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

UNITED STATES OF AMERICA ex rel.
CORI RIGSBY and KERRI RIGSBY — RELATORS/COUNTER-DEFENDANTS

v. — CASE NO. 1:06cv433-LTS-RHW

STATE FARM MUTUAL INSURANCE COMPANY — DEFENDANT/COUNTER-PLAINTIFF

and

FORENSIC ANALYSIS ENGINEERING CORPORATION;
EXPONENT, INC.; HAAG ENGINEERING CO.;
JADE ENGINEERING; RIMKUS CONSULTING GROUP INC.;
STRUCTURES GROUP; E.A. RENFROE, INC.;
JANA RENFROE; GENE RENFROE; and
ALEXIS KING — DEFENDANTS

DEFENDANT/COUNTER-PLAINTIFF
STATE FARM FIRE AND CASUALTY COMPANY'S
MEMORANDUM IN SUPPORT OF ITS MOTION TO EXCLUDE ALL TESTIMONY
BY THE RIGSBYS' EXPERT WITNESS R. RALPH SINNO, PH.D.

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Defendant/Counter-Plaintiff State Farm Fire and Casualty Company, improperly denominated in the First Amended Complaint as "State Farm Mutual Insurance Company" ("State Farm"), respectfully submits this memorandum in support of its motion, pursuant to Fed. R. Evid. 104(a), 702, 401, 402, 403, Fed. R. Civ. P. 26(a)(2)(B), 37(c)(1), and Miss. Unif. Dist. Ct. R. 26.1(A)(2), to exclude the testimony of the Rigsby's expert witness, R. Ralph Sinno, Ph.D.

I. PRELIMINARY STATEMENT

The Rigsbys proffer the expert testimony of Dr. Sinno, an engineer, in a misguided attempt to create a genuine question of material fact in response to State Farm's dispositive motions. Yet Dr. Sinno's opinion is incapable of doing so because it is irrelevant, inadmissible, and immaterial. "Rule 56 states that a court may consider only admissible evidence in ruling on a summary judgment motion." *Mersch v. City of Dallas*, 207 F.3d 732, 734-35 (5th Cir. 2000). To screen out incompetent summary judgment evidence, the Court must determine the admissibility of the expert's opinion "before reaching the question whether a fact issue exists," *id.* – a determination that the Fifth Circuit does not disturb on appeal absent an abuse of discretion. *See, e.g.*, *id.* at 735; *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 196 (5th Cir. 1996); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1006, 1009 (5th Cir. 1991) (en banc).

Because no jury will be present, this Court need not make its ruling now and has the discretion to make its admissibility determination "during, rather than in advance of," the hearing. *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006). "That is not to say that the scientific reliability requirement is lessened." *Id.* Where, as here, an expert's opinion is inadmissible, it "cannot be relied upon by plaintiffs to prevent summary judgment." *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992). So, too, where, as here, the proffered evidence is also legally "insufficient … the court remains free … to grant summary judgment" under Rule 56. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993).

Dr. Sinno's opinions are neither probative nor sufficient to inform whether the McIntosh flood claim submitted for payment to the National Flood Insurance Program was "knowingly" false or fraudulent, 31 U.S.C. § 3729, or more particularly per this Court's Orders, "whether the payment of the

flood insurance limits in the McIntosh case was justified, as a matter of law." ([261] at 3; *see* [274] at 2.) His opinions are incapable of creating any genuine issue of material fact, particularly in light of the dispositive effect of Kerri Rigsby's sworn factual admissions that she thought there was at least $250,000 in flood damage to the McIntosh home. ([91-7] at 139:9-140:8, 142:7-13.)

Dr. Sinno's opinions are wrought with speculation and his methods are unreliable. While he asserts that wind damaged the McIntosh home, he also asserts that storm surge caused no damage at all. He routinely fails to meaningfully consider that the severe damage to the McIntosh property was caused by storm surge flooding. To support his unfounded opinion, he adopts his own private and idiosyncratic definitions of words such as "damage," "severe," and "large." Dr. Sinno cherry-picks those facts and pictures that support his opinion. He repeatedly admits that his opinion is based on "guesswork" and "speculation." He fails to distinguish between the application of force and any resulting damage. He purports to rely on calculations of wind forces, but fails to furnish them. For multiple reasons, his opinion is unreliable, inadmissible, and immaterial.

