] *Id.* at 6.

> It is difficult to envision a breach of an insurance contract suit without consideration of the policy provisions or the procedure utilized in handling the claim. *See, e.g., Richards v. Allstate Insurance Co.*, 693 F.2d 502 (5th Cir. 1982); *Eichenseer v. Reserve Life Insurance Co.*, 682 F. Supp. 1355 (N.D. Miss. 1988), *aff'd*, 881 F.2d 1355 (5th Cir. 1989), *vacated on other grounds*, 499 U.S. 914 (1991); *Independent Life & Accident Insurance Co. v. Peavy*, 528 So. 2d 1112 (Miss. 1988); *Standard Life Insurance Company of Indiana v. Veal*, 354 So. 2d 239 (Miss. 1977). This would be the case even if punitive or extra-contractual damages were not sought.

Broussard v. State Farm, 1:06cv006-LTS-RHW, (Dkt. 91); *Tejedor v. State Farm*, 1:05cv00679-LTS-RHW, (Dkt. 105).

3. In accordance with this Court's prior rulings in *Broussard* and *Tejedor*, and Fifth Circuit jurisprudence, State Farm's Motion *in Limine* No. 2 of 15 must be denied. Plaintiffs agree not to introduce evidence of the financial worth of State Farm until such time as the trier of fact finds State Farm guilty of bad faith denial of insurance and/or fraud. All evidence that relates or refers to the procedures State Farm used in handling Plaintiffs' claim is admissible under *Broussard* and *Tejedor*. State Farm "has pointed out no particular evidence which it thinks would go to contract damages but not punitive damages – other than the value of the company." *Nichols v. Shelter Life Ins. Co.*, 694 F.Supp. 218, 221 (N.D. Miss. 1998). Therefore, State Farm's Motion *in Limine* No. 2 should be denied.

III. Opposition to State Farm's Motion *in Limine* No. 3: To Preclude Testimony or Evidence Relating to Interpretation of Insurance Policy Provisions or Principles of Mississippi Law and to Exclude the Wind/Water Claim Handling Protocol

1. State Farm's Motion asks this Honorable Court to exclude: (1) testimony interpreting principles of Mississippi law and evidence relating to the meaning or interpretation of homeowners policy provisions; (2) evidence of State Farm's claims handling guidelines or claims handling procedures for purposes of determining coverage;

and (3) State Farm's Wind/Water Claim Handling Protocol ("WWP") for any purpose, including punitive damages. For the following reasons, State Farm's Motion is moot as to part (1) and should be denied as to parts (2) and (3).

2. Plaintiffs have no intention of offering evidence as to part (1) above. This Court has previously correctly ruled "these issues of law are within the province of the Court, not the jury." *Huynh v. State Farm Fire and Casualty Co.*, No. 1:06cv1061-LTS-RHW. Notwithstanding, Plaintiffs intend to introduce evidence regarding the factual underpinnings of their various counts. Plaintiffs will not be submitting expert legal testimony regarding issues of law, but the jury must be presented with the elements of the various counts.

3. State Farm's Motion should be denied as to part (2) because, as detailed above in Plaintiffs' Opposition to State Farm's Motion *in Limine* No. 2 and as outlined by this Court's Orders in *Broussard*[26] and *Tejedor*,[27] "[i]t is difficult to envision a breach of an insurance contract suit without consideration of the policy provisions or the procedures utilized in handling the claim." *See, e.g., Richards v. Allstate Insurance Co.*, 693 F.2d 502 (5th Cir. 1982); *Eichenseer v. Reserve Life Insurance Co.*, 682 F. Supp. 1355 (N.D. Miss. 1988), *aff'd*, 881 F.2d 1355 (5th Cir. 1989), *vacated on other grounds*, 499 U.S. 914 (1991); *Independent Life & Accident Insurance Co. v. Peavy*, 528 So. 2d 1112 (Miss. 1988); *Standard Life Insurance Company of Indiana v. Veal*, 354 So. 2d 239 (Miss. 1977).

4. State Farm's Motion as to part (3) should be denied because the Wind Water Protocol (WWP) is relevant to the fundamental issue of how State Farm handled

---

[26] *Broussard v. State Farm*, 1:06cv006-LTS-RHW, (Dkt. 91).
[27] *Tejedor v. State Farm*, 1:05cv00679-LTS-RHW, (Dkt. 105).

Plaintiffs' claim and to the issue of punitive damages. State Farm should have no difficulty with the WWP if it was consistent with the policy provisions. Plaintiffs submit that the WWP was part of the corporate fraud scheme to deprive them of their wind claim.

As this Honorable Court is aware, the WWP was a directive to State Farm employees and adjusters immediately following Hurricane Katrina describing certain actions that were to be utilized in processing claims. And "the procedures utilized in handling ... claim[s]" are certainly relevant in a breach of insurance contract suit. *Broussard v. State Farm*, 1:06cv006-LTS-RHW, (Dkt. 91); *Tejedor v. State Farm*, 1:05cv00679-LTS-RHW, (Dkt. 105).

5. Moreover, the Court has previously addressed this issue in *Huynh v. State Farm Fire and Casualty Co.*, 1:06cv1061-LTS-RHW, (Dkt. 166), holding that evidence relating to how the claim was handled (WWP) is admissible.

> Plaintiff [can] delv[e] into the procedure[s] utilized in handling this claim, and the Plaintiff will be allowed to introduce appropriate admissible evidence concerning the manner in which this claim was handled by State Farm, whether that relates to the policy provisions *or the procedures used in applying them*, as well as what was done and not done in the claim adjustment and decision process. (emphasis added).

6. Similarly, in *Broussard v. State Farm Fire & Casualty Co.*, 2007 WL 268344, at *2 (S.D. Miss. Jan. 31, 2007), this very Court ruled that the WWP was relevant to the issue of punitive damages.

> To justify this decision, Defendant adopted a wind/water claim handling protocol that emphasized the exclusion but is at odds with other express terms of the insurance contract. Defendant failed to take into account the coverage afforded under the Plaintiffs' insurance policy for accidental direct physical loss to the dwelling and accidental direct physical loss to their contents caused by windstorm, which Katrina undoubtedly was. This protocol and actions taken thereunder attempted impermissibly to place

> the burden of proof on the Plaintiffs to establish that their losses were caused by wind rather than what are admitted to be covered accidental direct physical losses (otherwise known as an "all perils" policy in the case of the dwelling and a "named peril" policy as to contents, i.e., windstorm).
>
> Thus, instead of conduction a reasonably prompt investigation of all relevant facts, making a realistic evaluation of the claim (whether as an initial or continuing duty), and shouldering its burden of proof, the Defendant took the extraordinarily troubling position, even with expert reports in hand (obtained well after the lawsuit was filed), that it would rely on the jury to make the determination of the amount to pay the Plaintiffs for their covered losses.
>
> This Court remains convinced that a punitive damages instruction and an award of punitive damages are appropriate in this case.

7. It appears that State Farm does not want Plaintiffs to present their claims as pled. Plaintiffs have a fraud Complaint. Although Mr. Fowler will not be testifying as an expert legal witness, he certainly can testify that fraud occurred in this case and how it occurred. Any other resolution or position would be absurd. As far as proper interpretation of the policy, Plaintiffs should certainly be allowed to testify regarding what the policy says. If the policy provisions conflict with the wind/water protocol or any other procedure in place, the jury should hear that.

8. In accordance with this Court's prior rulings, Plaintiffs respectfully submit that State Farm's Motion *in Limine* No. 3 of 15 should be denied as to parts (2) and (3).

IV. Opposition to State Farm's Motion *in Limine* No. 4: To Limit Testimony or Evidence Relating to Insurance Department Bulletins and Related Correspondence[28]

1. State Farm relies on *Huynh v. State Farm Fire & Casualty*[29] in support of its argument that "MDI bulletins and related correspondence are not admissible under any

---

[28] State Farm's Motion at paragraph V re-raises issues addressed in the preceding Motion. Plaintiffs' respectfully refer this Court to their Opposition to State Farm Motion *in Limine* No. 3 of 15 in addressing same.

circumstances to prove Plaintiffs' breach of contract claims and may be admitted on Plaintiffs' extra-contractual and punitive damages claims solely for impeachment purposes."[30] *Huynh* does not support State Farm's argument.

2. *Huynh* never limits the admissibility of MDI bulletins to claims for extra-contractual and/or punitive damages. In fact, by the time the *Huynh* Order was issued, Judge Senter had ruled on the same issue on several occasions. His earlier, more detailed opinions discussed the issue in greater detail.

3. For example, in *Killeen v. State Farm Fire & Casualty Co.*,[31] this Honorable Court held that MDI bulletins may be admissible in the initial phase of trial assuming Plaintiffs establish the proper evidentiary predicate.

