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

SHERRY TARANTO, ET AL **PLAINTIFFS**

VERSUS **CASE NO.: 1:08-CV-1356-LG-RHW**

STATE FARM FIRE AND CASUALTY INSURANCE CO. **DEFENDANT**

RESPONSE BRIEF IN OPPOSITION
TO MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

This matter involves the total destruction of a family summer home in Waveland, Mississippi as a result of Hurricane Katrina. The Tarantos and Bracamontes (hereafter Taranto) are a large extended family from New Orleans, who like many Louisianans chose to enjoy frequent trips and quality time together on the Mississippi Gulf Coast. [1]

A hurricane is a force of both wind and water; a force that the parties agree completely destroyed the Taranto's home. The dilemma facing every person that examines a total loss property is determining the cause of that loss. A photo of the destroyed property is attached. [Exhibit A].

State Farm has filed a motion for partial summary judgment attempting to dismiss the claim for extra-contractual damages, attorneys' fees and punitive damages. Because there exist questions of fact precluding the granting of that motion, the motions should be denied as the issues presented are more properly resolved in a full trial by jury.

[1] Plaintiffs have attached and offered the transcripts of the referenced deposition testimony, and have provided the court with cited testimony in nontranscript/video form as well; submitting a Manual Filing and providing hyperlinks to the video segments for ease of the reader, pursuant to Fed.R.Civ.P. Rule 32(c).

In addition to the extra-contractual and punitive damage motion, State Farm has combined another motion on plaintiffs' procedural capacity within the same motion. For clarity of the issues a separate response brief companion motion for summary judgment file by State Farm on the issue of the plaintiffs' procedural capacity is responded to in a separate response in opposition.

INSURANCE PREMISED ON GOOD FAITH AND FAIR DEALING

The relationship between an insurance company and its insured customer is one of a fiduciary obligation. Indeed, an insurer owes to his insured a duty of good faith and fair dealing. "Under Mississippi law, insurers have a duty 'to perform a prompt and adequate investigation and make a reasonable, good faith decision based on that investigation' and may be liable for punitive damages for denying a claim in bad faith." ***Broussard v. State Farm Fire and Casualty Co.*, 523 F.3d 618, 627 (5th Cir. 2009), citing, *Liberty Mut. Ins. Co. v. McKneely*, 862 So.2d 530, 535 (Miss.2003); *U.S. Fid. & Guar. Co. v. Wigginton*, 964 F.2d 487, 492 (5th Cir.1992).**

SUMMARY JUDGMENT STANDARD

State Farm, as movant, must prove the pleadings, depositions, discovery and affidavits show a lack of genuine issue of any material fact and its entitlement to judgment as a matter of law. **F.R.C. P. 56(c)**. A summary judgment motion may be granted only if, viewing the facts and inferences supportable therefrom in the light most favorable to the non-moving party, there is no genuine dispute as to any fact, which could affect the outcome. ***Daniels v. City of Arlington, Texas*, 246 F.3d 500 (5th Cir. 2001)**. Furthermore, a defendant moving for summary judgment on the basis of an affirmative defense "must establish beyond peradventure all of the essential elements of the… defense to warrant judgment in his favor." ***Chaplin v. National Credit Corp*., 307 F.3d 368, 372 (5th Cir. 2002)**.

THE QUESTION OF PUNITIVE AND/OR EXTRA-CONTRACTURAL DAMAGES IS A DISPUTED FACTUAL ISSUE

The record does not support judgment on the issues of punitive damages, extra-contractual damages, and attorney fees. State Farm and its employees were predisposed to deny the homeowner's wind portion of policies, while they favored the payment of flood benefits under the National Flood Insurance Program. State Farm's claims handling process prompted them to conclude that, despite the direct loss, and the existence of an all-perils policy: more likely than not, that every single portion of the property was unblemished by wind or wind borne debris damage before the tidal surge reached levels that could totally destroy the remains of the property.

State Farm claims this Court can rule as a matter of law that punitive damages, as well as other extra contractual damages, are not recoverable in this case, based on the facts presented. ***Stewart v. Gulf Guar. Life Ins. Co.,* 846 So.2d 192 (Miss. 2002)**. Significantly, State Farm has not provided this Court with any evidence to demonstrate it had an arguable basis for its delays, its failure to properly adjust the claim, its false conduct, or any other improper acts. In fact as the evidence and testimony below will show, State Farm's actions reveal a disturbing practice of collecting the data to adjust its claims. Additionally State Farm wrongly interprets the standard when they allege that their adjuster's "observations of substantial evidence of storm surge flooding at plaintiff's property" somehow, as a matter of law, allows them to conclude that the entire damage to the Taranto home was caused by an excluded cause.

State Farm recites its preferred verbiage concerning the usual requirement of showing a lack of an arguable basis for denial of a claim in order to succeed on a bad faith claim. While this is the most common method of proving bad faith, Mississippi bad faith law is actually much broader than just the single lack of arguable basis for the denial of a significant claim. In

***Stewart v. Gulf Guar. Life Ins. Co*., 846 So. 2d 192, (Miss. 2002)**, the Mississippi Supreme Court explained the broader nature of bad faith and that it is possible to make out a bad faith claim for punitive damages even in the presence of arguable basis for denial of a claim.