II. THRESHOLD SCRUTINY OF EXPERT TESTIMONY

This Court must fulfill a vital "gatekeeping role" that requires it to make a threshold assessment "whether the reasoning or methodology underlying the [expert] testimony is scientifically valid and of whether that reasoning and methodology properly can be applied to the facts in issue." *Daubert,* 509 U.S. at 592-93. Throughout the evaluation, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. These "exacting standards of reliability," *Weisgram v. Marley Co.*, 528 U.S. 440, 442 (2000), require far "more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. Yet Dr. Sinno has neither relied on scientific data applicable to these facts, nor reliably applied a scientific methodology.

Federal Rule of Evidence 702 requires a sound basis and a sound methodology, properly applied to the facts of the case, before an opinion can be admitted into evidence.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, ***if*** (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, ***and*** (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702 (emphasis added). Thus, courts must exclude expert evidence that is not "based on sufficient facts or data," that is not "the product of reliable principles and methods," or whose methods are not applied "reliably to the facts of the case." *Id.* Indeed, "***any*** step that renders the analysis unreliable ... renders the expert's testimony inadmissible. ***This is true whether the step completely changes a reliable methodology or merely misapplies that methodology***." Fed. R. Evid. 702 advisory committee's note (2000) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)) (emphasis and omission in original).

Of course, an expert's "conclusions and methodology are not entirely distinct from one another," *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997), and the difference between an expert's conclusions and methodology "has only limited practical import." *In re Paoli*, 35 F.3d at 746. "When a judge disagrees with the conclusions of an expert, it will generally be because he or she thinks that there is a mistake at some step in the investigative or reasoning process of that expert." *Id.* As part its gatekeeping function, the court "must examine the expert's conclusions in order to determine whether they could reliably flow from the facts known to the expert and the methodology used." *Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3d Cir. 2000) (citation omitted). Upon doing so, a court may, for example, "conclude that there is simply too great an analytical gap between the data and the opinion proffered," and properly preclude the expert's testimony. *Joiner*, 522 U.S. at 146.

"Disciplines such as engineering rest upon scientific knowledge," *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148 (1999), and the Federal Rules of Evidence require expert scientific testimony to be based on scientific knowledge. *Daubert*, 509 U.S. at 589-90; Fed. R. Evid. 702. "The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word

'knowledge' connotes more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. "It is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate." *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000). Indeed, a core rule of evidence is that "speculation is unreliable ... and is inadmissible." *Dunn v. Sandoz Pharm. Corp.*, 275 F. Supp. 2d 672, 684 (M.D.N.C. 2003). "The courtroom is not the place for scientific guesswork, even of the inspired sort." *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996). "Expert testimony is inadmissible if it is speculative, unsupported by sufficient facts, or contrary to the facts of the case." *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 757 (8th Cir. 2006).

The Rigsbys, as the proponents of the expert evidence, bear the burden of showing that it is admissible. *Mathis v. Exxon Corp.*, 302 F.3d 448, 459-60 (5th Cir. 2002); *Tanner v. Westbrook*, 174 F.3d 542, 547 (5th Cir. 1999) (superseded on other grounds) (citation omitted); *see also Daubert*, 509 U.S. at 592 n.10. State Farm does ***not*** bear the burden of demonstrating its inadmissibility. *See Rieger v. Orlor, Inc.*, 427 F. Supp. 2d 99, 102 (D. Conn. 2006); *Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434, 534 (W.D. Pa. 2003).

Daubert carefully distinguishes between the threshold reliability inquiry that the Rigsbys must satisfy and the role of cross-examination. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky ***but admissible*** evidence. ... These conventional devices ... are the appropriate safeguards ***where*** the basis of scientific testimony ***meets the standards*** of Rule 702." *Daubert*, 509 U.S. at 596 (emphasis added). As the highlighted language shows, the Rigsbys must first satisfy their burden of demonstrating that the proffered evidence is admissible. *See McLendon v. Georgia Kaolin, Co., Inc.*, 841 F. Supp. 415, 418 (M.D. Ga. 1994) ("these devices are only sufficient safeguards where the scientific testimony meets the standards of Rule 702"); *see also Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 297 (8th Cir. 1996) ("cross-examination at trial" cannot "take the place of scientific peer

review"); *Porter v. Whitehall Labs.*, 791 F. Supp. 1335, 1345 & n.10 (S.D. Ind. 1992) ("an expert's opinion must have ***some*** basis other than hypothesis before the opinion may have the privilege of being assailed by cross-examination") (emphasis in original), *aff'd*, 9 F.3d 607 (7th Cir. 1993).