> The underlying basis for excluding evidence concerning the interpretation of policy provisions is that this testimony constitutes a legal conclusion and invades the province of the Court in instructing the jury. At the same time, it is inappropriate to hamstring Plaintiffs by not allowing them to pursue claims handling guidelines or procedures *with respect to the contractual claim*.
>
> The MDI bulletins and related correspondence are not admissible unless the Defendant responded to them in one manner and acted in another, or unless the Defendant raises reliance on the MDI bulletins for other purposes. In that event, these documents, and similar documents prepared or used by the Defendant in adjusting or evaluating the Plaintiff's claim, *may be admissible in the initial phase*, assuming the Plaintiffs establish the proper evidentiary predicate.

Killeen v. State Farm Fire & Casualty Co., 1:06cv649-LTS-RHW, (Dkt. 68) (emphasis added).

4. Plaintiffs respectfully request State Farm Motion *in Limine* No. 4 of 15 be denied and this Court enter an Order commensurate with its prior rulings.

---

[29] 1:06cv1061-LTS-RHW, Dkt. 166.

[30] *See* Defendant State Farm Fire and Casualty Company's Memorandum in Support of Its Motion *in Limine* No. 4: To Limit Testimony or Evidence Relating to Insurance Department Bulletins and Related Correspondence, Dkt. 245, at pp. 2 – 3.

[31] 1:06cv649-LTS-RHW, (Dkt. 68).

V. Opposition to State Farm's Motion *in Limine* No. 5: To Exclude Evidence of or Reference to any Grand Jury or Government Investigation Relating to Defendant's Response to Hurricane Katrina

1. State Farm's Motion requests "the Court enter an Order *in limine* precluding Plaintiffs and their counsel from introducing evidence of or making references to *any* governmental investigations or grand jury proceedings or investigations *relating* to State Farm's response to Hurricane Katrina"[32]

2. State Farm's request for the issuance of such a broad Order, governing evidence which remains unidentified, is improper as it fails to specifically identify the "investigations" and "proceedings" falling within the scope of its Motion.

3. Before granting a motion *in limine*, courts must be certain that such action will not unduly restrict opposing party's presentation of its case. *Whittley v. City of Meridian*, 530 So.2d 1341, 1344 (Miss. 1988). "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in the proper context." *Id. See also Scarboro v. Travelers Ins. Co.*, 91 F.R.D. 21, 22 (E.D. Tenn. 1980) (motions *in limine* to exclude evidence are disfavored and better practice is to deal with admissibility questions as they arise at trial). Essentially, if evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so that the questions of foundation, relevancy, and prejudice can be resolved in context. *Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F. Supp. 1398, 1401 (N.D. Ill. 1993).

4. Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial and instead denial of such a motion

[32] *See* Defendant State Farm Fire and Casualty Company's Memorandum of Law in Support of Its Motion *in Limine* No.5: To Exclude Evidence of or Reference to any Grand Jury or Government Investigation Relating to Defendant's Response to Hurricane Katrina, Dkt. 247, at p. 5 (emphasis added).

means only that without the context of trial, the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

5. State Farm's vague reference to "investigations" and "proceedings" is insufficient for this Honorable Court to assess whether excluding such evidence will or will not unduly restrict the Plaintiffs' presentation of their case. State Farm has not specifically identified the investigations and proceedings covered by its requested Order and therefore questions of foundation, relevancy, and prejudice cannot be resolved.

6. Accordingly, State Farm Motion *in Limine* No. 5 of 15 should be denied and this Court's ruling on the admissibility of governmental or grand jury investigations or proceedings should be deferred until trial.

VI. Response to State Farm's Motion *in Limine* No. 6: To Exclude Evidence of or References to the Motion to Change Venue Filed by State Farm in This or Any Other Action

1. Plaintiffs' have no plan to offer evidence referencing State Farm's Motion to Change Venue.

2. Plaintiffs request this Honorable Court enter an Order commensurate with its prior rulings allowing Plaintiffs to mention the motion for change of venue if "the topic is raised in any manner by State Farm." *Huynh v. State Farm Fire and Casualty Co.*, No. 1:06cv1061-LTS-RHW (Dkt. 166).

VII. Opposition to State Farm's Motion *in Limine* No. 7: To Exclude Evidence Regarding Claims-Handling of Property Losses Other Than Plaintiffs' and/or Evidence of "Fraudulent" Engineering Reports Regarding Other Properties

1. State Farm's Motion claims "[t]here is no difference between this case and *Aiken*[33] or *Huynh*[34] that would permit departure from these rulings [excluding evidence of other policyholder claims.]"[35] State Farm additionally claims "an insurer's handling of other policyholders' claims ... is not admissible in insurance bad faith actions ...."[36]

2. State Farm fails to recognize that neither *Aiken* nor *Huynh* dealt with claims specifically for pattern and practice fraud and/or fraudulent conspiracy. Although State Farm quotes this Court's decision in *Huynh* as holding that Plaintiffs may not offer any evidence "on the issue of fraud regarding engineering reports,"[37] an actual review of the *Huynh* Order never reveals this quote.[38] State Farm again confuses a breach of contract and bad faith denial claim with an independent tort action for fraud.

3. In particular, Plaintiffs have specifically alleged that State Farm and Haag Engineering Company conspired to deny any coverage under the wind portion of their homeowner's policy "*as part of a longstanding pattern of fraudulent claims adjustment procedures*."[39] State Farm filed a Motion for Summary Judgment seeking dismissal of Plaintiffs' fraud claim, but the Court denied that motion [168, 216, 225, 289]. Therefore,

---

[33] *Aiken v. Rimkus Consulting Group, Inc.*, No. 1:06cv741-LTS-RHW, 2007 WL 4245906, at *1-2 (S.D. Miss. Nov. 29, 2007).

[34] *Huynh v. State Farm Fire & Cas. Co.*, No. 1:06cv1061-LTS-RHW, 2008 WL 80759, at *1-2 (S.D. Miss. Jan. 7, 2008).

[35] *See* Defendant State Farm Fire and Casualty Company's Memorandum of Law in Support of Its Motion in Limine No. 7: To Exclude Evidence Regarding Claims-Handling of Property Losses Other Than Plaintiffs' and/or Evidence of "Fraudulent" Engineering Reports Regarding Other Properties, Dkt. 250, at p. 4.

[36] *Id.* (emphasis added).

[37] *Id.* at 4, albeit with no pinpoint citation.

[38] *Huynh v. State Farm Fire and Casualty Co.*, No. 1:06cv1061-LTS-RHW (Dkt. 166).

[39] *See* Plaintiffs' Amended Memorandum in Opposition to State Farm and Steve Saucier's Motion for Partial Summary Judgment as to Plaintiffs' Fraud-Based Claims and Misrepresentation Claims, Dkt. 225, at p. 3, explaining Plaintiffs' fraud-based claims.

evidence that tends to show "a longstanding pattern of fraudulent claims adjustment procedures" will be both relevant and admissible at the trial of this matter.

Obviously, to establish a "longstanding pattern of fraudulent claims adjustment practices," the Plaintiffs must offer evidence of other similar frauds. Otherwise, the jury would have to identify a "pattern" of behavior from a single claim.

In this case, there is overwhelming evidence of fraud. Lecky King received Plaintiffs' Complaint, and the case was then forwarded to Haag Engineering to evaluate the Fowler's property. Haag Engineering didn't bother to evaluate whether the Plaintiffs' home was damaged by wind before concluding it was destroyed by tidal surge, raising the obvious question – how does one rule out wind damage without performing a wind analysis? When asked whether she conspired with Haag Engineering to defraud the Fowlers, Lecky King asserted her Fifth Amendment right against self-incrimination, thereby giving rise to an adverse inference. That inference is confirmed and transformed to fact by the Rigsby sisters and Brian Ford, who testified that Ms. King routinely exerted her influence over Haag Engineering and other engineering firms to provide reports favorable to State Farm.

State Farm has been found guilty of the same conduct in other similar cases. Evidence of State Farm's conduct in those cases is therefore relevant and admissible to show a "longstanding pattern of fraudulent claims adjustment practices."

4. In cases alleging fraud, evidence of other similar frauds perpetrated by the Defendant are admissible because it is seldom that fraud can be the subject of direct, positive evidence. In *Nash Mississippi Valley Motor Co. v. Childress*,[40] the Court properly admitted evidence of a witness to the effect that the seller was in the habit of

[40] 156 Miss. 157, 164 (Miss. 1930)

setting back speedometers on its secondhand cars. The Court found that where fraud was charged, the evidence of other similar frauds perpetrated by the same person at or about the same time was admissible when the same motive to defraud might reasonably have existed and where the acts were all part of one general scheme to defraud.

> It is a well-established rule that other similar frauds may be shown in order to show the intent with which the representations complained of were made. In all controversies involving questions of fraud, a wide range of evidence is necessarily allowed, for it is seldom that fraud can be the subject of direct, positive evidence. Usually, it is a matter of inference from facts and circumstances. Where fraud is charged, the evidence of other similar frauds perpetrated by the same person at or about the same time, and when the same motive to defraud may reasonably be supposed to have existed, and especially where the acts are all part of one general scheme or plan to defraud, is admissible.

Nash Mississippi Valley Motor Co., 156 Miss. at 164 (internal citations omitted).

5. Although State Farm claims evidence of its other fraudulent claims handling procedures is irrelevant, has no probative value and is overly prejudicial, such evidence satisfies the United States Supreme Court's four-part test governing the admissibility of other acts evidence.

