

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

FRANK ANTHONY and CLARE ANTHONY,

Plaintiffs,

v.

STATE FARM FIRE AND CASUALTY
COMPANY, et al.,

Defendants.

No.: 1:08-CV-300-LTS-RHW

**STATE FARM FIRE AND CASUALTY COMPANY'S
MEMORANDUM IN SUPPORT OF ITS MOTION TO
EXCLUDE PLAINTIFFS' EXPERT NEIL B. HALL**

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I. PRELIMINARY STATEMENT

State Farm Fire and Casualty Company respectfully submits this memorandum in support of its motion, pursuant to Federal Rules of Evidence 104(a), 702, 703, and 403, to exclude the testimony of Plaintiffs' expert witness, Neil B. Hall. Plaintiffs proffer Mr. Hall, an architect, to testify that wind, rather than water, destroyed the roof and elevated level of their house. Mr. Hall is a self-described "professional expert witness" with no degree in engineering and no expertise in meteorology or hydrology. Mr. Hall's report offers no calculations or physical evidence of any kind to show that wind, rather than water, destroyed Plaintiffs' house. Instead, Mr. Hall's methodology depends entirely on a chronology of wind speeds and storm surge levels prepared for litigation by Plaintiffs' meteorologist Dr. Patrick Fitzpatrick. Relying on this purported chronology and an erroneous application of the Enhanced Fujita Scale (the "EF Scale"), a scale designed to deduce *wind speeds* from *tornadoes*, Mr. Hall concludes in wholly conclusory terms that winds destroyed Plaintiffs' house prior to the arrival of peak storm surge levels. For multiple reasons, Mr. Hall's opinion is unreliable and inadmissible. Plaintiffs cannot meet their burden to show otherwise.

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 Mr. Hall 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 of 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.

"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).

Plaintiffs, 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 Plaintiffs 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, Plaintiffs 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 Mr Hall'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. PLAINTIFFS' JUDICIAL ADMISSIONS UNDERCUT MR. HALL'S OPINIONS

Despite having accepted policy limits under their flood policy, Plaintiffs now proffer evidence, through the testimony of Mr. Hall that wind destroyed their house. (Compl. ¶ 37; Report of Neil B. Hall (the "Report"), 4, attached hereto as Exhibit A.) Plaintiffs' acceptance of full flood policy limits for flood damage to their house undercuts Mr. Hall's contrary conclusions. "[P]laintiffs' receipt of flood insurance benefits constitutes a judicial admission that flood damage occurred and precludes the plaintiffs' denying that at least the amount of damage represented by the flood insurance payment was caused by flooding." *See McIntosh v. State Farm Fire & Cas. Co.*, No. 06CV1080-LTS-RHW, Order at 3 (S.D. Miss. Apr. 14, 2008) [*McIntosh* Doc. 1180]; *accord Robichaux v. Nationwide Mut. Ins. Co.*, 2007 WL 2783325, at *2 (S.D. Miss. Sept. 21, 2007) ("Once an insurance payment is made and accepted, this act establishes, as an admission by both the insurer and the insured, that the insured's losses were caused by an event covered by the policy under which the payment is made, at least to the extent of the amount paid and accepted."); *Mills v. State Farm Fire & Cas. Co.*, 2007 WL 1514021, at *5 (S.D. Miss. May 21, 2007) ("By offering and accepting the flood insurance policy limits, the parties have indicated their agreement that at least to the extent of these benefits the damage to the insured property was caused by flooding, and the parties are now judicially estopped from denying this."). As a matter of law, a judicial admission is "conclusive" and "binding on the party making [it]." *Martinez v.*

Bally's La., Inc., 244 F.3d 474, 476-77 (5th Cir. 2001) (citation omitted). It "has the effect of withdrawing a fact from contention" and may not be "controverted or explained by the party who made it." *Id.*

Yet by proffering Mr. Hall, Plaintiffs are improperly attempting to controvert their binding judicial admission. Plaintiffs' acceptance of full flood policy benefits for damage to their property "prohibit[s] [plaintiffs] from mentioning, submitting evidence, or eliciting testimony, in the form of expert opinions or otherwise, to the effect that Plaintiffs' property was destroyed by the force of wind." *Fowler v. State Farm Fire & Cas. Co.*, No. 06CV489-HSO-RHW, Order at 17 (S.D. Miss. July 25, 2008) [*Fowler Doc. 372*]. A similar ruling is warranted here.

IV. PLAINTIFFS CANNOT SHOW THAT MR. HALL IS QUALIFIED TO OFFER EXPERT OPINION REGARDING WEATHER CONDITIONS AT PLAINTIFFS' HOUSE OR THE NATURE OF THE PERIL THAT DESTROYED THEIR HOUSE

Under both Federal Rule of Evidence 702 and *Daubert*, trial courts are tasked to carefully examine an expert's qualifications and bar experts from testifying on matters outside of the area of their expertise. *Sullivan v. Rowan Cos., Inc.*, 952 F.2d 141, 144 (5th Cir. 1992) (affirming lower court finding that geologist was not qualified to provide expert testimony in field of metallurgy) (quoting *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1135 (5th Cir. 1985)); *Rosado v. Deters*, 5 F.3d 119, 124 n.9 (5th Cir. 1993). Where a witness is qualified as an expert to testify in a particular area, the court must not permit the witness to testify on matters outside of that area or give lay testimony about a subject beyond his field of knowledge. *See Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 459-60 (5th Cir. 1996); *Edmonds v. Ill. Cent. Gulf R.R. Co.*, 910 F.2d 1284, 1287 (5th Cir. 1990).