Even if Dr. Sinno's testimony could somehow survive this Court's threshold scrutiny under Rule 702 (which it cannot), then it would be subject to further review and preclusion under Rule 403. "[E]xpert evidence can be both powerful and quite misleading. ... Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 ... exercises more control over experts than over lay witnesses." *Daubert*, 509 U.S. at 595. To this end, an expert opinion's "lack of reliable support may render it more prejudicial than probative, making it inadmissible under [Rule] 403." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987).

III. THE PROPOSED EXPERT TESTIMONY IS IRRELEVANT, INADMISSIBLE, AND IMMATERIAL

None of the Rigsbys' proposed expert testimony is probative of whether the McIntosh flood claim was "knowingly" false or fraudulent, 31 U.S.C. § 3729, and it should be excluded on that ground alone. *See* Fed. R. Evid. 401, 402, & 702. Indeed, it is incapable of raising a genuine issue of material fact given Kerri Rigsby's sworn factual admissions that she thought there was at least $250,000 in flood damage to the McIntosh home and that the damage to the first floor walls and floors appeared to her to be predominately caused by rising water from storm surge and waves.

> Q. And when you made the payment or agreed or authorized your subordinate, who was working – primarily working the claim, to request authority for $250,000, you thought there was at least that much flood damage to the home, didn't you?
>
> A. Was a lot of damage to that home.
> ….
>
> A. It was a large home. It was insured for a lot of money, and I – yeah, I believe I thought there was $250,000 worth of flood damage to that home.
> ….
>
> A. [T]here was severe damage to the home.
> ….

> Q. The third bullet point [in the October 20, 2005 report], which states that the damage to the first floor walls and floors appears to be predominantly caused by rising water from storm surge and waves, was that consistent with what you saw when you went out to the McIntosh home?
>
> A. Yes.

([91-7] at 139:9-140:8, 142:7-13.) The dispositive effect of these sworn factual admissions cannot be negated by their proposed expert testimony, rendering it irrelevant, inadmissible, and immaterial. *See, e.g., United States ex rel. Taylorvick v. Smith*, 513 F.3d 228, 232 (5th Cir. 2008).

IV. THE PRIME EXAMPLE THAT WIND CAUSED ALL THE DAMAGE IS FUNDAMENTALLY UNSOUND

Dr. Sinno asserts that Figure 16 in his report in this matter (which was Figure 14 in his report in *McIntosh*), which depicts a crack in what he calls "brick columns" after "the house shifted away" (Sinno Rpt. [279-7] at 17), "***speaks for the whole case***. Figure 1[6], that's all you need to really sit down and be relaxed and conclude that it is ***nothing but wind, wind, wind that did all the damage*** to the house. … The crack in the brick here at 45 degrees, this is nothing but wind damage." (Sinno Dep. in *McIntosh*, Ex. A to Mtn., at 89:8-90:3.) When asked whether the crack could be due to other forces, such as storm surge flooding, Dr. Sinno asserts that it is "***impossible***. ***Impossible*** to get a 45-degree angle like that cracking at high level except you have forces up high in the roof pushing the house from east to west." (*Id.* at 145:21-146:3.) Despite his unyielding certitude,[1] Dr. Sinno could not be more wrong. And because he states that it "speaks for the whole case," it deserves particular scrutiny.

Rather than wind, there are several other more likely alternative causes to the crack in the brick veneer – which is not a "brick column" – ranging from a shift in a single 2x4 stud, to pulling from a partially collapsed arbor frame, to the pounding from storm surge and transported debris. Mark Watson, State Farm's structural engineering expert, explains these matters in his report.

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[1] "I am 100-percent sure, although I cannot prove it here except for the by the cracking and the failure of the brick," (*id.* at 144:23-145:20), and "I stand by my report, everything I said in my report. And if I said anything extra over and above my report today in this deposition, I stand behind it, too." (*Id.* at 100:14-18.)

> First, this is not a brick column. It is simply brick veneer that wraps around a short corner offset. Further, a closer look at that caption shows that the base of the brick veneer has not moved or "shifted away." The separation that first seems so apparent actually stems from a single 2x4 stud that was disconnected from the sill plate and moved inward for approximately 4-1/2 to 5 inches. The next stud behind stayed intact and shows a uniform gap behind the brick veneer. Another factor to point out in regards to this specific corner veneer location is that originally, this corner supported the end of the arbor beam. During the hurricane, several outer arbor columns were damaged, causing a partial collapse of the arbor frame. This collapse certainly would have pulled against this beam to corner veneer attachment, which could have easily caused a diagonal separation crack in and of itself. Another issue is the exposure of the south and west sides of the home to the storm surge and accompanying wave action not to mention all of the transported debris that was slamming against and into the house (*see Figure 17 below*). The veneer in other locations along these sides often experienced a partial collapse, originating at the lower sections, often stopping approximately midheight of the wall. Again, this alone could have easily caused the separation crack along the south face of this short corner section. To associate the entire aspect of wind damage on this single location would be incorrect as it does not consider the other, more substantial evidence.