> Before punitive damages may be recovered from an insurer, the insured must prove by a preponderance of evidence that the insurer acted with (1) malice, or (2) gross negligence or reckless disregard for the rights of others. If the insurer had a legitimate or arguable reason to deny payment of the claim, then the trial judge, after reviewing all the evidence, should refuse to grant a punitive damage instruction. "Arguably-based denials are generally defined as those which were rendered upon dealing with the disputed claim fairly in good faith." These principles, however, are not ironclad. … . the issue of punitive damages may be submitted, notwithstanding the presence of an arguable basis, where there is a question that the mishandling of a claim or the breach of an implied covenant of good faith and fair dealing may have reached the level of an independent tort. ***Id*., at 200-201**.
>
> The question … is whether Gulf Guaranty breached its contract with Stewart in such a way as to amount to an intentional wrong, or in doing so whether its conduct was so grossly negligent that the breach constituted an independent tort.. … Because there is no dispute that Stewart's condition existed at the time the policy became effective, Gulf Guaranty contends that it was entitled to rely on the [pre-existing condition] exclusion. ***Id.***
>
> This Court has held that the denial of a claim without proper investigation may give rise to punitive damages. "Proper investigation… means obtaining all available medical information relevant to the claim, and make a reasonable effort to secure all medical records relevant to the claim. Methvin admits that se did no investigation before denying Stewart's claim. In fact, Methvin, in her letter, attempted to place the burden of submitting information regarding the claim on Stewart. … This evidence suggests that there exist questions of fact regarding the adequacy of Gulf Guaranty's investigation of Stewart's claim and that the jury could have properly concluded that such a failure evidenced bad faith and gross negligence, entitling Stewart to an award of punitive damages.
>
> Furthermore, there was evidence presented which would support a conclusion by the jury that Gulf Guaranty attempted to engage in post-claims underwriting in dealing with Stewart's claim. Post-claim underwriting occurs when an insured pays premiums and operates under the assumption he is insured against a specified risk, only to learn after he submits a claim that he is not insured… Clearly, no effort was made by Gulf Guaranty to determine whether Stewart was in insurable health at the time the policy was issued. ***Id.*, at 203-204**.

> … the trial court erred in granting Gulf Guaranty's motion for judgment notwithstanding the verdict as to the punitive damages. Though the preexisting condition exclusion constituted an arguable basis for Gulf Guaranty's denial of Stewart's claim, the evidence at trial demonstrated a breach of the implied covenant of good faith and fair dealing which the jury may well have concluded reached a level of an independent tort. The jury had before it evidence from which it could reasonable conclude that Gulf Guaranty's conduct was grossly negligent. ***Id*., at 205**.

A delay in payment under provisions clearly providing coverage beyond permitted by the loss payment clause of a policy, when motivated by economic gain, will also support a bad faith claim particularly where the insurer has knowledge of the economic hardship caused by the delay in payment. This is true even where there is a legitimate dispute and an ongoing investigation as to other coverage under the same policy. ***Travelers Indemnity Co. v. Wetherbee*, 368 So.2d 829 (Miss. 1979).**

Under Mississippi law, insurers have a duty to perform a reasonable prompt and adequate investigation of all relevant facts and make a reasonable, good faith decision based on that investigation**," *Broussard*, 523 F.3d at 627-28. *Broussard* relied upon *Sobley v. S. Natural Gas Co.*, 302 F.3d 325, 335-36 (5th Cir. 2002)** in holding that to "Qualify for punitive damages for such claim investigation, 'the level of negligence in conducting the investigation must be such that a proper investigation by the insurer would easily adduce evidence showing its defenses to be without merit.'" ***Id.*** This definition of negligent claims investigation, however, is the equivalent of saying that the insured must prove the lack of an arguable basis for denying the claims, and completely overlooks the ***Stewart*** holding that punitive damages can be awarded on the basis of gross negligence in claims handling despite the existence of an arguable basis for denying the claim and even despite the undisputed evidence that the pre-existing condition the insurer used as a basis of the denial existed at the time of the insurance application making the insured uninsurable.

Mississippi case law decided after ***Sobley*** makes it clear an insurer can mishandle a claim so badly that punitive damages are appropriate despite having an arguable basis for denying the claim and the absence of proof that a proper investigation would easily have adduced evidence showing the proffered defense lacked merit. ***Stewart*** decided two days after ***Sobley*** is just such a case. As the ***Stewart*** court made clear, no amount of investigation would have proved a lack of merit to the pre-existing condition exclusion defense because it was undisputed that the insured had the condition when the policy was issued and was uninsurable because of it at that time.

If a jury could find bad faith and award punitive damages where an insurer denied coverage under a valid pre-existing condition exclusion where it was undisputed that the insured did in fact have the pre-existing condition because of gross negligence, gross inadequacy, or reckless disregard for the rights of the insured in handling the claim, it is clearly reasonable to have a bad faith claim based in the egregious mishandling of a claim even if the evidence does eventually provide some support for the insurer's decision that the loss was caused primarily by the excluded cause of flood. The claims handling in each case must be considered on its own facts considering only what evidence the insurer had to support this particular denial at the time of the denial and whether the insurer did in fact provide this insured with proper individualized claims processing or handled the claim in a grossly negligent or inadequate manner or with reckless disregard for this insured's rights.

In regard to what constitutes an arguable basis for a denial, recent Mississippi case law decided after ***Sobley*** and some of the other cases cited in ***Broussard*** contains some very tough language about thorough investigations of claims prior to denial which must be read together with ***Broussard's*** sparse language on Mississippi's punitive damages law in considering on a

case-to-case basis whether the facts warrant a punitive damages instruction based on claims handling.

In ***United Am. Ins. Co. v. Merrill*, 978 So. 2d 613 (Miss 2007)**, the Mississippi Supreme Court reinforced its standards for determining whether an insurer can avoid punitive damages by relying on its investigation and cling to an arguable basis for denying a claim. The court made it clear that insurers must have substantiating evidence to support the basis asserted for a denial in its files prior to issuing a denial. An insurance company must present an arguable, good-faith basis for denial of a claim. See ***State Farm Inc. Co. v. Grimes*, 722 So. 2d 637 (Miss. 1998); *Standard Life Ins. Co. v. Veal*, 354 So. 2d 239 (Miss. 1977).**

The ***Merrill*** holding demonstrates that State Farm cannot go behind its claims file as it existed on the date it denied the plaintiff's claim, then subsequently build its evidence to support its basis for denial after the fact of denial. While subsequent evidence may be relevant to the contractual issue of actual cause and coverage, the independent tort of bad faith claims handling is focused on the act of denial and the process of claims handling that resulted in the denial. Intentionally shifting the burden of investigating the cause of the loss to the insured and forcing the insured to prove the extent of the covered loss avoiding the insurer's obligation to substantiate that all the damages were caused by excludable causes or true concurrent causes creates a separate line of tort damages independent from the damages issues on coverage.