Plaintiffs have designated Mr. Hall as an expert on the cause of the damage to their house. (*See* Plaintiffs' Designation of Expert Witnesses at 1, attached hereto as Exhibit B; Report, *passim*.) However, Mr. Hall's opinion in this case is not based on an inspection of either Plaintiffs' house or anything else. Instead, it is wholly based on assumptions of when wind and water impacted Plaintiffs'

house – assumptions based on unreliable information which he is unqualified to verify – and a novel and unsupported theory about how much damage might occur by the wind.

Plaintiffs cannot demonstrate that Mr. Hall is qualified to offer the opinions set forth in his report. Although retained as an expert "structural engineer," Mr. Hall does not hold a degree in any field of engineering. (See Hall Resume, Attachment D of Report.) Instead, he holds degrees in urban studies, systems management, landscape architecture, and architecture, fields wholly unrelated to the testimony he seeks to offer. (Hall Resume, Attachment D of Report.) Thus, it is no surprise that Mr. Hall claims that he is not a "real engineer," but rather a "forensic engineer," which he describes as "pretty much a self-declared profession." (Deposition of Neil B. Hall, 20:5-16, Jan. 29, 2009, *LaFleur v. State Farm Fire & Cas. Co.*, No. 07-0082 (Hancock County Miss. 2007), attached hereto as Exhibit C; Deposition of Neil B. Hall, 147:5-9, 152:12-15, Aug. 15, 2008, in *Gagne v. State Farm Fire & Cas. Co.*, No. 1:06-CV-00711 (S.D. Miss. 2006), attached hereto as Exhibit D.) Similarly, although Mr. Hall opines in his report as to the timing of wind speeds and storm surge levels at Plaintiffs' property, he is not a meteorologist and has not studied coastal hydrology. (Hall Dep. (*LaFleur*), 63:16-18, 77:12-14.) In fact, Mr. Hall admits that none of his education has concentrated on the study of how to determine the cause of damage to structures by a weather event. (Hall Dep. (*Gagne*), 119:9-13.)

Lacking the necessary expertise, Mr. Hall's real expertise, by his own account, are as a "professional expert witness." (Hall Dep. (*LaFleur*), 20:5-16.) His career as a "professional expert witness" has been prolific. As of May 1, 2008, his list of previous trial and deposition testimony was **thirty-five pages long** and included over two hundred matters spanning manifold subjects as far-reaching as slip-and-fall cases, construction defects, OSHA regulations, SCUBA regulator valve performance, a defective chair, and environmental pollution. (Hall Resume, Attachment D of Report.) Since Hurricane Katrina, Mr. Hall has written as many as **eight hundred** expert reports for insureds in Mississippi and Louisiana, an average of nearly one every day-and-a-half up to his deposition in this

case. (See Hall Dep. (*LaFleur*), 69:1-11; Deposition of Neil B. Hall, 130:15-131:6, Jan. 24, 2008, *Patrick v. State Farm Fire & Cas. Co.*, No. A2401-2006-140 (Harrison County Miss. 2006), attached hereto as Exhibit E.) Yet, of the four hundred losses reviewed in Mississippi, Mr. Hall has found that only two houses near the Alabama border were destroyed by storm surge, rather than wind. (Hall Dep. (*LaFleur*), 69:1-11; Hall Dep. (*Patrick*), 131:19-132:4.)

Here, Mr. Hall's lack of expertise in engineering, meteorology, and coastal hydrology fatally undermines the reliability of the opinions set forth in his report. Instead, the key to Mr. Hall's "analysis" is the *timing, sequence, and strength* of Hurricane Katrina's peak winds and peak storm surge, for which he necessarily relies upon information from others that he is unqualified to evaluate or scientifically substantiate. Specifically, the conclusions in Mr. Hall's report regarding the cause of Plaintiffs' loss depend heavily Dr. Fitzpatrick's chronology of Hurricane Katrina's winds and storm surge. They have little, if anything, to do with principles and concepts of engineering. This is particularly so given that Mr. Hall does not rely on analysis of physical evidence to conclude that wind, rather than water, caused certain damage to Plaintiffs' house. Rather, Mr. Hall uses the wind speed chronology provided by Dr. Fitzpatrick and, reasoning backwards, leaps to the conclusion that the EF Scale definitively proves that wind destroyed the elevated level of Plaintiffs' house. Further, because Mr. Hall has testified that flooding alone was sufficient to destroy Plaintiffs' house, (*see* Hall Dep. at 73:7-10, 74:13-16, attached hereto as Exhibit F), Mr. Hall's conclusions ultimately depend on the hurricane chronology and his novel application of the EF Scale. Mr. Hall lacks the expertise needed to offer expert testimony as to these matters. (*See also, infra*, Part VI(A).)