(Watson Rpt. [275-4] at 11.)

While Dr. Sinno purports to attribute the cause of ***all*** of the damage to the McIntosh home to wind, the "exclusion of alternative causes" is required for a reliable causation opinion. *Michaels v. Avitech, Inc.*, 202 F.3d 746, 753 (5th Cir. 2000); *accord United States v. Eff*, 461 F. Supp. 2d 529, 534 (E.D. Tex. 2006). The inadequate treatment of other potential causes necessarily undermines the reliability of an expert's opinion. *Burleson v. Tex. Dep't of Criminal Justice*, 393 F.3d 577, 587 (5th Cir. 2004); *Winters v. Fru-Con, Inc.* 498 F. 3d 734, 743 (7th Cir. 2007); *see also Cotroneo v. Shaw Envtl. & Infrastructure, Inc.*, 2007 WL 3145791, at *5 & n.23 (S.D. Tex. Oct. 25, 2007).

In order for causation testimony to be admissible, there must be a reliable basis for concluding that the theory advanced by the expert is the probable cause of the damages. *See, e.g., Brown v. Parker-Hannifin Corp.*, 919 F.2d 308, 312 (5th Cir. 1990). An expert's failure to negate possible alternative causes of the damage "renders his methodology unreliable," *Alexander v. Smith & Nephew, P.L.C.*, 98 F. Supp. 2d 1310, 1316 (N.D. Okla. 2000), and inadmissible. *Id.* Among other things, an expert must consider and rule out the combination of the probabilities that alternative causal candidates led to the damage because their combined probabilities may exclude even the possibility that the expert's causal

candidate can exceed the "more likely than not" threshold for establishing causation. *See Cavallo v. Star Enter.*, 892 F. Supp. 756, 771 (E.D. Va. 1996), *aff'd in relevant part*, 100 F.3d 1150 (4th Cir. 1996). So, too, "if [the] experts failed to rule out alternative causes, it means that these alternative causes may have been the sole causes" of the damages. *In re Paoli*, 35 F.3d at 761 & n.31. An expert must rigorously evaluate and rule out potential alternative causes and not "simply pick[] the cause that is most advantageous to [plaintiff's] claim." *Viterbo*, 826 F.2d at 424; *see also Brown*, 919 F.2d at 312.

Time and again, Dr. Sinno failed to rigorously address and rule out other likely alternative causes. His paradigmatic example that wind caused all of the damage to the house is but one example of his repeated failure to thoroughly evaluate other causes. The Fifth Circuit has long recognized that "the goal of *Daubert* and this court's previous cases has been to bring more rigorous scientific study into the expression of legal opinions offered in court by scientific … professionals." *Allen*, 102 F.3d at 198. As the Supreme Court subsequently stated in *Kumho*, one of the goals of "*Daubert*'s gatekeeping requirement" is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." 526 U.S. at 152. Thus, "[t]he court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it 'will have a reliable basis in the knowledge and experience of [the] discipline.'" *Watkins v. Telsmith*, 121 F.3d 984, 991 (5th Cir. 1997) (quoting *Daubert*, 509 U.S. at 592) (alteration in original). Dr. Sinno's opinions and methods fail to meet these fundamental requirements.

V. THE OPINION THAT "A WIND TUNNEL RIPPED THROUGH THE HOUSE" IS UNRELIABLE

As part of his opinion that wind caused all of the damage to the McIntosh home, Dr. Sinno claims that open windows allowed "high velocity wind to travel through" the first floor, whereby "a tunneling effect is created that ripped through the house from right to left causing internal damages and inviting flying debris into the house." (Sinno Rpt. [279-7] at 10.) He claims that these winds "could go

as high as 200 miles an hour through the tunneling effect," (Ex. A at 73:2-20), that "[w]ind effects increase with height above the ground," (Sinno Rpt. [279-7] at 9), and would "take everything in its way that is really exposed to the flow of that wind." (Ex. A at 137:14.) To justify his 200 mph wind tunnel, Dr. Sinno urges us to "[l]ook at the pictures. You can tell from the pictures." (*Id.* at 73:21-74:6.)