Reading ***Stewart*** and ***Merrill*** in conjunction with ***Broussard*** and ***Sobley***, it is clear that a denial of a claim prior to the development of actual evidence in the claim file, specific to the particular insured and supported by substantiating evidence supporting the reason stated by the insurer in its denial letter, constitutes gross negligence or reckless disregard for the insured in claims handling sufficient to support punitive damages under Mississippi law. It is also clear that

under Mississippi law, the insurer must actually investigate the cause of the specific insured's loss and may not assume the loss was caused by an excluded cause based on unverified information and the general condition of an area and shift the burden to the insured to prove the amount of his losses falling within a covered cause.

Contrary to State Farm's position, ***Broussard*** does not stand for the proposition that an insurer has an arguable basis for denial of a homeowners claim based in the water exclusion as a matter of law solely because the house was located in an area known to have been subjected to extremely high storm surge, nearby houses in the storm surge area had also been completely destroyed while the houses beyond the storm surge survived the hurricane, most with no or minor damage and many trees and shrubs in the neighborhood retained their branches and foliage.

The language from ***Broussard*** finding an arguable basis for denial makes it clear that an adjuster visited the Broussard property and looked at the actual evidence on that lot, considered the damage to the trees on the ***Broussard*** lot and determined that the damage to the trees on that lot was more consistent with flooding than tornadic activity and concluded that the totality of the evidence specific to that lot demonstrated that the home was destroyed by flood waters prior to issuing the denial.

Hurricane Katrina, like other hurricanes, had severe winds and eventually storm surge. After every hurricane, properties near the coast will have substantial evidence of storm surge flooding. There will also be substantial evidence of high wind, and accompanying wind borne debris that accompany every major hurricane. An insurance company must do more than conclude, conveniently, that the excluded event caused all the damage. They must in fact, do the opposite. They must assume the direct accidental loss is a covered event unless their adjustment

of claim reasonably indicates that, more likely than not, individual portion of the damaged by excluded events. The facts and handling of this case is in direct conflict with legal obligations imposed on State Farm.

STATE FARM CLAIMS HANDLING

The initial focus of the punitive liability of State Farm is on its adjuster Rachel Savoy. First Savoy was a seasoned adjuster that has been involved in numerous catastrophe claims prior to Katrina. Second, Savoy was an adjuster that handled both portions of this claim, the flood and the wind, an inherent conflict. Third, at its basic core an insurer gives the benefit of the doubt to its insured when gray areas of coverage arise. This axiom is maintained in the State Farm's Catastrophe Certification [Exhibit B, p. 47], and which is consistent with State Farm's obligation as described by Savoy in her deposition:

> Q: Would you agree that where there is a dispute in coverage that the benefit of the doubt is given to the insured?
>
> A. Always.
>
> Q. Would you agree that where there is a dispute, you try to find coverage rather than deny coverage?
>
> A. Always.

[Exhibit C; Savoy Depo. at pp. 124-125; http://bit.ly/cU8Lso].

Savoy's experience also provided an explanation of the types of damaged properties following a hurricane,

> Q. Give me an idea of the criteria or descriptions of properties when an adjuster goes out to the site, whether they are a slab property, total loss property, partially- - are there terms that describe different types of properties, in your experience, when you go out to a site?
>
> A. Terms that I use?
>
> Q. Yes.

> A. Sure. A slab would obviously would be a slab or piling, no house, just what was left of the foundation. And then there would be what - - I think we called it a stick, if the framing was still there but everything else was washed away. And the house is still there, so it's not a slab, but it would have been a total loss because one, it was either moved of its foundation and structurally unsound or the house was there and had like eight feet of water in it. And then there were houses that had two feet of water, and then it progressively goes down, eight, six.
>
> I have to categorize people in order of their damage to see them. So I would see slabs first, and then people who still had houses there, and then move to people who had categorized them eight feet or water, six feet of water, four feet of water, 2 feet of water, down to no water, to wind claims.

[Exhibit C; Savoy Depo at pp.57-58; http://bit.ly/906vkV].

In this case Savoy's explained her approach to the determination of the cause of this loss is to review and consider substantial documentation. When one reviews the testimony of this adjuster, and the claims file upon which she relied, it becomes apparent that her determination of a flood loss was predisposed and based on narrow and restricted information. Instead of explaining and listing the processes that she employs in the inspection and evaluation of totaled properties, she relies on unsubstantiated information and the concurrent cause exclusion in denying the Taranto claim. In exchange for consistent premiums payments by its customer, State Farm returned to these customers a unilateral rejection based on a misguided interpretation of an exclusion clause in their policy.

The denial of the Taranto claim was directly the result of the interpretation of the anti-concurrent cause clause. This clause was the subject of the Mississippi Supreme Court's pronouncement in the case of ***Corban v. USAA*, 20 So.2d 601 (Miss. 2009)**. In ***Corban***, the court restricted the use of the anti-concurrent cause clause in denying a claim on the exact factual situation presented here: where there exists no property to determine the cause. ***Corban***

expressed that the insurer is obligated to indemnify the policyholder for all losses which cannot be established, by a preponderance of the evidence to have been caused, or concurrently contributed to by flood damage. ***Corban*** further explains that, "'contributed to' comes into play only when 'flood damage' is a cause or event contributing concurrently to the loss. Pursuant to the policy language, only if proof of a 'concurrent' cause is presented to a jury for consideration would the jury receive an instruction including the policy phrase 'contributing concurrently'" ***Corban* at 619**. In this case there is a factual dispute as to the causal basis for the loss of the property. The issue of causation and under the guidelines of ***Corban***, "these determinations are for a jury." ***Corban* at 619**, citing ***Grace v. Lititz Mutual Ins. Co.*, 257 S.2d 217, 224 (Miss. 1972)**.