Mr. Hall's lack of relevant knowledge, training, or experience also renders him unqualified to *independently evaluate* the hurricane chronology and other meteorological data on which his analysis rests. Thus, it is no surprise that Mr. Hall's foremost criterion to evaluate the reliability of meteorological data is a "smell test." Mr. Hall has openly admitted that a "smell test" is "'A' on a list" of

methods he uses to evaluate meteorological data. (Hall Dep. (*Gagne*) at 296:9-297:6) Explaining further, Mr. Hall noted that "[s]ometimes, it's just a smell to it," and that he will not use weather data "that just doesn't smell right. . . ." (*Id.*)

Ultimately, Mr. Hall's true qualification for the proposed testimony is his willingness to market himself in Hurricane Katrina litigation as a "professional expert witness" and "self-declared" "forensic engineer," no matter how remotely related to his background in architecture, urban studies, and systems planning, and his ability to duck any judicial scrutiny while doing so. Further, the conclusory opinions and lack of analysis in Mr. Hall's report, discussed *infra*, reveal that, other than his expertise as a "professional expert witness" *per se*, his professional background and experience do not provide him with the expertise necessary to testify as to the cause of damage to Plaintiffs' house.

"[I]f a proposed expert is a 'quintessential expert for hire,' then it seems well within a trial judge's discretion to apply the *Daubert* factors with **greater rigor**" *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 435 (6th Cir. 2007) (emphasis added). "In all cases, the 'court must ensure that it is dealing with an expert, not just a hired gun.'" *Greenwich Ind., L.P. v. Specialized Seating, Inc.*, 2003 WL 21148389, at *4 (N.D. Ill. May 16, 2003) (quoting *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 263 (7th Cir. 1997)). Indeed, the *Daubert* factors are needed to test "whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers." *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997). Plaintiffs cannot show that Mr. Hall satisfies this test.

V. PLAINTIFFS CANNOT ESTABLISH THAT MR. HALL'S OPINION IS BASED ON RELIABLE DATA

As part of its role as gatekeeper, the district court must ensure that the underlying facts and data upon which a proffered expert's opinion are based are in and of themselves reliable. *See Allen*, 102 F.3d at 196; *Daubert*, 509 U.S. at 595. If an expert's opinion is based on unreliable facts, the opinion must be excluded. *See Brown v. Parker-Hannifin Corp.*, 919 F.2d 308, 311 (5th Cir. 1990); *In re TMI Litig.*, 193

F.3d 613, 697 (3d Cir. 1999); *Montgomery Cty. v. Microvote Corp.*, 320 F.3d 440, 448 (3d Cir. 2003). Here, the data used by Mr. Hall suffers from a variety of fatal flaws.

A. Mr. Hall's Inspection of Plaintiffs' Property, If He Performed One, Was Defective

Mr. Hall relies on an admittedly flawed and inadequate site inspection of Plaintiffs' property. Plaintiffs asked Mr. Hall to prepare his report as quickly as possible. (Hall Dep. at 9:20-10:1.) As a result, his report is based in part on a site inspection of Plaintiffs' property conducted that same day. (*Id.*; Report at 1.) Yet, when questioned about his inspection, Mr. Hall could not be certain who inspected Plaintiffs' house (he or his son), but in either case, it likely lasted no longer than half an hour. (Hall Dep. at 10:2-21.) Mr. Hall distrusts the value of this perfunctory site inspection because it was conducted more than three years after Hurricane Katrina and after the house had already been demolished. (*Id.*, 12:6-16.) The passage of time and demolition of the house, he admits, render any information gathered from the site inspection "tainted" and untrustworthy. (*Id.*)

Lacking this evidence of the post-Katrina condition of the house, Mr. Hall could have consulted Plaintiffs' engineering analysis by Compton Engineering that was performed shortly after the storm and while the house still stood. This report describes in detail the construction and makeup of Plaintiffs' house. (Compton Report, attached hereto as Exhibit G ¶¶ 2.4-2.7.) It also provides a detailed engineering analysis of the damage Plaintiffs' house sustained during Hurricane Katrina, including a conclusion that "[r]ising water and wave action was responsible for much of the exterior wall structural damage observed on the ground and second floor." (*Id.* at ¶ 3.) The Compton Report describes evidence that flood waters reached into the attic, leaving behind flood-borne silt. (*Id.* at ¶ 1.)

But Mr. Hall failed to even consider that report. (Hall Dep. at 30:8-10.) Instead, Mr. Hall prefers his (or his son's) belated and admittedly fruitless site inspection of an empty lot. Plaintiffs cannot show that the methods and basis for Mr. Hall's opinion are reliable when he depends on an admittedly tainted inspection and rejects a superior source of data in the Compton Report.