The pictures that Dr. Sinno urges us to look flatly refute his assertions. They depict items above the water line intact, including undisturbed chandeliers, fans, shelves with books, food, and clothing.

If 200 mph winds had "ripped through the house … causing internal damages and inviting flying debris into the house," as Dr. Sinno asserts, then the chandeliers that were hanging by chains from the ceiling would have swung violently, banging into the ceiling, and breaking the glass globes and the light bulbs. Food would have been blown off the shelves of the pantry. Clothing would have been tossed from the shelves. Holes would have been created, and items would have been embedded, in the sheetrock above the interior water line. None of that happened. The empirical facts refute Dr. Sinno's unfounded opinions, which fail to reliably apply, and are contrary to, the facts of the case. *See* Fed. R. Evid. 702. Yet, "the existence of sufficient facts and a reliable methodology is in all instances mandatory," *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007), and "[e]xpert testimony is inadmissible if it is … unsupported by sufficient facts, or contrary to the facts of the case." *Marmo*, 457 F.3d at 757.

VI. THE OPINION THAT WIND DESTROYED ALMOST ALL FIRST FLOOR WINDOWS IS UNFOUNDED

Underlying Dr. Sinno's unfounded "wind tunnel" opinion is yet another unfounded assertion: *i.e.*, that "all" but "maybe one or two" windows on the first floor of the McIntosh home were broken by wind suction or flying debris. (Sinno Rpt. [279-9] at 9; Ex. A at 35:10-36:9; 54:4-55:10.) This assertion

is false as a matter of fact. Photographs of the McIntosh home taken soon after Katrina show multiple first floor windows intact, as the examples immediately below reveal.

While Dr. Sinno concedes that he cannot determine whether any specific window was blown out by suction or debris because "I have no proof. I was not there," (Ex. A at 54:4-55:10), his basic assertion that "all" but "maybe one or two" of the first floor windows were destroyed by wind exemplifies yet another fundamental flaw that plagues his overall approach. Time and again, his assertions are based on almost nothing more than his own *ipse dixit* say so. But "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146. "'[W]ithout more than credentials and a subjective opinion, an expert's testimony that "it is so" is not admissible.'" *Hathaway*, 507 F.3d at 318 (quoting *Viterbo*, 826 F.2d at 424).

Again failing to address alternative causes, Dr. Sinno ignores the likelihood that water forces or floating debris broke various first floor windows, despite noting that the house was "inundated by floating debris from the water surge," but which he says entered the home "later on" through the "open spaced allowed" by the broken windows. (Sinno Rpt. [279-7] at 10.) This Court has previously noted that, based on its experience in trying several Katrina cases, "there has been no disagreement among the experts that the forces generated by storm surge flooding are far greater than the forces attributable to wind alone." ([261] at 2.) The interior of the McIntosh home was littered with all manner of debris, including large wooden trusses (from a separate structure), which float and are easily transported by

surge and waves. Trusses are more than capable of breaking the windows in the first instance. Nor does Dr. Sinno's wind hypothesis account for the fact that many of the first floor windows were left with their plywood covering intact. Nor does he consider that windows on the second floor remained intact – at a level subjected to wind but not storm surge and waves.

VII. THE OPINION THAT WIND DAMAGED WATER AND GAS LINES IS FLAWED ON MANY LEVELS

As part of his opinion that wind caused all of the damage to the McIntosh home, Dr. Sinno also adverts to the report that, after Katrina, some water pipes and gas lines were founded to be broken. (Sinno Rpt. [279-7] at 16). From this account, Dr. Sinno asserts that "the McIntosh house sustained severe structural deformation and damage from wind loading prior to the water surge." (*Id.*) Beyond the fact that Dr. Sinno stated that "water pipes [were] broken, and this could cause some damage, which is not my department," (Ex. A at 17:13-18), his opinion is methodologically flawed on multiple levels.

Dr. Sinno not only fails to disclose any information as to the location and scope of the broken water pipes or gas lines, but he also ignores the fact that "[t]he force created by waves breaking against a vertical surface is often ten or more times higher than the force created by high winds during a storm event." (Watson Rpt. [275-5] at 15.) Indeed, as noted in a published paper addressing the structural damage caused by Katrina in Mississippi – and co-authored by Dr. Fitzpatrick, one of the Rigsbys' other experts – "[h]igh winds commonly damage roofs and exterior structural components, but generally pose much less of a threat to structures than storm surge and wave action, which can produce loads orders of magnitude higher, and are severe enough in many cases to destroy entire structures." *See* (Christopher D. Eamon, Patrick Fitzpatrick & Dennis D. Truax, *Observations of Structural Damage Caused by Hurricane Katrina of the Mississippi Gulf Coast*, 21 J. of Performance of Constructed Facilities 117, 119 (2007) (Ex. B to Mtn.).) Thus, water forces acting on the McIntosh home were, by an order of magnitude, more likely to have caused damage to the water pipes and gas lines than wind.