In the testimony of Ms. Savoy, she explained her application of the anti-concurrent cause clause:

> Q. But for purposes of whether you are filling the claim State Farm or for the NFIP, the information that's being put on these forms or on any form, for insurance purposes, has to be truthful and honest and not falsified correct?
>
> A. Yes.
>
> Q. Now, are you familiar with the term "Anti-Concurrent Cause" at all?
>
> A. I've never heard it said like that. Concurrent causation is what we hear a lot.
>
> Q. Concurrent causation, acc, anti-concurrent clause, anything of that nature, are we talking about the same animal here?
>
> A. I think so. You all refer to it as ACC. We just call it concurrent causation out in the field.
>
> Q. Well, I'll refer to it as con-current causation. Can you give me a description of what, in you experience and knowledge of adjusting claims, what does concurrent causation mean to you in handling a claim?

> A. Any loss that occurs with the covered loss and a non-covered loss whether it be before or after or during is not covered.

[Exhibit C; Savoy depo at pp. 32-33; http://bit.ly/bAjCJ1].

Savoy further explains the application of the concurrent cause part of the policy,

> Q. OK and when you say that something is not covered if the cause of the loss is combined to create a loss in any sequence of events; is that correct?
>
> A. That's my understanding.
>
> Q. Ok. And is that a method with which you have applied the concurrent causation exclusion over your experience over the eleven, twelve years?
>
> A. Yes.

[Exhibit C; Savoy Depo at p. 33; http://bit.ly/aOCPI8].

The ultimate foreclosure of the wind claim, and how the causation determination is made, is summed up in the following explanation by Savoy,

> Q. When you entered that there was no wind coverage because of concurrent causation, are you essentially saying that whatever wind was there, when combined with the flood would result in an exclusion of this coverage?
>
> A. Yes.

[Exhibit C; Savoy Depo at p. 89; http://bit.ly/c4qSJe].

The resulting denial is essentially based on State Farm's one-sided approach that if the water touched it, it's a flood claim. It is with that foundation that State Farm then pays out the flood part of the claim under the NFIP, while simultaneously denying the wind claim on the same basis. Savoy worked closely with State Farm's flood coordinator, Lecky King. Savoy's approach on this claim was the exact approach directed by State Farm's flood coordinator, Lecky King, in an email dated September 9, 2005, and reads in pertinent part,

> We will not deny any wind coverage at this time. We are thoroughly investigating every loss. We have requested expert analysis of wind speeds, wave surge and other reports which will give us the necessary tools to make proper

> determination. Once this has been completed we will communicate our decision to the effected policyholders.
>
> This also applies to those policyholder with both a wind and a flood policy. The flood damage should be resolved, paid and closed. However, the wind claim will remain open pending the investigation and resulting findings.

[Exhibit D].

What is presented to the inspecting adjusters is a rushed method of paying off the flood claim, which was done in the present case, and then, with a blind application of the concurrent cause exclusion, there is never a need for a proper wind evaluation.

Next, the process by which Savoy considered whether the property was covered on the wind loss was critically based on information that was supposedly received by State Farm from the insured. Immediately following the storm, homeowners were contacting their insurance companies and making claims. State Farm established a call center to receive those claims, and recorded the information received. In the "Facts" section of the Taranto claim file a description that, "Thinks storm surge has completely destroyed their home" is entered. [Exhibit E]. This entry was the most significant fact upon which Savoy based her denial of wind coverage.

> Q. Well, let me back up and ask it this way. Is there a sit-down conference or a meeting or a telephone conference with people before the management review is determined?
>
> A. Well, I have visited with the policyholder upon the inspection. You know I review their claims, the notes that they say in the files, although limited. You know, when we receive the file on the flood, it says they thought the tidal surge knocked the house over, which is pretty much what I found to be true.
>
> Q. Where is that?
>
> A. On page 19, under the facts. These are the comments made by the policyholders, "extent of damage unknown. Thinks storm surge has completely demolished their home." That's the facts imputed on every

claim. That's what the policyholder when they call in, that's where we put their comments.

Q. Is that information a legitimate source of support for a determination of how a property is damaged?

A. Well, we always consider what the policyholder tells us, yes. I think it's pretty valid. I mean it's not always - - They don't 100% know but they give us their opinion.

[Exhibit C; Savoy Depo. at pp. 104-105; http://bit.ly/cxgg5r].

Savoy reinforces her reliance on the storm surge report of the insured as a basis of the denial,

Q. And if we look back on your claims file, and all of the information in the claims file itself, photos, etc. Was there any indication that this property was damaged as a result of any type of hurricane winds from Katrina?

A. Is there any doubt?

Q. No, any information that would lead you to conclude that this property was damaged by wind at all or was this a completely exclusive flood loss of this property?

A. I believe it was a completely exclusive flood loss. This letter was basically sent to people- - because I did send some of these letter- - saying, we're not denying that there was wind damage to the property we're just saying that the flood was dominant. And so my understanding was this letter was saying we weren't excluding wind. We just didn't have any documentation to prove that there was wind, but we had substantial documentation to prove that there was flooding.

Q. And the substantial documentation is what?

A. Twenty-six foot of tidal surge is pretty substantial to me.

[Exhibit C; Savoy Depo at pp. 84-85; http://bit.ly/9BM2m8].

When asked to explain the specifics upon which she relied to deny that this property was a wind loss or sustained wind damage, Savoy could not point to any factual information:

Q. When you come to look at a property, or when you are doing an inspection in looking at a property alone, do you have the experience and knowledge that you can determine what came first at a property, wind or water, just by looking at the property?