B. Mr. Hall's Report Is Based on a Poor Understanding of the Construction Quality of Plaintiffs' House

Mr. Hall's report is also unreliable because it is based on little more than a superficial understanding of the construction of Plaintiffs' house. Mr. Hall concedes that he does not know whether Plaintiffs' house had hurricane resistant features, such as anchor bolts and hurricane straps, or whether it was built to code standards. (*Id.* at 59:13-21.) He is unaware of the construction quality of the house. (*Id.* at 60:22-61:16.) Similarly, he failed to even consider Compton Engineering's analysis of Plaintiffs' house that details the house's construction, including its hurricane straps. (*Id.* at 30:8-10, 100:6-24; Compton Report ¶¶ 2.4-2.7.) There is no evidence that Mr. Hall ever considered any blueprints or plans of Plaintiffs' house in forming his conclusions. (Report, *passim.*)

Mr. Hall's general lack of knowledge concerning the construction, makeup, and quality of Plaintiffs' house renders him unequipped to offer a reliable engineering opinion as to the cause of the damage it sustained during Hurricane Katrina. This is especially so because his report is predicated upon (i) an opinion of the house's construction quality under the EF Scale, and (ii) an opinion of how a house of such quality would have reacted to the winds assumed in Dr. Fitzpatrick's hurricane chronology. (*See* Report at 4.) Under Mr. Hall's unprecedented application of the EF Scale, he inputs the quality of a house's construction and a sustained windspeed to determine a definitive and conclusive description of the damage that such a house would have sustained. (*Id.*) Under this theory, depending on whether a house is of expected quality, lower quality, or upper quality, a given amount of wind may cause more or less destruction. (*See id.*) For example, the EF Scale Report clearly states that "[u]se of hurricane clips or other positive anchorage devices" indicates a house of upper bound construction capable of withstanding greater winds. (*A Recommendation for an Enhanced Fujita Scale ("Recommendation")*), 9, Wind Science and Engineering Center, Texas Tech University, Oct. 10, 2006, attached hereto as Exhibit H; Report, 4; *see infra* Part VI(A).)

Here, because Mr. Hall has an incomplete understanding of the construction quality of Plaintiffs' house, he cannot reliably apply the EF Scale to determine the damage winds would have caused – even using his novel misuse of the EF Scale. For example, Mr. Hall admits that he arbitrarily assumes houses to be of "expected" quality for purposes of his EF Scale analysis. (Hall Dep. at 60:22-61:18.) Yet, in this case, Plaintiffs' house is defined to be upper bound because the construction utilized hurricane clips. (Compton Report at 2.4(1); *Recommendation* at 9.) Accordingly, Mr. Hall's lack of knowledge regarding the construction quality of Plaintiffs' house inflates the amount of damage that the assumed wind speeds would have caused under his analysis.

Mr. Hall's methodology suffers from a fundamental fallacy: "Garbage in. Garbage out." *Coffey v. Dowley Mfg. Co.*, 89 F. App'x 927, 931 (6th Cir. 2003). "As with any model, the data input is crucial." *In re TMI Litig. II*, 911 F. Supp. 775, 792 n.9 (M.D. Penn. 1996) (citation omitted), *aff'd*, 193 F.3d 613 (3d Cir. 1999). "[I]f the 'data' from which [an expert's] modeling assumptions arise is invalid, or non-existent, then there is no hope that his technique, much less his results, is going to be reliable." *Castellow v. Chevron USA*, 97 F. Supp. 2d 780, 792 (S.D. Tex. 2000). Therefore, Mr. Hall's report is, at its heart, based on unreliable data and should be excluded.

C. Mr. Hall Employs Unreliable Meteorological Data Prepared for Litigation

Mr. Hall's report is also inadmissible because it depends on unreliable meteorological and storm surge data. Mr. Hall's report does not analyze the physical damage observed to Plaintiffs' house. Instead, the key components of his report are (i) a chronology purporting to show that peak wind speeds reached Plaintiffs' property before peak storm surge levels, and (ii) his conclusions as to the effect of these forces on Plaintiffs' house. (Report at 3-4.) Based on this chronology, Mr. Hall concludes that winds rendered Plaintiffs' house a total loss prior to the arrival of peak surge levels. (*Id.* at 4.) However, the chronology and storm surge speeds he uses to isolate wind as the cause of damage to Plaintiffs' house are unreliable.

Mr. Hall did not derive his weather chronology by analyzing the physical damage to Plaintiffs' house. Instead, Mr. Hall simply borrows a timeline by Plaintiffs' meteorologist Dr. Fitzpatrick. (Report at 2, Attachment C-1.) Mr. Hall utilized Dr. Fitzpatrick's chronology despite openly believing parts of it to be inaccurate. (Hall Dep. at 71:16-72:13; Report at 2.) Mr. Hall's report does not explain why, despite these deficiencies, he found Dr. Fitzpatrick's chronology reliable enough to form the basis of his report, or whether he subjected it to any scrutiny beyond his "smell test." (Report, *passim*.) In short, there is no indication that Mr. Hall ever meaningfully evaluated the data in Dr. Fitzpatrick's chronology. Indeed, he is unqualified to do so.

Mr. Hall's "data" regarding the speed of storm surge waters at Plaintiffs' property is even less reliable. At deposition, Mr. Hall opined that storm surge had a current velocity of three feet per second and was not "strong enough to breach" the elevated walls of the house. (Hall Dep. at 100:18-21; 105:18-23.) However, Mr. Hall concedes that "[t]here was no measurements [sic]" on which to base this current velocity. (*Id.* at 105:18-23.) In fact, his "only" source for this speed was "a depo table part of a model done by Dr. Slinn," which Mr. Hall admits to having only seen "upside down." (*Id.* at 105:18-106:9.) He has never seen a full copy of the study from which this figure allegedly came. (*Id.*) Yet, Plaintiffs, as "the party seeking to have the district court admit expert testimony[,] must demonstrate that the expert's findings and conclusions are based on the scientific method, and, therefore, are reliable. This requires some objective, independent validation of the expert's methodology." *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc).