Dr. Sinno's opinion also suffers from a fundamental flaw in logic. The Fifth Circuit has instructed for at least twenty years that "courts must critically evaluate" whether the expert used a "well-founded methodology or mode of reasoning" in reaching his opinions. *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307, 310 (5th Cir. 1989), *modified*, 884 F.2d 166 (5th Cir. 1989) (cited with approval in *Daubert*). Likewise, in *Daubert*, the Supreme Court held that district courts must "make 'a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid ....'" 509 U.S. at 592-93; *accord Hathaway*, 507 F.3d at 317.

An expert's testimony is speculative and unreliable where, as here, it relies on the fallacious reasoning embodied in "the blunder of the *post hoc ergo propter hoc* fallacy." *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1243 (11th Cir. 2005).

> The *post hoc ergo propter hoc* fallacy assumes causality from temporal sequence. It literally means "after this, because of this." It is called a fallacy because it makes an assumption based on the false inference that a temporal relationship proves a causal relationship.

Id. (citation omitted). "[T]he fallacy of *post-hoc propter-hoc* reasoning … is as unacceptable in science as in law." *Black v. Food Lion, Inc.*, 171 F.3d 308, 313 (5th Cir. 1999). Despite freely admitting that he "cannot tell what the wind did before the water surge" without a photograph (Ex. A at 135:25-136:6), Dr. Sinno falls prey to "the fallacy of *post-hoc propter-hoc* reasoning" by concluding that because the McIntoshes reported finding broken pipes after Katrina that it must have been Katrina's relatively moderate Category 2 winds, rather than its severe Category 5 storm surge and waves (with forces an order of magnitude higher), that caused the damage.

VIII. <u>DR. SINNO IMPROPERLY EMPLOYS HIS OWN PRIVATE AND IDIOSYNCRATIC DEFINITIONS</u>

As with his basic errors in logic, Dr. Sinno's efforts to take an Alice-in-Wonderland approach to defining common words – "When I use a word, it means just what I choose it to mean, neither more nor less," Lewis Carroll, *Through the Looking Glass*, Ch IV, Humpty Dumpty (1872) – must be rejected. An expert's testimony must "have a reliable basis in the knowledge and experience of his discipline,"

Daubert, 509 U.S. at 592, and he is not entitled to give his own private and idiosyncratic definition to a common word and, thus, "deprive the term of all meaning." *Adams v. Cooper Indus., Inc.*, 2007 WL 1805586, at *4 (E.D. Ky. 2007). To do so, "reveals a methodological flaw that cannot be overlooked by the court." *Id.* (quoting *Allgood v. Gen'l Motors Corp.*, 2006 WL 2669337, at *29 (S.D. Ind. 2006)). Dr. Sinno's use of common words such as "damage," "severe," and "large" present such problems.

With respect to "damage," Dr. Sinno asserts "that since the water surge occurred three hours after the collision of the damaging sustained high velocity wind forces with the McIntosh residence, then this leaves no justification whatsoever for the water surge to be blamed to have caused any structural damage to the framing and the envelope of the house." (Sinno Rpt. [279-7] at 22.) Addressing this concept in *McIntosh*, Dr. Sinno stated – at least a dozen times – that flood waters did not cause damage to the McIntosh property. (Ex. A at 77:7-17, 78:3-18, 79:6-80:19, 81:23-82:9, 124:12-21, 125:3-17, 133:7-16, 135:18-24, 148:24-149:7.) Indeed, he contends that "[t]he water surge did not cause any damage categorically," (*id.* at 77:7-17), and that "[t]he word 'damage' should not be used with water at all in this case." (*Id.* at 78:3-8.) Dr. Sinno's private definition of the term "damage," which he interprets subjectively at will, divorces all common meaning from the word. It is also flatly inconsistent with the common meaning of that term damage and with Kerri Rigsby's sworn factual admissions that she thought there was at least $250,000 in flood ***damage*** to the McIntosh home and that the ***damage*** to the first floor walls and floors appeared to her to be predominately caused by rising water from storm surge and waves. ([91-7] at 139:9-140:8, 142:7-13.)