> 1) The evidence must be introduced for a proper purpose in accord with Federal Rule of Evidence 404(b).
>
> 2) The offered evidence must be relevant to an issue in the case pursuant to Rule 402, as enforced through Rule 104(b);
>
> 3) The evidence must satisfy the probative-prejudicial balancing test of Rule 403; and
>
> 4) If the evidence of other acts is admitted, the district court must, if requested, provide a limiting instruction for the jury.

Huddleston v. United States, 485 U.S. 681, 691-92 (1988).

6. First, the evidence is being offered for a proper purpose. It is being offered by Plaintiffs to show the existence of a pattern of activity.[41] And "evidence demonstrative of [a] pattern is admissible under Rule 404(b)." *Carofino v. Forester*, 450 F. Supp. 2d 257, 272 (2nd Cir. 2006) citing *Ismail v. Cohen*, 899 F. 2d 183, 188 (2nd Cir. 1990)(characterizing the establishment of "pattern" as a legitimate ground for admitting prior act evidence under Rule 404(b)). Proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" is admissible. Fed. R. Evid. 404(b). State Farm's knowledge of its improper reliance on the Haag Report is an essential element of Plaintiffs' claims for fraud.[42]

7. Second, evidence of State Farm utilizing fraudulent claims handling procedures and issuing fraudulent engineering reports is relevant to Plaintiffs' case. "Pursuant to Federal Rule of Evidence 401, '[r]elevant evidence means evidence having *any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.'" *Carofino*, 450 F. Supp. 2d at 273 quoting Fed.R.Evid.401 (emphasis added); *Huddleston*, 485 U.S. at 687 (defining as relevant "evidence that makes the existence of any fact at issue more or less probable"). The fact State Farm utilized fraudulent claims handling procedures and issued fraudulent engineering reports in other homeowner policy cases is "clearly consequential to the Court's determination of this action." *Carofino*, 450

---

[41] The "pattern" ground for admission under Rule 404(b) is more often referred to as a **common scheme or plan.** 2 Margaret A. Berger & Jack B. Weinstein, *Weinstein's Federal Evidence* § 404.22[5][a]. The concept of pattern, plan or common scheme "applies to a myriad of factual patterns, which can be grouped into two major areas: '[t]he first includes other crimes evidence demonstrating a connected or inseparable transaction; [t]he second subcategory of common plan involves similar act testimony constituting **a continuing scheme or conspiracy.**'" *Carofino*, 450 F. Supp. 2d at 272 quoting *United States v. O'Connor*, 580 F. 2d 38, 41 (2nd Cir. 1978).

[42] *Great Southern Nat'l Bank v. McCullough Environmental Services, Inc.*, 595 So.2d 1282, 1289 (Miss. 1992).

F. Supp. 2d at 273 ("evidence that defendant made false misrepresentations to an insurance carrier concerning how many times per week he saw a particular patient both immediately after and during the period when he was seeing [plaintiff] tends to make more probable the alleged fact that he was making the same false misrepresentations to [individual paying for plaintiff's treatment]"). As detailed above, State Farm's fraudulent conduct in adjusting other homeowner claims is relevant to Plaintiffs' claim that their loss was denied coverage "as part of a longstanding pattern of fraudulent claims adjusting procedures."

8. Third, evidence of State Farm's fraudulent conduct satisfies the probative-prejudicial balancing test. "All evidence tending to demonstrate a defendant's liability, by its nature, will be prejudicial in some respect to the defendant; Rule 403 is designed to exclude only *unfair* prejudice." *Carofino*, 450 F. Supp. 2d at 273 citing *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 151 (2nd Cir. 1997)("Although any evidence that tends to establish liability is prejudicial to the interests of the defendant, the prejudice is unfair only if the evidence has 'an undue tendency to suggest decision on an improper basis'" (quoting Fed.R.Evid. 403 advisory committee note)). "Rule 404(b) specifically provides for the admission of other wrongs or acts, either prior to or subsequent to the incident in question, which are relevant to an actual issue in the case." *Seelsmail v. Cohen*, 706 F. Supp. 243, 253 (S.D.N.Y. 1989), *aff'd in part, rev'd in part*, 899 F.2d 183 (2nd Cir. 1990).

Plaintiffs' are offering evidence of State Farm's longstanding practice of fraudulently denying claims to prove "[w]hen State Farm marketed and sold the policy, year in, year out, for 14 years, State Farm had [a] well established system[] in place to

avoid paying the claims;"[43] that from day one State Farm never intended to adjust any large-scale catastrophe in good faith and therefore defrauded Plaintiffs of their premiums. "[T]he nature of the fraud [Plaintiffs seek to offer is] extremely similar; indeed ... the same exact type of fraud of which [State Farm] is accused in this case." *Carofino*, 450 F. Supp. 2d at 274. Plaintiffs' intend to offer evidence proving that in response to large-scale catastrophes, State Farm conspires with Haag Engineering to deny homeowner claims in bad faith and that such a system has been in place the entire time State Farm has marketed and sold homeowner policies to Plaintiffs.[44] The probative value of evidence proving a count of Plaintiffs' Complaint is not *unfairly* prejudicial. But it is highly probative. State Farm sent Haag Engineering to Plaintiffs' home knowing that they had previously been found by a jury to have been in bad faith for using Haag. *Nicolau* , 951 S.W. 2d 444 (TX 1997). The *Watkins* jury had not yet reached a similar verdict when Haag was sent to Plaintiffs' home but the allegations had been made years earlier. After *Watkins*, State Farm terminated the use of Haag but to this day relies on their report not to pay Plaintiffs. The pattern is clear: *Nicolau, Watkins, Fowler*. There are many other cases relating to State Farm and Haag that show the same pattern.

9. Fourth, and finally, the Court "shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted." *Huddleston*, 485 U.S. at 691-92 (internal citations omitted). In this case, the evidence will be properly admitted to prove State Farm's pattern and practice of issuing

[43] *Id.* explaining fraud-based claims.

[44] *See, e.g., Watkins et al. v. State Farm Fire & Casualty Co. et al.*, No. CJ-2000-303, verdict returned (Okla. Dist. Ct., Grady County May 25, 2006)(State Farm, in concert with Haag Engineering, purposefully, unfairly and repeatedly misled the plaintiffs and other insureds to believe their claims were being fairly and thoroughly investigated by competently trained personnel).

fraudulent claims handling procedures and the State Farm / Haag Engineering fraudulent conspiracy.

10. In drafting Federal Rule of Evidence 404, "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence." *Huddleston*, 485 U.S. at 688-89. The prior act evidence Plaintiffs seek to offer passes the United State Supreme Court's 4-part test for admissibility. The evidence is being introduced for a proper purpose. It is relevant. Its probative value outweighs any prejudicial effect. State Farm's Motion must be denied.

VIII. Opposition to State Farm's Motion *in Limine* No. 8: To Exclude Evidence of Out-Of-State Conduct

1. Relying on *State Farm Mutual Auto. Ins. Co. v. Campbell*[45] and *BMW of N. Am., Inc. v. Gore*,[46] State Farm claims "evidence of State Farm's out-of-state conduct is inadmissible for purposes of punitive damages."[47] Moreover, State Farm claims evidence of its out-of-state fraudulent conduct "should be excluded … as unduly prejudicial and as improper character evidence."[48] State Farm is wrong on both counts.

2. State Farm fails to discuss the United States Supreme Court's most recent decision on the issue. In *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), the Supreme Court specifically held that while evidence of harm to nonparties cannot be used

[45] 538 U.S. 408 (2003).

[46] 517 U.S. 559 (1996).

[47] *See* Defendant State Farm Fire and Casualty Company's Memorandum of Law in Support of its Motion *in Limine* No. 8: To Exclude Evidence of Out-of-State Conduct, Dkt. 252, at p. 3.

[48] *Id.* at p. 11.

in calculating the amount of punitive damages, this evidence can be considered under the first *Gore* guidepost – "the degree of reprehensibility of the defendant's conduct."[49]

> We have explained why we believe the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation. At the same time we recognize that *conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility*.
>
> Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible ....

Phillip Morris USA, 127 S. Ct. at 1065 (emphasis added) citing *Witte v. United States*, 515 U.S. 389, 400 (1995)(recidivism statutes taking into account a criminal defendant's other misconduct do not impose an "'additional penalty for the earlier crimes,' but instead ... 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one'" (internal citations omitted)).

3. Similarly, State Farm's argument that its out-of-state fraudulent conduct is unduly prejudicial and improper character evidence fails for all the reasons set forth in Plaintiffs' Opposition to Motion *in Limine* No. 7 of 15, as well as Haag's Motion *in Limine*.[50] Evidence of State Farm's out-of-state fraudulent conduct passes the United States Supreme Court's 4-part test for the admissibility of other acts evidence. And according to the Mississippi Supreme Court,[51] in cases alleging fraud, evidence of other similar frauds perpetrated by the Defendant are admissible because it is seldom that fraud can be the subject of direct, positive evidence. In addition, character evidence is admissible under Federal Rule of Evidence 404(b) to prove "motive, opportunity, intent,

---

[49] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)(quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994)).