A. Just by looking at it not normally no. There are a lot of other things to consider. There are a lot of other facts involved in it. And there is enough weather data out there.

So my experience in what I have seen, I normally that the wind drives water. There has to be wind, that you know- - that drives the water, whether it's wind driven rain or wind driven tidal surge or whether it's surface water or not.

Q. Would you agree, at least, in looking back at these claims notes, that this property was destroyed by a combination of wind and water?

A. By these claims notes? They're very limited. Our access, our phone service, as far as being able to hook online and enter activity logs and was very limited. It is a problem that has been rectified, we have an offline tool now that we use so we can put in the log notes and later upload them when there is more connectivity.

These log notes are very short, very direct and to the point because we didn't have a large activity time frame to put them in.

So if you are asking about the log notes, no they don't have everything in here that I use to come up with my determination of how I came to the decision that it was tidal surge.

[Exhibit C; Savoy Depo at pp. 80-81; http://bit.ly/dCyW4c].

Using the information contained in the facts section of the claim file, purportedly from the insured, and without any other corroborating evidence that "storm surge completely demolished their home," Savoy determines it to be a flood loss, with the claim under the wind policy simultaneously denied.

At the time of the initial claim very few if any persons had returned to the Louisiana or Mississippi Gulf Coast, and in the testimony of plaintiff Sherry Taranto she could not have known, any water level or surge condition of Katrina. When asked about the remarks contained

in the claim file, Sherry Taranto a co-owner and insured on the property was asked how that information came to be in the claim file:

> Q. Okay. What is your - - what is your best information as to how high the water was at your property?
>
> A. I don't recall.
>
> Q. 24-feet? Would you disagree with that question?
>
> A. It was only - - it may have just form stuff that occurred that repeated.
>
> Q. Okay. Well, what did you hear?
>
> A. I don't know for sure no. Again yeah, you are hearing it could have went from 14 to whatever. I don't know. It was just figures, you know, numbers people were - - heights that they were coming out with.
>
> Q. Okay. Well, do you disagree with me that there was 24 feet or more of water at the location of your house?
>
> A. I have no way of knowing.

[Exhibit F; Taranto depo at pp. 77-78].

While there were other insureds involved in this claim, under any circumstance, information on the cause of the damage of a home or conditions of the property following the loss, whether provided by the insured or his neighbor can only be considered anecdotal evidence and certainly not the type of reliable information to be used in determining cause of a loss, especially where there is no evidence remaining of the property to examine.

Using questionable information gathered in the immediate aftermath of the storm is unique to the Taranto claim. The case of ***Flores v. State Farm Fire and Casualty Insurance Co.*, 1:08-CV0471-LTS-RHW**, a case pending in this District, is presently considering this same issue in a pending motion. In ***Flores*** an identical denial of coverage was made based on the insured's post storm call to the State Farm call center. In the deposition testimony of Heather

Keyt, the State Farm adjuster who handled the claim, the same discussion was had on the denial of the claim based on the "Facts" section of the claim file, and the entry that the insured expressed that he thought that a "27 foot storm surge took it down."

In ***Flores*** the adjuster similarly repeats the insured's statement throughout her testimony in securing her decision that this was a flood loss:

> Q. Sure. Let me ask it in a different way. In looking at the photographs and your recollection of the claim, is there any way for you to look at these photographs and say there is absolutely 0% wind damage to this property, there is 100% flood, 50-50, 60-40, is that any type of calculation that you made with regard to this claim?
>
> Mr. Heidelberg: Let me object to the form of that question.
>
> A. To me, it was 100% water. I mean, the homeowners -- like I said, the homeowners even said that a 27 foot storm surge- -
>
> Q. Yeah, you mentioned that go to that page. What page is that, again? I'm sorry.
>
> A. It's on the very first page, page 1.
>
> Q. And you're talking about the section under the facts section that says the home was wiped out completely; 27 foot storm surge took it out; correct?
>
> A. Correct.
>
> Mr. Heidelberg: Took it down.
>
> Mr. Denenea: Took it down. I'm sorry.
>
> Q. In that entry how do you know that's from the homeowners?
>
> A. This page is from when the homeowners call in to get their claim, and this is what they say.
>
> Q. Ok. And is that something you took and wrote down, or is that somebody at the phone center took down, or do you know.
>
> A. It's whoever takes the claims. I mean it's nothing that I did.
>
> Q. Do you know when that would have been entered, that information?

A. It says date of loss, 8/29. So I don't know when. I mean, whenever the home owner had called in to file the claim, date and time of - - well, it's just the - -

Q. In your evaluation of the property, did you ever ask the homeowner how they came to conclude that the 27 foot storm surge took down the property?

A. Yes, and they told me it was water. I mean, they even told me the water was right behind the house, and there was nothing to protect it, you know, on either side. And, I mean, they said that it was water that took it out.

[Exhibit G; Keyt Depo pp. 75-77; http://bit.ly/bSvYO1].

Ms. Keyt again reverts back to the same assured storm surge assertion in describing her discussions with the insured,

Q. Did he describe the there is no flood policy, or was that something you had?

A. He told me there was no flood policy. He said that there was nothing left of the home. You know, he said the same thing as what was said in the facts, you know, about the home being wiped away by the storm surge.

[Exhibit G; Keyt depo at p.59; http://bit.ly/cMBCL4].

Again, when asked about other available resources that she used in the determination of wind or flood, Ms. Keyt returned to the same line on the surge level,

Q. And my question is, when you would utilize those maps for evaluation the properties, were you required to record that information in your claim file?

A. No.

Q. Why not?

A. We just, I mean - - well like, one this one, the homeowner had said, you know, twenty-seven foot storm surge. So, you know, we just took that information, I mean, and then looked at the other houses around the area.