Mr. Hall's reliance on Dr. Fitzpatrick's chronology is also improper because the chronology was prepared as part of Dr. Fitzpatrick's expert report in this litigation. There is no indication that Mr. Hall ever accounted for the financial and other incentives of litigation adversely affected the reliability of Dr. Fitzpatrick's chronology. Reports, studies, and data specifically prepared for purposes of litigation are generally not the type of information an expert would rely upon in forming an opinion. *See Holbrook v.*

Lykes Bros. S.S. Co., Inc., 80 F.3d 777, 781-82 (3rd Cir. 1996); *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1143 (4th Cir. 1994); *Munoz v. Orr*, 200 F.3d 291, 301-02 (5th Cir. 2000). "[A] district court may decide that the financial and other incentives of litigation pose an unacceptable risk to the objectivity and neutrality of the person gathering the data, such that the data would not normally be considered reliable in the relevant field." *United States v. Marine Shale Processors*, 81 F.3d 1361, 1370 (5th Cir. 1996). Of primary concern in this situation is the lack of "circumstantial guarantee[s] of trustworthiness" of a report prepared by one with "no business duty to report accurately." *In re Imperial Credit Indus. Sec. Litig.*, 252 F. Supp. 2d 1005, 1012 n.5 (C.D. Cal. 2003), *aff'd sub nom. Martinson v. Snavelly*, 145 F. App'x 218 (9th Cir. 2005). Mr. Hall's unquestioning reliance on material prepared in anticipation of litigation is not scientific and undermines the reliability of his opinion.

VI. PLAINTIFFS CANNOT SHOW THAT MR. HALL'S METHODS ARE SOUND

For every conclusion contained in an expert's proposed testimony, the court must determine if the methodology leading to that conclusion is sound. *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 196 (5th Cir. 1996). A court may appropriately exclude expert testimony when it finds that an expert has extrapolated data, and there is "too great an analytical gap between the data and the opinion proffered." *General Elec. Co.*, 522 U.S. at 146; *Moor*, 151 F.3d at 279. Such testimony should also be excluded when it is speculative or not amenable to scientific verification. *Moore*, 151 F.3d at 273. Under *Daubert*, an engineering expert must "show how his conclusion . . . is grounded in – follows from – an expert study of the problem." *Navarro*, 117 F.3d at 1032. Plaintiffs cannot meet their burden to show that Mr. Hall's methods are reliable.

A. Mr. Hall Erroneously Relies on an Inapposite Tornado Weather Scale

With wind speeds from Dr. Fitzpatrick's chronology in hand, Mr. Hall relies entirely on his novel application of the EF Scale for tornados to conclude that such winds destroyed Plaintiffs' house. (Report

at 3.) The EF Scale was designed to deduce *tornado wind speeds* from the amount of damage caused *by a tornado*.¹ It provides estimated wind speeds based on damage to structures, such as residences, of varying levels of quality. (Report at 4.) Mr. Hall rejects the purpose of the EF Scale and invents his own.

Reasoning backwards, Mr. Hall contends that the EF Scale's *possible* damage indicators *definitively prove* that the assumed wind gusts in Dr. Fitzpatrick's report would have damaged the house's siding and roofing and allowed wind-driven rain to render the house a total economic loss before the surge reached the elevated floor level. (*Id.* at 3-4.) Mr. Hall's report does not support this conclusion with any explanation of his methodology or any evidence that the observed physical damage reflects causation from wind, rather than water. (*Id.*, *passim.*) Rather, without any supporting analysis, Mr. Hall treats EF Scale's damage indicators as conclusive proof that the elevated portion of Plaintiffs' house was destroyed by wind.

Mr. Hall is remarkably confident about his backwards application of the EF Scale in spite of the fact that it has never been peer-reviewed. When questioned about whether there is any scientific literature to support his misuse of the EF Scale, Mr. Hall answers that he once saw an abstract by an engineer with whom he has never spoken and who he believes supports his theory. (Hall Dep. (*Patrick*) at 96:11-23, 102:20-103:3.) He also contends that an adjunct professor, whose name he does not recall, once spoke on the use of the EF Scale in investigating Katrina wind claims. (*Id.* at 96:11-23, 98:25-99:24, 102:13-17.) Because he had so little information about this alleged support for his theory, Mr. Hall could not say whether either gentleman's work was peer reviewed or supported Mr. Hall's theory.

¹ The EF Scale was developed from 2000 to 2004 by dozens of expert meteorologists and expert engineers at the Fujita Scale Enhancement Project of the Wind Science and Engineering Research Center at Texas Tech University. Their findings have been published in an official report entitled: "A Recommendation for an Enhanced Fujita Scale (EF-Scale)." (*Recommendation, passim.*) A full copy of the EF-Scale Report can be obtained on the National Weather Service's website at: <http://www.spc.noaa.gov/efscale/>.