With respect to "severe," Dr. Sinno disingenuously expands its scope by contending that there was "severe shingle damage" to the McIntosh roof, as "clearly evident" in the photographs. (Sinno Rpt. [279-7] at 5-6.) With respect to "large," Dr. Sinno also interprets that word at will by contending that there were "large holes" in the roof. (*Id.* at 23.) Yet the pictures that Dr. Sinno references belie those statements and show a house with only minimal damage to the shingles, with the overwhelming majority

of the shingles intact. Nor, as explained below, were there any "holes" in the "roof" from Katrina. The roof is, of course, the plywood decking attached to the rafters, with shingles being a layer atop the roof.

IX. THE ASSERTIONS THAT THERE WAS AN "OPEN ROOF" WITH "LARGE HOLES" ARE FALSE

Dr. Sinno's assertions that there was an "open roof for rainwater to enter to attic," and that the "damage to the roof left large holes," (Sinno Rpt. [279-7] at 10, 23), are without support and rest on nothing more than his say so.[2] Dr. Sinno even admits that, upon inspection, he did not actually see any holes in the roof from Katrina. (Ex. A at 84:18-21.) As the Fifth Circuit has stated, "the district judge serves as a gatekeeper for expert evidence, it is an important role designed to extract evidence tainted by farce or fiction. Expert evidence based on a fictitious set of facts is just as unreliable as evidence based on no research at all. Both analyses rest in pure speculation. We find the testimony properly excluded on this ground." *Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1331 (5th Cir. 1996).

X. THE ASSERTION THAT THE ROOF "UPLIFTED" IS FALSE AND MISLEADING

While Dr. Sinno claims that "the roof did get uplifted and clearly damaged at several locations and all around the house envelope," (Sinno Rpt [279-7] at 5), he admits that the roof never actually detached from the McIntosh home. (Ex. A at 46:12-47:2.) Again engaging in semantic gymnastics, Dr. Sinno asserts that the roof uplifted because, according to him, uplift occurs "at any time the vertical forces are higher than the gravitational downward forces." (Sinno Rpt. [279-7] at 5.) Yet, under Dr. Sinno's definition, the roof on all houses would be "uplifted" at some point, and the definition ignores the distinction between uplift ***forces*** and an uplift ***failure***. By obscuring that difference, as Dr. Sinno does, would mean that any home that experienced Katrina's winds would have an "uplifted" roof. There

[2] Dr. Sinno's report contends that the "open roof" allowed rainwater to "enter the attic and destroy the false ceiling and the interior portions of the house, *see* Figures 11 and 12." (Sinno Rpt. [279-7] at 10.) Figures 11 and 12 are photographs of the ***same*** room, taken from virtually the same angle, but Figure 11 – which was taken later in time – has less sheetrock on the ceiling than in Figure 12, due to its subsequent removal.

is no valid or reliable evidence that the McIntosh home sustained an uplift failure of its roof. Dr. Sinno's idiosyncratic say so does not suffice.

XI. DR. SINNO CHERRY-PICKED THE FACTS ON WHICH HE RELIES

To support his opinion that wind caused all of the damage to the McIntosh property, Dr. Sinno relies on various facts and photographs. Yet he fails to include facts and photographs that refute – or falsify – his theories. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." *Daubert*, 509 U.S. at 593 (citation omitted).

Dr. Sinno cherry-picks those items that tend to support his opinion and ignores the rest. For instance, he omits any discussion of why items above the water line – including chandeliers, sheetrock, folded clothes, and food items – remained intact. He likewise avoids including any photographs of them in his report. As but another example, he ignores the fact that multiple first floor windows remain intact.

An expert who "cherry-picked the facts he considered to render an expert opinion" and who "merely accepted some of the … data that suited his theory and ignored other portions of it that did not" fails to employ a reliable methodology. *Barber v. United Airlines, Inc.*, 17 F. App'x 433, 437 (7th Cir. 2001). "[S]uch a selective use of facts fails to satisfy the scientific method and *Daubert*, and it thus fails to assist the trier of fact." *Id.* (internal quotations omitted). Courts routinely reject such selective cherry-picking of data. "[A]ny theory that fails to explain information that otherwise would tend to cast doubt on that theory is inherently suspect. By the same token, if the relevant scientific literature contains evidence tending to refute the expert's theory and the expert does not acknowledge or account for that evidence, the expert's opinion is unreliable. Accordingly, courts have excluded expert testimony 'where the expert selectively chose his support from the scientific landscape.'" *In re Rezulin Prod. Liab. Litig.*, 369 F. Supp. 2d 398, 425 & n.164 (S.D.N.Y. 2005) (citation omitted).