[Exhibit G; Keyt depo at p.28; http://bit.ly/cvW2hJ].

This same catchphrase was also relied upon as the basis for denying the Flores claim by Ms. Keyt's team manager at State Farm, Sherona Miller, who specifically stated that she relied upon that entry in denying the claim [Exhibit H; Miller depo. at p. 43].

A cursory review of the State Farm records would lead one to believe this to be a simple evaluation. The entire house is destroyed, there is no evidence to realistically distinguish whether this was a wind or flood event that destroyed the home, but the homeowner has admitted that he "thinks storm surge has completely demolished home." The reality is that the "storm surge" statement exists only as a fiction, impossible to have been known by the insured, yet completely relied upon by State Farm as the basis of the denial of their homeowners' claim.

ROUTINE PRACTICE

The question that is raised from State Farm's creation of an insured's statement on cause is whether this was an isolated practice. In this case the call center representative entered specific information on the conditions of the property, purportedly from the insured, that the insured would not and could not have known. In the case of ***Margiotta v. State Farm***, **USDC 06-4272, Section S, (E.D.La. 2008)**, another State Farm slab case involving the call center, the exact creation of false data was exposed. The inquiry on this exact issue was explored in a deposition of Randolph Jackson, a State Farm call center adjuster.

Q. And we go down to the bottom of that boxed section. It says, 19 feet, as per insured.

A. That's correct.

Q. Is that correct? This would have been specifically obtained by Ms. Margiotta?

A. That is correct.

Q. No doubt about that?

A. No doubt about it.

Q. Okay. Do you know or do you have any recollection of how she determined that level to be?

A. I have no clue, sir. No recollection.

Q. And it says, the section says, did water – water entered the living area, circled yes, and it says, 19 feet, as per insured. Is that correct?

A. That is correct.

[Exhibit I; Jackson Depo. pp 71-72; http://bit.ly/dyEsZQ].

The call center adjuster was again questioned on how he obtained the information on the insured's home,

Q. Okay. So there's no doubt that she told you that the house was nine feet off the ground, and that there was ten feet of water in the house?

A. Well, I evidently, I wouldn't have entered that particular information if it wasn't relayed to me.

[Exhibit I; Jackson Depo. p. 72; http://bit.ly/aBUNdR].

Q. It shows, exterior waterline, yes, and it shows, ten feet zero inches. The same thing for interior water line, yes, nine feet zero inches. Do you know where that came from?

A. That was information provided by Ms. Margiotta, from the insured.

Q. Okay. She told you specifically - - or let me ask you this way. You asked her specifically about an exterior water line and an interior water line?

A. I asked her, standard practice, my standard practice was to ask how much water was in the home, and her indication to me was, the house was nine feet off the ground, according to the file. There is I believe, there is another place in the file that actually states that the house was nine feet off the ground, and there was ten feet of water in the house.

Q. Okay. And that specifically would have come from Ms. Margiotta?

A. That's correct.

Q. No other location?

A. Not that I'm aware of.

Q. Okay. Were you aware that there was no house there to measure a water line?

A. No, sir, I was not.

Q. Did Ms. Margiotta tell you that her house didn't exist there any more?

A. No sir, she did not.

[Exhibit I; Jackson depo. pp.62-64; http://bit.ly/9xuzLw].

In the case of ***Weatherly v. State Farm*, 2009 WL 1247098 (E.D.La. 5/4/09),** the recorded statements of a call center adjuster were the subjects of a motion before the court. The adjuster had been involved in receiving and entering information on State Farm claims at its call center from its insureds following Katrina. The Court ruled that the statement was relevant and admissible. In this case, the ***Weatherly*** statements corroborate the routine practice of State Farm in collecting data of properties following the storm. Without returning to their property, the insureds were asked the condition of their property, including damage and water levels. The call center adjuster in that case, Lorrie Beno, explained the process of collecting that data,

Q. My question here would be these folks had never been back to their house, nor had they any report from anyone as to what the condition of their home was or anything like that. So I'm wondering where that information would have -- the twenty-five feet would come from?

A. They probably told me that, or if they weren't sure and I did a bunch of them in that area, I said to them you know, a lot of that area saw like twenty five feet of water, so you think that's what your house would have gotten because if you're not sitting up on a hill, which turns out after I had been down there, there weren't any hills down there.

Q. Um-hum.

A. Would your house have seen that much? Oh, yeah, you know okay and people agreed with it because they were traumatized and wanted to get paid the limit.

Q. Right.

A. And we knew that from mapping it was flooded out, so if it had been eighteen feet instead of twenty-five, the result would have been exactly the same.

Q. Um-hum.

A. So it didn't make that much difference. We were kind of getting a guess at it.

Q. Was that a State Farm approach or a Laurie Beano approach?

A. No, it was State Farm.

Q. Is that something that State Farm would suggest to you all, if they haven't been there and they haven't heard, then you know…

A. Absolutely.

[Exhibit J; Beno Statement 1/16/2009 at pp. 6-8; http://bit.ly/99TwCI].

This adjuster in ***Weatherly*** specifically confirms State Farm's method and practice of collecting hurricane data in the call center. Where the insured had not been back to the property the phone adjuster would either suggest the water level or have a guess at it. It was definitely not accurate information, and certainly not information to base a decision on a claim of an insured.

In the deposition of that adjuster on May 5, 2009, where the above statement was authenticated, the creation of fictional data is again revealed. In that deposition the adjuster confirmed the information on flood levels when asked how the flood levels would have been entered on the worksheet used in that case.

Q. In the middle of the document, it says, "Is there an exterior water line?" "Is there an interior water line?" And, for both of those, you have "yes." Now, that cannot be correct with regard to an interior water line, can it?

MR. HANNA: I am going to object to the phraseology of the question.

MR. TRAHANT: You may answer it. There is no house there to measure an interior water line, correct?