(*Id.* at 97:2-7, 99:9-13, 101:4-8). After being pressed, Mr. Hall finally acknowledged that he knows of no literature that supports his use of the EF Scale in this manner. Indeed, members of the panel who created the EF Scale oppose Mr. Hall's misuse of the Scale, (Hall Dep. (*Patrick*), 112:4-18), but he continues to misuse it, unabated

Mr. Hall's selection of the EF Scale to support his opinion on causation is scientifically unreasonable. There are *stark* differences between the EF Scale (for tornadoes) and the Saffir-Simpson Hurricane Scale used for hurricanes. According to the Saffir-Simpson Hurricane Scale, "[s]ome structural damage to houses and buildings . . . with a minor amount of wall failures" suggests *sustained* hurricane wind speeds of 111 to 130 mph.² The EF Scale, on the other hand, would estimate similar wind speeds only after large sections of the roof structure had been removed and exterior walls had collapsed. (*See, Recommendation*, at 8 (EF-Scale Table).) In other words, by applying the wrong scale, Mr. Hall can erroneously claim that lower wind speeds could have destroyed Plaintiffs' house.

The EF Scale was developed so that the National Weather Service ("NWS") would be able to rate tornadoes and estimate tornado wind speeds with a greater degree of accuracy from visible damage caused by tornadoes.³ It is to be used by reference to damage observed in tornado-like conditions – not hurricane conditions where wind and flood act concurrently. Furthermore, Mr. Hall is not a NWS meteorologist storm surveyor, has not been trained by the NWS, and is not qualified to use the Enhanced Fujita Scale.

The EF Scale provides descriptions of previously observed damage in *non-coastal* structures that were of lower-bound, average, and upper-bound construction. (*Recommendation* at A1-69.) NWS storm surveyors who use the EF-Scale in the field look to the damage caused by a tornado to estimate

² See <http://www.nhc.noaa.gov/aboutsshs.shtml>.

³ See <http://www.spc.noaa.gov/efscale/>.

the tornado's wind speeds; they do not isolate hurricane wind damage from hurricane flood surge damage for the purpose of estimating wind speeds; nor do they look to a hypothetical wind speed to determine whether the wind was the *cause* of damage to a particular house. Due to the complexity of the EF Scale, the NWS provides storm surveyors with extensive training, as well as a software program named "EFkit" which helps to guide their decisions in the field.⁴ Mr. Hall is not a NWS storm surveyor, has not been trained by the NWS, and did not utilize EFkit software when he (or his son) visited the site.

Mr. Hall's misunderstanding of the EF Scale is worsened by his apparent failure to review architectural or engineering plans or Compton Engineering's report for Plaintiffs' house. The EF Scale varies with the construction quality.⁵ Yet, as shown above, *see supra* Part V(B), Mr. Hall is unaware that Plaintiffs' house had hurricane straps and would have been designated of "upper bound," rather than "expected," construction under the EF Scale. (*See Recommendation* at 9.) As a result of Mr. Hall's erroneous presumption of the construction quality of Plaintiffs' house, he underestimates the amount of wind needed to destroy Plaintiffs' house under this EF Scale methodology. Thus, even if Mr. Hall's use

⁴ National Weather Service representatives at the Enhanced Fujita Scale Project emphasized that "extensive training needs to be developed and implemented to all storm surveyors." J.R. McDonald & K.C. Mehta, *Summary Report of the Fujita Scale Forum*, Wind Science and Engineering, Texas Tech University, Lubbock, TX, p. 20 (Dec. 10, 2002), http://www.wind.ttu.edu/F_Scale/images/Fujita%20forum.pdf. To fulfill this need, two training modules have been developed by the NWS for storm surveyors. James G. LaDue, and Edward Mahoney, *Implementing the New Enhanced Fujita Scale within the NWS*, NOAA/ NWS Warning Decision Training Branch, Norman, OK, p. 1 (2006), <http://ams.confex.com/ams/pdfpapers/115420.pdf>. The NWS has also created a computer program named "EFKit," to guide storm surveyors in the field. *Id.* at p. 1. According to NWS experts, the complexity of the EF-Scale has necessitated the use of computer support and multiple training modules: "With 28 Damage Indicators (DIs) and anywhere from 3 to 12 Degrees of Damage (DODs) for each DI, the EF-scale involves a relatively steep learning curve compared to the F-scale. To further complicate training and education, there is built in uncertainty in the EF-scale in that each DOD exhibits a wide range of valid winds that overlap EF ratings." *Id.*

⁵ The EF-Scale provides 28 "Damage Indicators" which represent various types of structures or items that can be damaged by tornado winds. Relevant examples near Plaintiffs' house might include: "No. 2: One- or Two-Family Residences;" "No. 21: Metal Building System;" and, Numbers 27 and 28: hardwood and softwood trees. (*Recommendation* at A-1.) Associated with each Damage Indicator are several "Degrees of Damage," which might range from loss of shingles to total destruction of the item. To rate the Degree of Damage, the observer must know whether the home is of lower-, average- or upper- bound construction. For example, Degree of Damage No. 4: "Large sections of roof structure removed" in a one-family residence of lower-bound construction would suggest an estimated wind speed of 104 to 122 mph, while in a home of upper-bound construction it would suggest an estimated wind speed of 122 to 142 mph. *Id.* at A-3.

of the EF Scale were proper (and it is not), he misapplies his own methodology as a result of his incorrect assumption about the construction of Plaintiffs' house.