[50] *See infra* p. 42, *et seq.*

[51] *Nash Mississippi Valley Motor Co. v. Childress*, 156 Miss. 157, 164 (Miss. 1930).

preparation, plan, knowledge, identity, or absence of mistake or accident."[52] Finally, the Motion fails because Plaintiffs possess evidence that State Farm routinely reacts to large scale catastrophes involving potentially high liabilities, such as Hurricane Katrina and the 1999 Oklahoma tornadoes, by engaging in a pattern and practice of fraudulently denying claims.

For example, in litigation regarding State Farm's handling of homeowner claims following the 1999 Oklahoma tornadoes, State Farm was found, by clear and convincing evidence, to have directed and coerced Rimkus and *Haag Engineering* to effectuate State Farm's pattern and practice of fraudulently denying claims. *Watkins v. State Farm Fire & Casualty Co., et al.*, No. CJ-2000-303, *verdict returned* (Okla. Dist. Ct., Grady County, May 25, 2006). Here, State Farm engaged in an identical pattern of behavior following Hurricane Katrina. Once again, State Farm engaged Haag Engineering as its co-conspirator.

4. Because State Farm employs a routine pattern and practice of fraudulently denying homeowner claims in response to large scale catastrophes, State Farm's out-of-state conduct is also admissible under Federal Rule of Evidence 406.

---

[52] *Howard Opera Houst Assoc. v. Urban Outfitters, Inc.*, 322 F.3d 125 (2d Cir. 2003)(in action against retail chain for nuisance, evidence of prior excessive noise problems at other stores in the chain was relevant to prove that defendant knew its music had a disruptive effect and insisted on playing it at excessive levels despite that knowledge; such prior acts were probative of defendant's "intent, plan, motive, and pattern of behavior"); *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356 (10th Cir. 1987)(in suit against mineral exploration company for trespass, assault and outrageous conduct, evidence of other incidents in which the defendant trespassed or destroyed property was admissible to prove recklessness and to negate any claim of accident or mistake); *Dial v. Travelers Indem. Co.*, 780 F.2d 520 (5th Cir. 1986)(in action to recover on fire insurance policy, evidence of other fires at previous and subsequent residence was relevant to negate claim of accident); *Turley v. State Farm Mut. Auto. Ins. Co.*, 944 F.2d 669 (10th Cir. 1991)(trial court erred in excluding evidence of prior conspiracy to stage a "slip and fall"; such evidence was admissible to show intent to defraud insurance company under 404(b)); *Foxx Valley Constr. Workers Fringe Benefit Funds v. Pride of Fox Masonry & Expert Restorations*, 140 F.3d 661 (7th Cir. 1998)(evidence of lawyer's sharp practices during representation of one of client's earlier corporations was admissible to prove lawyer's "intent to delay the proceedings as he had successfully done in the prior suit five years ago." Evidence was prejudicial to lawyer, "but not unduly or unfairly.");

> Evidence of the habit of a person or of ***the routine practice of an organization***, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Fed. R. Evid. 406; see also *Vining v. Enterprise Fin. Group, Inc.*, 148 F. 3d 1206 (10th Cir. 1998)(court found no abuse of discretion in admitting a report prepared by staff of the state insurance department regarding the defendant's business practices as evidence that the defendant engaged in a pervasive, consistent pattern of abusive rescissions); *Rosenburg v. Lincoln Am. Life Ins. Co.*, 883 F.2d 1328 (7th Cir. 1989)(evidence that defendant's agents had a habit of selling conditional insurance, waiving such conditions, and later asserting them as defenses was admissible as routine practice).

5. Plaintiffs acknowledge this Honorable Court has excluded "out of state conduct involving State Farm" in other cases, including *Huynh.*[53] However, as stated above and detailed in Plaintiffs' Opposition to Motion *in Limine* No. 7 of 15, this case is different. Unlike *Huynh*, this case involves claims for pattern and practice fraud and fraudulent conspiracy.

6. Plaintiffs have alleged a "pattern and practice" of fraudulent conduct by State Farm that must be proven at trial. Plaintiffs have the burden to show that State Farm engaged in a course of conduct that extends beyond Plaintiffs. State Farm's motion, if granted, would pose an almost insurmountable burden on Plaintiffs to prove this aspect of their case. Before granting a motion *in limine*, courts must be certain that such action will not unduly restrict an opposing party's presentation of its case. *Whittley v. City of Meridian*, 530 So. 2d 1341, 1344 (Miss. 1988).

---

[53] *Huynh v. State Farm Fire and Casualty Co.*, No. 1:06cv1061-LTS-RHW.

7. For all the reasons set forth herein, including Plaintiffs' Opposition to Motion *in Limine* No. 7, State Farm's Motion should be denied.

IX. Opposition to State Farm's Motion *in Limine* No. 9: To Preclude Plaintiff George Fowler or Any Other Witness From Testifying to the Legal Conclusion of Fraud

1. According to State Farm's 9th Motion, "George Fowler should not be permitted to testify that State Farm committed 'fraud' … [n]or should any other witness be allowed to testify that State Farm committed 'fraud.'"[54] Essentially, State Farm wants this Court to employ a gag order preventing anyone in Court from mentioning the word "fraud," notwithstanding the fact that Plaintiffs have sued State Farm for committing fraud.

2. First and foremost, Plaintiffs never intended to offer any "expert" testimony regarding the legal meaning of fraud, including from Plaintiff George Fowler. This Court has previously ruled such "issues of law are within the province of the Court, not the jury." *Huynh v. State Farm Fire and Casualty Co.*, No. 1:06cv1061-LTS-RHW.

3. Plaintiffs have no objection to a limiting instruction that Plaintiff George Fowler will not be testifying as to the legal meaning of fraud.

4. Notwithstanding, Mr. Fowler and others will offer testimony regarding the factual underpinnings of the Plaintiffs' fraud claim – the factual elements necessary to support their cause of action for fraud. Plaintiffs have pled fraud in their Complaint. Plaintiffs may use the term "fraud" to describe certain of State Farm's actions, which is necessary to establish the factual elements necessary to prove their claim at trial.

[54] *See* Defendant State Farm Fire and Casualty Company's Memorandum of Law in Support of Motion *in Limine* No. 9: To Preclude Plaintiff George Fowler or Any Other Witness From Testifying to the Legal Conclusion of Fraud, Dkt. 254, at p. 2.

5. In the simplest terms, the Court should not handicap the Plaintiffs' ability to describe State Farm's fraudulent conduct by precluding the use of the word "fraud" from the witness stand. In filing this Motion, State Farm apparently intends to turn the trial of this matter into a game of "Taboo," the Milton Bradley party game where players attempt to describe a word or phrase without using five common words or phrases. Essentially, State Farm suggests that Plaintiffs should have to describe State Farm's fraudulent conduct without using the term fraud or any of its derivatives.

6. State Farm's Motion is without merit. With the exception to the limiting instruction above, State Farm's Motion should be denied.

X. Opposition to State Farm's Motion *in Limine* No. 10: To Exclude Testimony of Alexis "Lecky" King

1. After losing its relentless fight to prevent the deposition of Alexis "Lecky" King from occurring at all, and after Lecky King refused to testify – pleading the Fifth to every question beginning with "And what is your current address"[55] – State Farm seeks to suppress all evidence that the deposition ever occurred and the witness refused to testify.

2. In support of its Motion, State Farm first claims Lecky King's testimony is irrelevant and fails the probative/prejudicial balancing test of Federal Rule of Evidence 403 because of "the evidence that she had no involvement in the decision to deny Plaintiffs' claim."[56] What evidence? What testimony? [redacted] When Lecky King was directly asked "[redacted]

[55] Deposition transcript of Alexis "Lecky" King at 5, lines 19 – 22. All relevant portions of Ms. King's deposition transcript are attached hereto as Exhibit "A."

[56] *See* Defendant State Farm Fire and Casualty Company's Memorandum in Support of Its Motion in Limine No. 10: To Exclude Testimony of Alexis "Lecky" King, Dkt. 256, at p. 6.

," .[57] Additionally, although State Farm labels Lecky King's activity log entry in this case as a "clerical error,"[58] Ms. King has NEVER supported that position. She has never said she had nothing to do with State Farm's denial of Plaintiffs' claim or in orchestrating the longstanding pattern of fraudulent claims adjustment procedures Plaintiffs complain of and that were applied to their claim. And she won't.

Moreover, there is no clerical error; Lecky King appears in State Farm's activity log in Plaintiffs' file ordering: "Home office complaint. Please contact insured immediately to schedule appt. Insured is in Miami phone # 305-322-6873 (cell)".

She clearly was involved in Plaintiffs' claim. Susan Hood testified (Hood deposition at p. 98.) in Mississippi. Plaintiffs will offer testimony proving Lecky King was a key player in State Farm's pattern and practice of fraudulently denying claims. And that pattern and practice of denying claims was applied to Plaintiffs' claim, when Haag Engineering, acting under the influence of and conspiring with State Farm Team Leader Lecky King, issued its report for the Plaintiffs' property without ever evaluating the potential for wind damage.