WITNESS: From what I was told, no, there was not a house there.

BY MR. TRAHANT:

Q. So then, an interior or exterior water line ---- I mean, there cannot be an interior or exterior water line on the house because there was no house there, correct?

A. Well, there would have been an interior/exterior water line before the house left if it was all water. I don't know if that part was actually generated by the computer or if I entered that in there. I would have put in twenty-five (25) feet. But, other than that, I don't know how much else I had done on it.

Q. And then, under "Settlement Information, "you understood that this was the Weatherlys' primary residence, correct?

A. I don't recall that, but it says that on the documents and I can tell you that that was my handwriting on the next page for the Questionnaire, yes.

Q. I am on the Flood Claim Worksheet page right now, and section number 1 (one), letter "d.," says, "Is this the Principal Residence for the named insureds?" And somebody wrote in there, the word "No."

A. That is not in my handwriting.

Q. Okay. So, you did not put "no" in here, that it is not their primary residence?

A. Correct.

Q. To your recollection, you did not tell anybody that this was not the Weatherlys' primary residence, correct?

A. I don't have enough knowledge or remembrance on this file to know whether I had or not.

Q. Did you know that any of these flood documents had been altered or changed after you did what you did and submitted them?

A. As far as the first one, if there was a mistake made on it in adding or transferring the numbers over, they can be changed. Sometimes, it would come back to me ---- or, there have been times where I just made an error

and they would write it in and let me know, or maybe they would not let me know other times, but I don't recall this one in particular.

Q. If you look at the bottom of the Flood Loss Questionnaire.

A. Okay.

Q. And ----

MR. HANNA: Bates number 53 (fifty-three)?

MR. TRAHANT: Bates number 53 (fifty-three). It has "Primary residence," and there is "yes" behind there.

BY MR. TRAHANT:

Q. Did you write that word, "yes?"

A. I would have circled it. That is correct.

Q. And then, somebody scratched through and circled "no" and put a question mark.

A. That is correct. I think it applies to the initials that are there. It looks like it is written below that word, "no."

Q. Can you make out what those initials are?

A. No, I don't know whose those are.

Q. Do you have any idea, as you sit here, what would have given anybody reason to believe that this was not the Weatherlys' primary residence?

MR. HANNA: Objection to the form.

WITNESS: None that I know of or can remember on this file.

[Exhibit K; Beno depo pp. 342-345; http://bit.ly/9ZFz1r].

The entry of that phony information is also consistent with the entry of flood information in the present case. With a house leveled to rubble, and without any realistic way to measure waterlines to complete the required NFIP forms, Savoy invents the data:

Q. And if we look in the primary cause section, it says, OT overflow Tidal, you would have entered that in their question.

A. Yes.

Q. And to the left of that it says, "was there a general condition of flooding?" It's at least checked off or dots in yes correct?

A. Yes.

Q. "Is there an exterior water line?" The answer is "yes," and it says "fifteen feet." Do you see that?

A. Yes.

Q. How did that fifteen feet, how was that concluded by you?

A. Site inspection.

Q. And the exterior water line is being measured how in this particular property?

A. Because there is no property, the same thing, what it would have been an interior is what it was exterior.

Q. Ok. And the second line is interior water line, fifteen feet.

A. Right.

Q. Are these numbers something that you would have measured based on the level of water and the location or how was that actually measured?

A. Yes. Because there is no house there, then yes. Normally, if there is four feet of water on the exterior it will be about two to three inches less on the interior of the house. That's what it's based off of on the flood. They want to make sure that there was an exterior water line and an interior water line when the house is still standing, when it's something visual.

Here, it doesn't come into play too much. They want to know if there is a general condition of flooding. You have to fill those boxes in or else it won't let you continue.

Q. Would you agree that the fifteen feet is, at best a guestimate of what the interior and exterior water line was?

A. On the interior, it's what it would have been if the house had still been standing there and the exterior was based on site inspection.

Q. And since the house wasn't there, how do you measure and exterior water line of a property that doesn't exist?

A. I put it matching the exterior, as it would have been for the interior.

Q. No. My question was, with regard to the exterior, how do you measure an exterior waterline on a property that's not there?

A. By what's remaining, the tree.

Q. So this measurement is not necessarily a measurement of the house itself, but the adjacent tree?

A. Yes.

[Exhibit C; Savoy depo at pp. 112-114; http://bit.ly/b1xEWW].

Once again the supposed facts as submitted by an insured immediately after the storm, are facts from someone that could not have had the personal knowledge of the cause of the loss of plaintiff's home, yet are recorded by State Farm, and used to deny their claim. In the Taranto case, State Farm's adjuster Rachel Savoy specifically relied on the statement "storm surge has completely demolished the home" as the basis for denying the claim. This "State Farm fact" is exposed as a "bare assertion fallacy" or the Latin phrase - *Ipse Dixit*; State Farm says it's what the insured said, and without question it therefore shall be true.

Although Savoy repeated the insured's "storm surge" statement as her factual basis she failed to perform her own independent investigation on the cause of the loss. What is entered as the most critical fact, if not only fact, in this case in State Farm's determination of causation under their policy is just accepted as a certainty. A homeowner with actual knowledge of the storm surge cause is just as unlikely as an insured that would know and report that a tornado destroyed his home.

EVIDENCE OF STATE FARM'S ROUTINE PRACTICE

The comparable cases above are evidence of the routine practice of State Farm in recording and utilizing data to suit its own financial benefit.