Finally, Mr. Hall errs in suggesting that the EF Scale provides a definitive correlation between wind speed and damage. The NOAA EF-Scale website clearly warns that the scale does not provide a definitive correlation between wind speed and damage:

***** IMPORTANT NOTE ABOUT ENHANCED F-SCALE WINDS:** *The Enhanced F-scale still is a set of wind estimates (not measurements) based on damage. It uses three-second gusts estimated at the point of damage based on a judgment of 8 levels of damage to the 28 indicators listed below. These estimates vary with height and exposure.*

See <http://www.spc.noaa.gov/efscale/ef-scale.html> (emphasis in original). A similar disclaimer is provided in the EF Scale Report: "[T]he limitations of the [original] scale are well known to the users," and include the lack of a "definitive correlation between damage and wind speed." (*Recommendation* at 1.) This limitation was not remedied by the new scale because the Fujita Scale Enhancement "project did not have sufficient resources available to carry out a full-blown study using either the deterministic or simulation approach." (*Id.* at 1, 4). Consequently, Mr. Hall's assumption that the scale shows a definitive correlation between wind speed and causation are unreliable.

B. Mr. Hall's Conclusions Do Not Reliably Flow from Any Calculations or Analysis of Physical Evidence

Throughout his report, Mr. Hall identifies numerous elements of damage that he claims are attributable to winds, including: (i) removal of the metal roof; (ii) removal of the roof over the screened patio; (iii) removal of siding at the elevated level; (iv) loss of siding at the lower level; and (v) damage to the elevated interior by wind and wind-driven rain. (Report at 3-4.) Despite having numerous post-Katrina photographs of Plaintiffs' house at his disposal, (*see id.* at Attachment B), Mr. Hall presents no physical evidence that wind, rather than water, destroyed the elevated level of the house. (*Id.*, *passim.*) Indeed, aside from his unreliable and erroneous application of the EF Scale, Mr. Hall's report contains no support whatsoever for his assertion that wind caused the above elements of damage.

Just as important is the report's utter lack of calculations to assess what wind forces could have destroyed Plaintiffs' house. This fatal omission is unsurprising because Mr. Hall has admitted that wind load calculations cannot be performed without construction data. (Hall Dep. (*Gagne*) at 205:10-18.) Indeed, Mr. Hall never does calculations. (*Id.* at 223:12-25.) His Report does not contain any type of performance analysis of the house's hurricane resistant qualities or the various connections that held the house together. (Report, *passim*.)

In addition to being unscientific, Mr. Hall's methods run counter to his own advice in a February 2008 article about how to differentiate between wind and flood damage in Hurricane Katrina. (Neil B. Hall, *Differentiating Between Wind & Flood Damage in Hurricane Katrina*, 9th Annual Windstorm Insurance Conference, Jacksonville, Florida, 2008, at 1-2, attached hereto as Exhibit I.) Mr. Hall states that to determine the cause of damage, one must analyze "the building's resistance to both wind and flood and its condition prior to the storm." (*Id.* at 1.) Here, however, Mr. Hall knew little more than superficial information regarding the construction of Plaintiffs' house, which was demolished when he (or his son) inspected the site. (*See* Report at 2; Hall Dep. at 59:13-21.) Thus, Mr. Hall offers no physical evidence that the damage to the elevated portion of Plaintiffs' house was caused by wind, rather than water. (Report, *passim*.) In addition, Mr. Hall's failure to provide any calculations assessing the forces of wind and water on Plaintiffs' house flouts his own advice that it is "important" for a causation analysis to consider "what structural damage could have been caused by wind in the absence of flood" and "what structural damage could have been caused by flood in the absence of wind." (Hall, *Differentiating* at 1-2.)

Given the numerous post-hurricane photographs at Mr. Hall's disposal and his professed expertise as a "self-described" "forensic engineer," Mr. Hall's utter failure to analyze the physical damage observed to Plaintiffs' house or employ any calculations renders his testimony inadmissible.

Indeed, without Mr. Hall's EF Scale "analysis," his report does not even *purport* to provide a basis for concluding that wind, rather than water, destroyed Plaintiffs' house.

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*, 121 F.3d at 991 (quoting *Daubert*, 509 U.S. at 592). Mr. Hall's conclusory assertions that wind caused certain elements of damage amount to *ipse dixit* and provide no support for the conclusions of his report. Therefore, Mr. Hall's opinions and methods fail to meet the fundamental requirements for expert testimony, and Plaintiffs cannot meet their burden to show it is admissible.

C. Mr. Hall Fails to Exclude Storm Surge as the Cause of Damage

Mr. Hall's causation opinion is also unreliable because he fails to exclude storm surge as a likely cause of damage. From the outset, Mr. Hall dismissed water as a potential causal or contributing factor, despite his admission that surge was 19 feet deep on Plaintiffs' property, including 9.3 feet above floor level. (Report at 3, Attachment C-1 at 8.) In fact, aside from relying on Dr. Fitzpatrick's hurricane chronology, Mr. Hall's report makes no effort to exclude this admitted storm surge as the cause of Plaintiffs' loss. His report simply attributes damage to the roof and elevated level to wind, but provides no analysis of how the damage observed reflects damage from wind, rather than water.