3. State Farm's next equally unavailing argument is that if Lecky King's testimony is allowed into evidence, "this Court should instruct the jury *not* to draw *any* adverse inferences against State Farm."[59] Essentially, State Farm's wants an anti-adverse inference instruction. Both the United States 5th Circuit Court of Appeals and the Mississippi Supreme Court have long allowed adverse inferences in civil cases. *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 119 (5th Cir. 1990)("The ... contention

---

[57] King Dep. at 22, lines 5 – 8.
[58] Dkt. 256, at p. 2.
[59] *Id.* at p. 8 (emphasis added).

that an adverse inference may be drawn from a witness' assertion of her fifth amendment rights in civil cases is correct."); *Morgan v. U.S. Fidelity & Guaranty Co.*, 222 So. 2d 820, 828 (Miss. 1969). Moreover, adverse inferences apply not only when a party asserts Fifth Amendment protection, but also when a non-party witness does so. *See Pyles v. Johnson*, 136 F. 3d 986, 997 (5th Cir. 1998).

State Farm contends that Plaintiffs will not be able to "independently corroborate"[60] or "support"[61] the adverse inference. It is wrong. Plaintiffs will offer testimony from witnesses who have personally seen Lecky King destroy engineering reports unfavorable to State Farm, order reports be destroyed and/or been told the "methodology" they were employing in adjusting a claim was wrong solely because the engineering reports concluded the predominate cause of a loss was wind and wind-driven debris. This is the very pattern of behavior Plaintiffs complain of.

4. Finally, State Farm claims "Plaintiffs should be limited, at most, to referring to the bare fact that Ms. King was deposed, and asserted her Fifth Amendment privilege in blanket fashion, without presenting any of the questions asked and unanswered."[62] State Farm even challenges questions directed to the heart of the Plaintiffs' case, reasoning that they are "prejudicial." For example, Ms. King was asked,

[60] *Id.* at p. 6.
[61] *Id.* at p. 7.
[62] *Id.* at 8.

First, State Farm is correct about one thing: Lecky King's testimony is very prejudicial to State Farm's defense. That much is obvious. Not every Team Leader asserts the Fifth Amendment in response to such basic questions. State Farm appears to confuse "prejudicial" evidence with "unfairly prejudicial" evidence. The former is always admissible. The latter is subject to a balancing test under Federal Rule of Evidence 403.

All evidence in support of a party's contentions is necessarily prejudicial; if not, it isn't relevant. Plaintiffs intend on offering highly prejudicial evidence such as the above referenced question. But this evidence is not the "unfair prejudice" Rules 403 is designed to exclude; it directly supports a count in Plaintiffs' Complaint. *Carofino v. Forester*, 450 F. Supp. 2d 257, 273 (2nd Cir. 2006) citing *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 151 (2nd Cir. 1997)("Although any evidence that tends to establish liability is prejudicial to the interests of the defendant, the prejudice is unfair only if the evidence has an undue tendency to suggest decision on an improper basis.").

5. State Farm cites to an unpublished District Court of New York decision[63] citing a Second Circuit dissent[64] to support its contention "that the questions posed to a witness asserting her Fifth Amendment privilege are themselves prejudicial in light of the risk of exploitation by a lawyer."[65] An actual review of the majority's opinion in the Second Circuit case of *Brink's Inc. v. City of New York*[66] reveals the witness's claims of the Fifth Amendment privilege were admitted into evidence. The majority in *Brinks* reasoned "the evidence is not prejudicial in the sense of being inflammatory, even though

---

[63] *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV 3288, 2005 WL 375315, at *5 (S.D.N.Y. Feb. 17, 2005)

[64] *Brink's Inc. v. City of New York*, 717 F.2d 700, 715-16 (2nd Cir. 1983).

[65] Dkt. 256 at 5.

[66] 717 F.2d 700, 709-10 (2nd Cir. 1983).

it is prejudicial in the sense of giving support to a party's position, i.e., it is 'damning'" *Brink's Inc.*, 717 F.2d at 710 citing *United States v. Cirillo*, 468 F.2d 1233, 1240 (2nd Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *see also United States v. Danzey*, 594 F.2d 905, 910-15 (2nd Cir. 1979), *cert. denied*, 441 U.S. 951 (1979). The more proper procedure to cure State Farm's objections is for it "rebut any adverse inference that might attend the employee's silence, by producing contrary testimonial or documentary evidence." *RAD Services, Inc. v. Aetna Casualty and Surety Co.*, 808 F.2d 271, 275 (3rd Cir. 1986). State Farm will obviously object to this, as it can't rebut the truth.

Similarly, State Farm cites *Cavalier Clothes, Inc. v. Major Coat Co.*[67] as holding that the systematic interrogation of the witness on direct examination by counsel will result in the refusal of the Court to give an adverse inference instruction. The Court in *Cavalier Clothes* actually denied the adverse inference instruction "[b]ecause there [was] no independent evidence of fraud ..."[68] While the Court did warn against "sharp practices," the adverse inference was ultimately not allowed because of a lack of corroborating evidence. In Plaintiffs' case, as detailed above, there will be ample corroborating evidence at trial.

6. Contrary to State Farm's contentions, [redacted] asked in an effort to cover up the real incriminating questions, should not work to Plaintiffs' detriment. State Farm's Motion should be denied and this Court should instruct the jury that "it could, but need not, infer that the witness[] would have testified adversely." *RAD Services, Inc.*, 808 F.2d at 274.

---

[67] 1995 WL 314511 (E.D. Pa. 1995).

[68] *Id.* at *6.

XI. Opposition to State Farm's Motion *in Limine* No. 11: To Preclude Testimony or Evidence that Plaintiffs' Home Was Completely Destroyed by Wind

1. The principle living areas of Plaintiffs' home, the two floors located on pilings, were destroyed by hurricane force winds and wind-driven debris prior to the arrival of storm surge.

2. Plaintiffs accepted proceeds tendered under the National Flood Insurance Program for damage their home sustained to the finished areas located on the first of three levels, not for damage to the home's principle living areas. Damage to the first level occurred after Hurricane Katrina's winds destroyed the home's top two floors located on pilings.

3. The National Flood Insurance Program proceeds Plaintiffs accepted were for damage to their home's finished outdoor living areas, including a finished living room, bedroom, bathroom, and storage closet along with its contents, all located on the first-level.

4. The home's principle living areas – located on the second and third floor – were destroyed by Hurricane Katrina's winds before the arrival of tidal surge. State Farm can argue its position to the jury, but its Motion *in Limine* should be denied.

XII. Opposition to State Farm's Motion *in Limine* No. 12: To Preclude Evidence of or Reference to Replacement Cost of Dwelling

1. In its Motion, State Farm takes the remarkable position that Plaintiffs cannot submit evidence of, let alone recover, replacement costs for their home because Plaintiffs have not yet completed re-building their home.[69] Essentially, State Farm

[69] Plaintiffs have cleaned out the lot, repaired the boat lifts, prepared the lot for construction, and have signed a contract with Deltec Homes for them to supply a pre-fabricated construction kit for the construction of a round home (to avoid hurricane winds in the future). Plaintiffs are in the process of negotiating with G & S Construction, Mr. Steve Snider, for the actual construction of the home.

contends that the re-building of Plaintiffs' home is a condition precedent to recovering replacement costs under the policy. Plaintiffs agree. However, such conditions are waived because State Farm has refused to perform under the contract. Indeed, Plaintiffs had to file this suit to compel State Farm to pay under the wind portion of the policy, and even now, State Farm refuses to pay any amount of money under the wind coverage, even though it has admitted the Plaintiffs' home sustained $43,006.84 in wind damage.[70]

2. When one party refuses to perform under the contract, any conditions precedent to be performed by the other party are excused. Restatement (2d) of Contracts, § 255(a); *Hentz v. Hargett*, 71 F.3d 1169, 1174 (5th Cir. 1996)("repudiation operated to excuse the non-occurrence of such a condition when it appeared that the condition precedent would not be followed by performance of petitioner's duty"). Section 255 of the Restatement, Comment (a), provides: "No one should be required to do a useless act, and if, because of a party's repudiation, it appears that the occurrence of a condition of a duty would not be followed by performance of the duty, the non-occurrence of the condition is generally excused." In judging whether occurrence of the condition would be followed by performance of the duty, the obligee may take the obligor at his word. *Hentz*, 71 F.3d at 1173-74. Here, State Farm has clearly indicated it will not perform under the insurance contract unless and until the jury forces it to.