XII. THE ASSERTION THAT THE "C&C" FAILED DUE TO WIND IS ADMITTEDLY SPECULATION

As part of his opinion that wind caused all of the damage to the McIntosh property, Dr. Sinno contends that "[t]he presence of excessive openings, windows and doors, on the ground floor in the envelope of the McIntosh house, that are highly susceptible to breakage by flying debris, made it easy to predict and expect premature failure in C&C," *i.e.*, "components and cladding." (Sinno Rpt. [279-7] at 7.) He further contends that "[f]ailures of these C&C elements" – *i.e.*, "windows, doors, skylights, and curtain walls" – "due to wind are very common and the McIntosh residence sustained these failures and it is not an exception." (*Id.* at 19.) Yet Dr. Sinno freely admits that these opinions are nothing more than speculation and guesswork.

Indeed, no less than six times in his deposition in *McIntosh*, Dr. Sinno characterized his opinion about the C&C at the McIntosh house as "it's speculating. It's guess work. …. It's just guess work. We're speculating. … I have no proof that there was premature failure, but it's easier to speculate … I did not say there were premature failure. I said we speculate. … [S]o there is speculation, guess work. … I have no proof it happened, but I could speculate. I could guess that it could have happened." (Ex. A at 58:20-60:22.) But the "exacting standards of reliability," *Weisgram*, 528 U.S. at 442, demanded by the rules regulating expert evidence are not satisfied by "subjective belief or unsupported speculation," *Daubert*, 509 U.S. at 590, "mere guesswork," *Allen*, 102 F.3d at 199, "scientific guesswork," *Rosen*, 78 F.3d at 319, or a "scientific hunch." *Christophersen*, 939 F.2d at 1115.

"[A] district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." *Rosen*, 78 F.3d at 318 (internal citation omitted). To be sure, "the existence of sufficient facts and a reliable methodology is in all instances mandatory. '[W]ithout more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible.'" *Hathaway,* 507 F.3d at 318 (5th Cir. 2007) (quoting *Viterbo*, 826 F.2d at 424). Dr. Sinno offers little more and his opinion should be barred.

XIII. DR. SINNO'S STRUCTURAL ENGINEERING WIND FORCE CALCULATIONS ARE UNDISCLOSED

Dr. Sinno's report fails to include calculations regarding the lateral force of the wind on the McIntosh property. This Court's task to make a threshold assessment of the reliability and admissibility of expert evidence is frustrated where, as here, a structural engineer has failed to include the wind force calculations on which he relied. While Dr. Sinno admits that he relies on calculations to determine the pressure the wind exerted on the windows at the McIntosh home, he has previously attempted to obscure the fact that he failed to include them in his report, though ultimately admitted that he does not have them at all in his files or anywhere else. (Ex. A at 113:25-117:14.) This omission stands in stark contrast to the report from Mr. Watson, State Farm's expert structural engineer, who appended his structural calculation sheets of the wind load to his report. *See* (Watson Rpt. [275-5] at App. Three.)

Judge Ozerden recently excluded a structural engineering expert who, as here, performed multiple calculations to form an opinion on the cause and extent of damage to a house during Hurricane Katrina, but failed to disclose any of them in his report. *Fowler v. State Farm Fire & Cas. Co.*, No. 1:06CV489-HSO-RHW, Hr'g Tr. (S.D. Miss. May 22, 2008) (Ex. C to Mtn.); *accord Fowler*, slip op. at 2 (S.D. Miss. May 23, 2008) (*Fowler* [321]) (supplementing reasons stated at the hearing), *reh'g denied*, 2008 WL 2699777, at *1 (S.D. Miss. July 2, 2008). For the expert to do calculations "in his mind" presents a "significant procedural hurdle" under the governing disclosure rules, which "are fairly clear," and "[t]hat is a problem from the standpoint of analyzing the reliability of the opinion." (Ex. C at 3:18-5:16); *accord Fowler*, slip op. at 1-2. Thus, because the expert's opinion was "not based upon a sufficiently disclosed or identified methodology in the report," his testimony was excluded. (Ex. C at 8:5-6); *accord Fowler*, slip op. at 2. Dr. Sinno's testimony should similarly be excluded on this basis.

CONCLUSION

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

This the 6th day of May, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, E. Barney Robinson III, one of the attorneys for State Farm Fire and Casualty Company, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following, via the means directed by the Court's Electronic Filing System:

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