Curiously, Mr. Hall attempts to take both sides on whether storm surge was independently capable of rendering Plaintiffs' house a total loss. Mr. Hall frankly admits that storm surge collapsed the

break-away walls and damaged the interior at ground level and that surge was independently capable of rendering Plaintiffs' house a total loss. (Report at 3-4; Hall Dep. at 73:7-10, 74:13-16.) That Mr. Hall concedes the destructive power of storm surge but fails to rule it out as the cause of damage shows that his causation analysis is incomplete, unreliable, and unhelpful to the Court. Perhaps realizing this, Mr. Hall later takes the contradictory position in his deposition that storm surge was not strong enough to breach the elevated walls of Plaintiffs' house. (Hall Dep. at 100:18-21.) Yet the only basis he provides for this speculative opinion is the alleged storm surge speed from the report he claims to have once seen "upside down," but never in full form. (Hall Dep. at 105:18-106:9.) Yet, even assuming his storm surge speed was accurate, he provides no calculations or analysis to opine that surge at this velocity could not have breached the elevated walls of Plaintiffs' house.

Mr. Hall's Report also fails to consider whether flood-borne debris destroyed Plaintiffs' house, contrary to the advice in his February 2008 paper, where Mr. Hall noted that a "specific appreciation of other events including . . . flood-borne debris such as barges, trailers and containers" is "important" for understanding the "cause of slab claim damage." (Hall, *Differentiating* at 1-2.) Departing from his own advice, Mr. Hall's report does not consider whether the impact of surge-borne debris could have destroyed the elevated level of Plaintiffs' house. (Report, *passim*.)

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 Env'tl. & 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.

VII. MR. HALL'S REPORT WAS INADEQUATELY PEER-REVIEWED

In *Daubert*, the Court recognized that when a theory or technique is submitted to the scrutiny of other experts within the field, "it increases the likelihood that substantive flaws in methodology will be detected" and thus enhances the reliability of the information. 509 U.S. at 593. Perhaps realizing this, Mr. Hall claims that his reports have been "peer reviewed," but in reality, they were allegedly reviewed by only one other person, Jim H. Moore, an engineer with experience in "commercial HVAC and plumbing projects," space systems reliability, and fire investigation. (*See* Resume of Jim H. Moore, attached hereto as Exhibit J.) Although a licensed engineer in Mississippi, Mr. Moore is primarily a fire cause and origin expert who has jumped on the Katrina gravy train with his friend, Mr. Hall. (Deposition of Jim H. Moore, 16:7-16, May 18, 2008, *Patrick v. State Farm Fire & Cas Co.*, No. A2401-2006-140 (Harrison County Miss. 2006), attached hereto as Exhibit K.) Prior to Katrina, he had never rendered an opinion on wind versus water causation. (*Id.* at 22:24-23:3.)

State Farm has taken Mr. Moore's deposition in several matters and confirmed that Mr. Moore's "review" included only a simple reading of Mr. Hall's report, concentrating on grammatical and stylistic errors and improvements. He read Mr. Halls "facts" and "evidence" for the purpose of determining "whether or not his conclusions matched or warranted from – the evidence that he presented." (*Id.* at 8:2-23). When asked whether he accepted responsibility for the report as set forth in the Mississippi Rules and Regulations of Procedure, Mr. Moore stammered and would only respond that he did not know whether the rules required him to do so. (*Id.* at 11:17-16:6.) He also claimed ignorance regarding whether Mr. Hall was required to employ the scientific method. (*Id.* at 80:19-25.)

Mr. Moore incorrectly assumed that Mr. Hall has a degree in civil engineering. (*Id.* at 38:1-3). Mr. Hall's report contains no indication that Mr. Moore ever visited Plaintiffs' property. Further, Mr. Hall freely admits that he did not even discuss his conclusions with Mr. Moore. (Hall Dep. at 96:23-97:3.) There is simply no indication in Mr. Hall's report that Mr. Moore submitted the report to any degree of scrutiny sufficient to bolster its reliability. Therefore, Plaintiffs have not shown that Mr. Moore adequately peer-reviewed Mr. Hall's report or that his signature evidences the reliability of Mr. Hall's conclusions. *See, e.g. Bennett v. PRC Public Sector, Inc.*, 931 F.Supp. 484, 494 n. 21, 502 n. 42 (S.D. Tex 1996) (expert's opinion that defective design of workstation caused plaintiffs' injuries held inadmissible; among other deficiencies, expert's statement that he had "discussed [his conclusion] with my peers and ... had gotten concurrence with [his] thoughts" did not constitute adequate peer review under *Daubert*).

VIII. CONCLUSION

For the foregoing reasons, State Farm respectfully requests that its Motion to Exclude the expert testimony and expert report of Mr. Hall be granted.

Dated: June 15, 2009

Respectfully submitted,

/s/ H. Scot Spragins

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CERTIFICATE OF SERVICE

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

DATED, June 15, 2009.

/s/ H. Scot Spragins

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