3. In the simplest terms, State Farm cannot refuse to pay the funds due and owing under the policy, then insist that Plaintiffs rebuild before they are entitled to sue for recovery of the replacement costs. Most gulf coast residents simply do not have the financial resources to rebuild an entire home to completion without the benefit of the

---

[70] *See* State Farm Insurance Investigation Summary, September 2, 2007, page 100008, a copy of which is attached as Exhibit "C" to Plaintiffs' Amended Memorandum Opposition to State Farm's and Steve Saucier's Motion for Partial Summary Judgment, Dkt. 225.

insurance benefits due from their homeowner's insurer. State Farm could greatly reduce its exposure following hurricanes by simply denying coverage, then insisting that the maximum recovery is the actual cash value under the policy – normally significantly less than replacement costs – simply because the homeowner hasn't completed rebuilding the home, which they simply can't afford to do without the insurance proceeds State Farm withholds. Homeowners are not required to do such a vain and useless thing; they aren't required to incur the expense of rebuilding their home in the hope and expectation that State Farm would then reimburse them for full replacement costs under the policy, particularly where, as here, State Farm has already denied any responsibility under the policy.

4. Moreover, Plaintiffs are claiming the replacement cost of the home is $713,543.00 and that Steve Saucier and State Farm did not provide sufficient limits to cover the true replacement cost of the home. Although Plaintiffs expressed their unhappiness with their home's coverage, Mr. Saucier never procured coverage commensurate with the home's replacement value.[71] Surely State Farm must concede the replacement cost of the home would be probative as to this claim as well. Right?

5. State Farm's argument fails. Its motion must be denied.

XIII. Opposition to State Farm's Motion *in Limine* No. 13: To Preclude References to Edward B. Rust, Jr. and to Preclude Plaintiffs From Calling Him as a Witness or Introducing His Testimony at Trial

1. State Farm's Motion cites no case, statute, treatise or law review article to support its contention that Plaintiffs are absolutely prohibited from referring to or calling

[71] *See* State Farm Insurance Companies undated form letter, a copy of which is attached to Plaintiffs' Amended Memorandum Opposition to State Farm's and Steve Saucier's Partial Motion for Summary Judgment, Dkt. 225, as Exhibit "V."

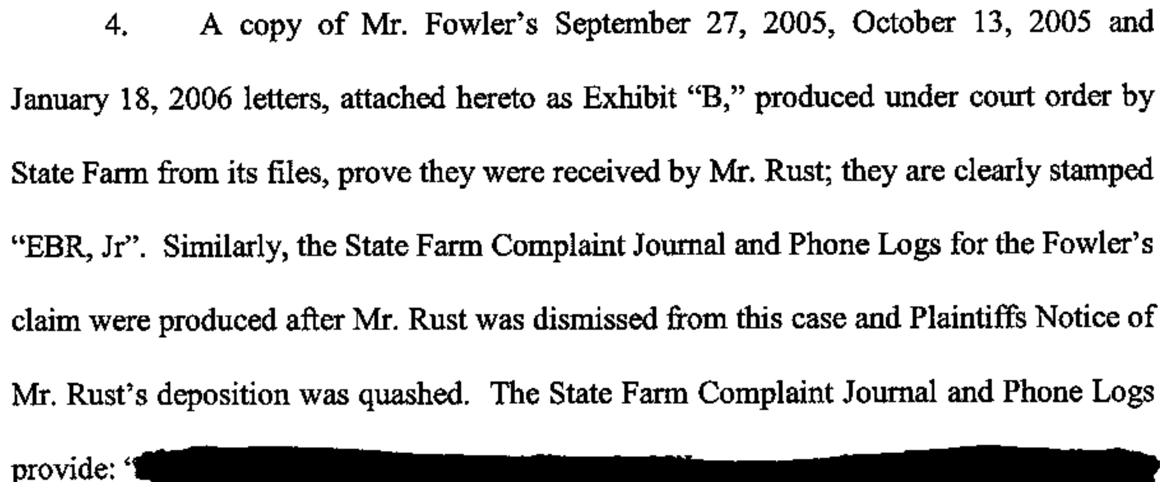
to testify the head of the company Plaintiffs are accusing of a corporate-wide scheme to defraud policyholders; no authority at all.

2. Instead, State Farm claims "[b]ecause Mr. Rust had no involvement with Plaintiffs' homeowners policy or the adjustment of their claim – which Judge Senter has explicitly recognized in dismissing Mr. Rust from this case – any reference at trial to Mr. Rust or any testimony he could give ... would be entirely irrelevant to Plaintiffs' claims."

3. To be certain, at the time Judge Senter entered his Order [28] nearly nineteen months ago, the wealth of information on fraud that has now been accumulated against State Farm and its modus operandi, had yet to surface. In fact, through the discovery process, Plaintiffs have learned Edward B. Rust, Jr.'s Affidavit [38-2] certifying to this Honorable Court that Mr. Rust had no personal knowledge of the Fowler's claim or the letters Mr. Fowler sent, was not a truthful representation to this Court.

> I do not have personal knowledge of the specific insurance claim and related allegations of the Fowlers. Nor do I recall receiving or reviewing correspondence or other communications pertaining to the specific insurance claim of the Fowlers.[72]

4. A copy of Mr. Fowler's September 27, 2005, October 13, 2005 and January 18, 2006 letters, attached hereto as Exhibit "B," produced under court order by State Farm from its files, prove they were received by Mr. Rust; they are clearly stamped "EBR, Jr". Similarly, the State Farm Complaint Journal and Phone Logs for the Fowler's claim were produced after Mr. Rust was dismissed from this case and Plaintiffs Notice of Mr. Rust's deposition was quashed. The State Farm Complaint Journal and Phone Logs provide: "



[72] Affidavit of Edward B. Rust, Jr. in Support of Emergency Motion to Quash Notice of Deposition and Emergency Motion for Protective Order, Dkt. 38-2, at p. 2 ¶ 8.

Susan Hood, at p. 87 of her deposition, testified as follows, identifying Mr. Rust's stamp:

Q.

A.

Q.

A. [76]

Ms. Hood also testified that the various letters sent by Mr. Fowler [77], . Mr. Boyden is an Executive Vice President responsible for claims.[78] She further testified that "[79] She denied [80] ".[81]

[73] *See* document Bates Stamped FOWG0000102 (emphasis added). A copy of all relevant portions of State Farm's Complaint Journal for the Plaintiffs' claim is attached hereto as Exhibit "C."

[74] *See* Exhibit C, document Bates Stamped FOWG00001104 (emphasis added).

[75] *See* document Bates Stamped FOWG000010311 (emphasis added). A copy of all relevant portions of State Farm's Phone Log for the Plaintiffs' claim is attached hereto as Exhibit "D."

[76] *See* Hood Dep. at p. 87. All relevant portions of Susan Hood's deposition transcript are attached hereto as Exhibit "E."

[77] *See* Hood Dep. at p. 85.

[78] *See* Hood Dep. at p. 88.

[79] See Hood Dep. at p. 89.

[80] *See* Hood Dep. at 90.

[81] *Id.*

Therefore, it is clear the letters reluctantly produced by State Farm prove not only that Mr. Rust received Mr. Fowler's letters, but that these were circulated to the two most senior claims people of State Farm shortly after Katrina destroyed Plaintiffs' home and Mr. Fowler advised Mr. Rust of what he believed was the highly reprehensible approach of State Farm with regard to the wind/water issue. Neither Mr. Rust, nor Mr. Boyden, nor Ms. Hood did anything to change State Farm's approach.

5. Stated very simply, Mr. Rust made untrue representations in order to evade being named in this action and giving a deposition.

6. Additionally, Mr. Rust, who is a Texas lawyer, knew about the Supreme Court of Texas's decision affirming an award of punitive damages in *State Farm Lloyds v. Nicolau*[82] -- a case in which State Farm engaged the services of Haag Engineering. In *Nicolau*, the Texas Supreme Court affirmed the trial court's decision that "State Farm knowingly engaged in unfair or deceptive acts or practices."[83]

Mr. Rust was also clearly aware of the award of punitive damages in *Watkins v. State Farm Fire & Casualty Company*, where a jury found State Farm "recklessly disregarded its duty to deal fairly and act in good faith with class members in its use of Haag Engineering Company,"[84] and State Farm "intentionally and with malice breached its duty to deal fairly and act in good faith with class members in its use of Haag Engineering Company"[85] all in response to the 1999 Oklahoma tornado catastrophe.

---

[82] 951 S.W.2d 444 (Tex. 1997).

[83] *Id.* at 453.

[84] *Watkins et al. v. State Farm Fire & Casualty Co. et al.*, No. CJ-2000-303, verdict class form questions, (Okla. Dist. Ct., Grady County May 25, 2006), attached hereto as Exhibit "F."

[85] *Id.*

A jury could easily conclude that civil judgments involving punitive damages should and would draw the attention of the Chairman of the Board. If not, then his testimony may warrant consideration on that issue. Either Mr. Rust knows about those decisions, and made the conscious decision to continue to use Haag, or the amount of the punitive damages award was insufficient to convince him to change the approach. Either way, the jury can consider his testimony.

7. The fact that Mr. Rust received Plaintiff George Fowler's letters warning of similar fraudulent conduct and did nothing, in light of both *Nicolau* and *Watkins*, is relevant to Plaintiffs' claim. As the head of the company, wouldn't Mr. Rust be interested in investigating if the same conduct State Farm had previously been convicted of was happening? Probably not, as Mr. Rust not only knew it was happening but approved of it.

8. Evidence that State Farm's Chairman of the Board and President, Edward B. Rust, Jr., did nothing in response to Plaintiffs' letters alleging the same acts for which State Farm has previously been convicted, using the exact same engineering firm, is relevant to Plaintiffs' claim to fraud, conspiracy and punitive damages.

9. State Farm's Motion is based on falsehoods. It must be denied.

XIV. Opposition to State Farm's Motion *in Limine* No. 14: To Preclude References to Congressman Gene Taylor and to Preclude Plaintiffs From Calling Him as a Witness at Trial

1. Congressman Gene Taylor has been listed as a witness since the beginning of Plaintiffs' case because he is very knowledgeable about State Farm's behavior in South Mississippi after it was destroyed by Katrina. In spite of the fact State Farm has

never deposed Congressman Taylor to see what testimony he may offer, it presently seeks to exclude Congressman Taylor's testimony as irrelevant and highly prejudicial.

2. At the outset, Plaintiffs would note that a motion *in limine* is not a substitute for discovery. State Farm's blanket objection to Mr. Taylor's testimony – testimony unknown to State Farm at this point – is impermissible. *Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F. Supp. 1398, 1401 (N.D. Ill. 1993)(if evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so that the questions of foundation, relevancy, and prejudice can be resolved in context).

3. Mr. Taylor is the local congressman. He received multiple complaints from his constituency concerning the types of behavior alleged by the Plaintiffs in this case. Particularly, Mr. Taylor received complaints alleging fraud, manipulation of engineering data, refusal to recognize wind damage, refusal to pay when a loss was caused by a combination of wind and water, etc. Mr. Taylor will testify that he received complaints from his constituents addressing those types of concerns.

4. Thereafter, armed with this information and the complaints raised by his constituents, Mr. Taylor spoke to Edward B. Rust, Jr. to address the problems. At a minimum, Mr. Taylor can address his conversation with Mr. Rust concerning the issues raised by his constituents. Clearly, any comments made by Mr. Rust would be an admission of State Farm. Mr. Rust's comments are, by definition, non-hearsay. *See* Federal Rule of Evidence 801 (d)(2)(C) "A statement by a person authorized by the party to make a statement concerning the subject," and (D) "A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during

the existence of the relationship," and (E) "A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

5. Most importantly, though, Congressman Taylor was copied on all letter correspondence Plaintiff George Fowler sent to Edward B. Rust, Jr. And, after receiving Plaintiff George Fowler's letters, Mr. Taylor spoke with Mr. Rust to discuss State Farm's claims handling procedures being applied to homeowner claims in South Mississippi, including Plaintiffs' claim.

6. Furthermore, Congressman Taylor has been extensively involved in promoting U.S. legislation to prevent the conflict of interest that is obvious when an insurer can choose to pay the policyholder with government money or its own money from ever arising again. In fact, the latest Government report on the issue supports the notion that there was in fact a conflict.

7. Congressman Taylor is knowledgeable about State Farm's "pattern and practice of fraudulent claims handling procedures" Plaintiffs complain of. Congressman Taylor is knowledgeable about the fraud perpetrated against the Plaintiffs and against others as part of the State Farm's fraudulent claims handling scheme.

8. Plaintiff George Fowler has consulted with Congressman Taylor about State Farm's conduct as it relates to Plaintiffs' claim. Moreover, State Farm has cited no authority for its contention that Mr. Taylor's testimony must be excluded because "he is a respected public official."[86] State Farm's Motion is unfounded. It must be denied.

[86] *See* Defendant State Farm Fire and Casualty Company's Memorandum of Law in Support of Its Motion *in Limine* No. 14: To Preclude References to Congressman Gene Taylor and to Preclude Plaintiffs From Calling Him as a Witness at Trial, Dkt. 264, at p. 4.

XV. Response to State Farm's Motion *in Limine* No. 15: To Exclude Evidence of or Reference to Hearsay Evidence, Including Media Reports

1. Plaintiffs agree that the trial of this matter will be governed by the Federal Rules of Evidence. And hearsay evidence is generally not admissible and neither are media reports.

2. Plaintiffs listed the "newspaper and magazine articles, blog posts, and other documents found on the Internet"[87] because they may use these media reports in cross-examination to impeach Defendants' witnesses.

3. Plaintiffs will stipulate the media reports referred to in Defendant's Motion [265, 266] will not be offered for the truth of the matter asserted but reserve their right to use the media reports to impeach Defendants' witnesses in accordance with the Federal Rules of Evidence.

XV. Opposition to Haag Engineering's Motion *in Limine* to Exclude Pre-Katrina Evidence and References Thereto

1. Haag Engineering has filed a Motion in Limine that closely parallels State Farm Motions 7 & 8 of 15 relating to evidence of fraud and wrongdoing at other locations both before and after Hurricane Katrina. Therefore, plaintiffs refer the court to their response to State Farm's Motions on those issues. Specifically, Haag contends that any reference to *Nicolau*, *Watkins*, the South Carolina Board of Registrations for Engineers "and any pre-Katrina conduct should be excluded from evidence at the trial of this matter, including any arguments or references thereto."[88]

---

[87] *See* Defendant State Farm Fire and Casualty Company's Memorandum of Law in Support of Its Motion in Limine No. 15: To Exclude Evidence of or Reference to Hearsay Evidence, Including Media Reports, Dkt. 266, at p. 2.

[88] Dkt 237, p. 2.

2. Haag cannot seriously contend that evidence of pre-Katrina conduct is irrelevant to the issues in this case, which include allegations of fraud and a fourteen-year conspiracy. Plaintiffs necessarily must introduce evidence of pre-Katrina conduct to support the allegation that State Farm and Haag have conspired for at least fourteen years to defraud the plaintiff in the event of a catastrophic event.

3. Haag contends that any evidence of fraud and collusion at other locations is inadmissible character evidence under FRE 404(b). Although that may be generally true, it doesn't apply in a case involving allegations of fraud and conspiracy. As explained in Plaintiff's opposition to State Farm's motion 7 of 15, the Mississippi Supreme Court has previously ruled that evidence of other frauds perpetrated by the Defendant are admissible because it is seldom that fraud can be the subject of direct, positive evidence:

> It is a well-established rule that other similar frauds may be shown in order to show the intent with which the representations complained of were made. In all controversies involving questions of fraud, a wide range of evidence is necessarily allowed, for it is seldom that fraud can be the subject of direct, positive evidence. Usually, it is a matter of inference from facts and circumstances. Where fraud is charged, the evidence of other similar frauds perpetrated by the same person at or about the same time, and when the same motive to defraud may reasonably be supposed to have existed, and especially where the acts are all part of one general scheme or plan to defraud, is admissible.

Nash Mississippi Valley Motor Co. v. Childress, 156 Miss. 157, 164 (Miss. 1930) (internal citations omitted). That holding is completely consistent with the exceptions found in FRE 404. Evidence of other wrongs may be admissible for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In this case, motive, intent, plan, knowledge and absence of mistake or accident are all at issue. Haag Engineering's entire defense is predicated upon the assumption that it performed a thorough, complete and independent investigation of the Fowlers' home, and it is mere coincidence their findings – that the Fowler's home was destroyed solely by tidal surge -- eliminates State Farm's exposure under the wind coverage of the Fowler's homeowner's policy. Haag didn't even perform a wind analysis at the Fowlers' home. Plaintiff is entitled to introduce evidence to demonstrate Haag's flawed conclusion based upon an inadequate and incomplete investigation is no accident. It happened before; they were caught before; they were punished before, and they continued to do it anyway.

The United States Supreme Court has adopted a four-part test governing the admissibility of other acts evidence.

1) The evidence must be introduced for a proper purpose in accord with Federal Rule of Evidence 404(b).

2) The offered evidence must be relevant to an issue in the case pursuant to Rule 402, as enforced through Rule 104(b);

3) The evidence must satisfy the probative-prejudicial balancing test of Rule 403; and

4) If the evidence of other acts is admitted, the district court must, if requested, provide a limiting instruction for the jury.

Huddleston v. United States, 485 U.S. 681, 691-92 (1988). All four prongs are satisfied in this case for the same reasons identified in Plaintiffs' response to State Farm's Motion 7 of 15. Plaintiffs can introduce evidence of the fact that Haag Engineering has a pattern of providing reports supporting positions to State Farm, that such reports are not

objective and are sometimes based on incomplete investigations, and that Haag knows its reports allow State Farm to minimize its exposure.

4. In drafting Federal Rule of Evidence 404, "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence." *Huddleston*, 485 U.S. at 688-89. Evidence of fraudulent conduct at other locations, both before and after Hurricane Katrina, is relevant to support plaintiff's theory of fraud and conspiracy.

5. Haag also complains that it was not a party to the *Nicolau* and *Watkins* decisions. That certainly is true. But State Farm was, and State Farm is a party to this lawsuit. If it weren't, then Haag's argument may have more footing. All of that evidence will be admissible against Haag's co-conspirator, State Farm. The claims will be tried together; therefore, the evidence will be admissible as to both parties.[89]

6. In *Nicolau*, the court concluded that "the Haag reports were not objectively prepared, that State Farm was aware of Haag's lack of objectivity, and that State Farm's reliance on the reports was merely pretextual."[90] The Fowlers have made identical allegations in this case. State Farm's knowledge of Haag's lack of objectivity is at issue in this case. The fact that State Farm was found in bad faith in *Nicolau* for relying on Haag's inadequate, pre-determined investigation, yet continued to use Haag to justify denial of the Fowlers' claim, tends to support the Fowlers' claim of fraud and conspiracy.

---

[89] *Blankenship & Associates v. NLRB*, 999 F.2d 248 (7th Cir. 1993)(Agency did not violate 404(b) in taking notice of facts of seven prior proceedings in which the consultant was involved though not named as a party.).
[90] 951 S.W.2d at 448.

7. Haag cannot seriously suggest that it was unaware of the outcome in *Nicolau*. Its own engineer testified at the trial.[91] Knowing that it has previously been accused of kowtowing to State Farm's desire to minimize its exposure under its homeowner's policies, one would think that Haag would bend over backwards to ensure it conducted an objective engineering analysis. But by its own admission, Haag didn't even bother to conduct a wind analysis at the Fowlers' property before concluding it was destroyed by water. Haag is certainly free to argue this was a mere oversight on its part, e.g., it's just another coincidence that Haag failed to determine whether the winds from Hurricane Katrina might have cause the loss of the plaintiff's home. But at the same time, the plaintiffs can introduce evidence to show it was a pattern of behavior, not an accident.

8. Haag proudly states that "No court has found Haag guilty or civilly liable for a conspiracy or fraud, and Plaintiffs have not set forth any specific acts by Haag which amount to any conspiracy or fraud between Haag and the State Farm Defendants in the aftermath of Hurricane Katrina." The first phrase is almost circular. Under Haag's apparent position, they would first have to be found guilty of conspiracy or fraud before evidence of conspiracy or fraud would be admissible. Moreover, as Haag argues repeatedly, it wasn't a party to *Nicolau* or *Watkins*. If it had been, it might not be able to make such a boast.

Haag's suggestion that plaintiffs have no evidence to support conspiracy and fraud in this case is almost laughable. The evidence shows Lecky King received Plaintiffs' Complaint. The case was then forwarded to Haag Engineering to evaluate the Fowler's property. When asked whether she conspired with Haag Engineering to defraud

[91] Id.

the Fowlers, Lecky King asserted her Fifth Amendment right against self-incrimination, thereby giving rise to an adverse inference. That inference is confirmed by the Rigsby sisters and Brian Ford, who testified that Ms. King routinely exerted her influence over Haag Engineering and other engineering firms to provide reports favorable to State Farm. As noted, Haag Engineering didn't bother to evaluate whether the Plaintiffs' home was damaged by wind before concluding it was destroyed by tidal surge. Under those facts, a jury could certainly conclude that Haag made no real effort to determine if wind contributed to the Fowlers' loss, and it did so because of its loyalty to a very good customer, State Farm. Stated differently, a jury could conclude Haag conspired with State Farm to defraud the Fowlers' of their insurance coverage.

9. Finally, Haag suggests that plaintiffs plan to introduce testimony and other items of evidence from the *Nicolau* and *Watkins* trial records. Plaintiffs have no intention of introducing such individual items of evidence. Instead, plaintiffs will introduce the outcome of those trials, the actual findings of the jury and the court, for the purpose of establishing motive (to satisfy a significant client), knowledge (Haag clearly knew of the *Nicolau* and *Watson* cases) and absence of mistake or accident (Haag's failure to conduct a wind analysis was no coincidence).

10. For these reasons, and for all the reasons in Plaintiffs' opposition to State Farm motions 7 & 8 of 15, Haag Engineering's motion must be denied.

CONCLUSION

Wherefore, for the foregoing reasons, Plaintiffs respectfully request this Honorable Court enter an Order providing as follows:

1. Denying State Farm's Motion *in Limine* No. 1 and Order the trial of all compensatory claims, including Plaintiffs' fraud based claims and all evidence relevant thereto, be tried in the compensatory phase of trial and thereafter a punitive damages case, if warranted;

2. Denying State Farm's Motion *in Limine* No. 2 and Order all evidence that relates or refers to the procedures State Farm used in handling Plaintiffs' claim be heard in connection with the trial of issues of core liability;

3. Granting in part and denying in part State Farm's Motion *in Limine* No. 3 and Order Plaintiffs not be allowed to offer testimony interpreting principles of Mississippi law and evidence relating to the meaning or interpretation of homeowners policy provisions but allowing into evidence State Farm's claims handling guidelines and the Wind/Water Protocol for both compensatory and punitive damages;

4. Denying State Farm's Motion *in Limine* No. 4 and Order that Mississippi Department of Insurance Bulletins are only admissible if Plaintiffs establish the proper evidentiary predicate – prove Defendant responded to them in one manner and acted in another, or Defendant raised reliance on the MDI bulletins for other purposes;

5. Denying State Farm's Motion *in Limine* No. 5 and Order rulings on the admissibility of governmental or grand jury investigations or proceedings be deferred until trial so questions of foundation, relevancy, and prejudice can be resolved in context;

6. Granting State Farm's Motion *in Limine* No. 6 and Order Plaintiffs only be allowed to mention or refer to State Farm's Change of Venue Motion venue if the topic is raised in any manner by State Farm;

7. Denying State Farm's Motion *in Limine* No. 7 and Order evidence regarding State Farm's claims-handling of property losses other than Plaintiffs' and/or evidence of "fraudulent" engineering reports regarding other properties be admitted in evidence to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident;

8. Denying State Farm's Motion *in Limine* No. 8 and Order State Farm's out-of-state conduct admissible for proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in the compensatory phase of trial and admissible for proving the reprehensibility of State Farm's conduct in the punitive phase;

9. Denying State Farm's Motion *in Limine* No. 9 and Order Plaintiffs' are allowed to use the word fraud at trial and present the factual underpinnings of their claim, provided a limiting instruction be read to the jury before Plaintiff George Fowler testifies advising that he will not be testifying as to the legal meaning of fraud;

10. Denying State Farm's Motion *in Limine* No. 10 and Ordering Alexis "Lecky" King to testify at trial, either live or by deposition, and instruct the jury that it could, but need not, infer that the witness would have testified adversely to State Farm's interests;

11. Denying State Farm's Motion *in Limine* No. 11 and Ordering that Plaintiffs are precluded from changing their position that they accepted proceeds tendered under the National Flood Insurance Program for damage their home sustained to the finished areas located on the first of three levels, but not for damage to the home's principle living areas on the second and third levels;

12. Denying State Farm's Motion *in Limine* No. 12 and Ordering Plaintiffs be allowed to present evidence of the replacement cost of their home and its contents because State Farm cannot rely on a condition precedent when it has refused to perform under the insurance contract;

13. Denying State Farm's Motion *in Limine* No. 13 and Ordering Plaintiffs be allowed to mention the name of Edward B. Rust, Jr. and the fact Mr. Rust did nothing in response to Plaintiff's letters and even mislead this Honorable Court about receiving the letters;

14. Denying State Farm's Motion *in Limine* No. 14 and Ordering Plaintiffs be allowed to call Congressman Gene Taylor to the witness stand, with any further rulings on the admissibility of Mr. Taylor's testimony being deferred until trial so that questions of foundation, relevancy, and prejudice can be resolved in context;

15. Granting in part and Denying in Part State Farm's Motion *in Limine* No. 15, and Ordering the media reports referred to in Defendant's Motion [265, 266] may not be offered for the truth of the matter asserted but may be offered for all other purposes consistent with the Federal Rules of Evidence; and

16. Denying Haag Engineering's Motion to Exclude Pre-Katrina Conduct and Ordering Haag Engineering's Pre-Katrina Conduct, including the *Nicolau* and *Watkins* decisions, admissible for proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in the compensatory phase of trial and admissible for proving the reprehensibility of Haag Engineering's conduct in the punitive phase.

Respectfully submitted, this the 11th day of April, 2008.

GEORGE AND CRISTINA FOWLER

BY: BALCH & BINGHAM, LLP

/s Ryan A. Hahn
John A. Scialdone (MS Bar No. 9524)
Ryan A. Hahn (MS Bar No. 102487)
1310 Twenty Fifth Avenue
Gulfport, MS 39501
Telephone: (228) 864-9900
Facsimile: (228) 864-8221
Attorneys for Plaintiffs

- and -

Conrad Williams, III
(La. Bar No. 14499, PHV)
Crescent Farm
4084 Highway 311
Houma, LA 70361-2017
Telephone: (985) 876-3891
Facsimile: (985) 851-2219
Attorney for Plaintiff

- and -

George J. Fowler, III
(PHV No. 44872 and LA Bar No. 5798)
FOWLER, RODRIGUEZ
400 Poydras Street, 30th Floor
New Orleans, LA 70130
Telephone: (504) 523-2600
Facsimile: (504) 523-2705
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2008 I electronically filed the foregoing Pleading with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all attorneys of record.

s/ Ryan A. Hahn
Of Counsel

Exhibits "A" through "E"

FILED UNDER SEAL