Rule 406 of the Federal Rules focuses on Habit and Routine Practice, and reads:

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

In the case of ***S.E.C. v. Lyon*, 605 F.Supp.2d 531(S.D.N.Y. 2009)**, the court was faced with a similar issue on admitting deposition testimony regarding an investment organization's routine practice in the communication with its investors. "Rule 406 provides that 'evidence of ... the routine practice of an organization, whether corroborated or not ... is relevant to prove that the conduct of the ... organization on a particular occasion was in conformity with the habit or routine practice.' Fed.R.Evid. 406. The SEC's proffered testimony falls squarely within that Rule's ambit. It is relevant, and therefore, presumptively admissible." ***Id.*, at 543**. Permitting three witnesses to testify on the "process" or "procedure" or a "script to read" in handling investors communications is on point with the present case, is consistent with the literal reading of **Rule 406**, and supports the use of the deposition testimony above in similar State Farm cases. See also ***Spartan Grain & Mill Co. v. Ayers*, 517 F.2d 214 (5th Cir. 1975)**.

The issue of the processes and practices of the call center information gathering is not a surprise to State Farm. State Farm anticipates the issue of the propriety of the call center processes as it has recently added Linda Lewis, a call center representative as a witness, who purportedly took down the information from the insured in the "facts" section of the claim file. [Exhibit L]. Anticipating the question of fact on the impropriety of the information gathering, State Farm apparently will have Ms. Lewis testify as a representative who can dispute or explain

the information gathered by State Farm in the immediate aftermath of Katrina. Whatever her testimony includes, her knowledge and involvement of the gathering of hurricane data will absolutely eliminate any prejudice to State Farm, or confusion to the jury on this issue. See **Fed.R.Evid. 403**.

Perhaps State Farm had an arguable basis to conclude that some of the damage to the plaintiff's property was caused by storm surge. What they didn't have an arguable basis to conclude was that ALL of the damage to plaintiff's property was caused by storm surge. The exclusion of all but flood is also contradicted in the testimony of the adjuster, Rachel Savoy as she states that State Farm is not denying wind damage,

> Q: Ok. Is there any way, in looking at the file and reviewing the documents and as we sit today that you can give any type of percentage as to what damage occurred by wind as opposed to what may have occurred by water?
>
> A. I think that would be just a complete assumption.
>
> Q. Is that you just can't tell?
>
> A. There was no house to determine what was damaged by wind.
>
> Q. And I guess the same question with regard to any type of sequence of damage, what came - - what was damaged on this property, any wind damage first, flood damage first, then wind damage, is there any way of looking at the file and examining the property at to determine the sequence of that?
>
> A. No. There would be no way. It would be an assumption.

[Exhibit C; Savoy depo. p. 127; http://bit.ly/9Ic5ky].

This unknown combination of wind and water as the cause of the damage was again explained by Savoy in reviewing the denial letter [Exhibit M] from State Farm to the insureds,

> Q. In the letters sent by Mr. Angelle, where he describes the damage to the property was from wind and water, is it your position that the description of wind damage to this property was error by Mr, Angelle?

A. No. It's a form letter. I don't think anything was put in error. It is a form letter that states we weren't denying there was wind in the area.

Q. Do you dispute, or at least for this particular property, that the letter was sent by Mr. Angelle was accurate with regard to this property being damaged by wind?

A. I don't think there was any way to make a determination that the property was damaged by wind when it wasn't there. I think it's an impossible thing to prove.

Q. And is that something that, at least looking at Mr. Angelle's letter, would be an inaccurate statement with regard to his providing that to the insured?

A. I think you are misunderstanding the letter. I think the letter was stating that we are not saying there wasn't wind damage there. We can't see it. We are not denying that wind could have done something at that property. We are just saying tidal surge was the cause of loss to your property. We're not denying that there was any wind.

[Exhibit C; Savoy Depo at pp. 91-92; http://bit.ly/bN74Fw].

State Farm made the decision based on information that simply could not have existed to obtain payment from he NFIP, while protecting its own financial position in the denial of the wind claim.

State Farm's unjustifiable claims handling and denial gave them a tremendous economic advantage over their customer. That decision made it unlikely that the plaintiffs could rebuild their home. That decision was, plaintiffs' suggest, an overly aggressive business/litigation decision and not a fair and reasonable adjustment of the claim. Based on what is shown to be an intentional manipulation of the claims data and denial of this claim, plaintiffs assert that they are entitled to a jury determination of whether State Farm abandoned its obligations as an insurer of good faith and fair dealing.

The facts and examples above illustrate a classic example of a question that cannot be decided as a matter of law on summary judgment, and which should be decided based on the

facts adduced at trial. There are numerous facts of record to establish that State Farm did not have an arguable basis to deny payment to the plaintiffs, and that State Farm acted tortiously and improperly. The numerous examples of egregious behavior must require this Court to deny State Farm's motion on this point outright. Failure and refusal to pay amounts that are undisputedly owed is the essence of bad faith conduct entitling the plaintiff to punitive damages.

This issue was recently denied in an almost identical motion for summary judgment filed by State Farm. In the case of ***Lebon v. State Farm*, 2010 WL 1064705 (S.D.Miss. 3/18/10)**, the court ruled, "On a motion for summary judgment, the Court does not weigh the evidence or evaluate the credibility of witnesses. The Court considers the evidence submitted by the parties in support of and in opposition to the motion and grants all reasonable inferences to the non-moving party. In other words, that evidence and those inferences drawn from the evidence are viewed in the light most favorable to the non-moving party." That same holding is applicable in this case, as the facts and circumstances of the total loss are almost identical to that of the ***Lebon*** plaintiffs. See also this court's memorandum and order in denying a similar motion in ***Webster v. USAA Cas. Ins. Co.*, 2007 WL 2127594 (S.D.Miss. 2007)**.

Furthermore, extra-contractual damages, such as attorney's fees and certain other expenses, are available when an insurance company has breached its contract, and are an alternative to punitive damages even when bad faith has not been shown. See ***Essinger v. Liberty Mutual Fire Ins. Co.*, 529 F.3d 264, 270 (5th Cir. 2008)**. When and insurance company breaches its contract with an insured but does not do so in a way that is so egregious as to permit the recovery of punitive damages…, the insured in some circumstances will have a right to attorney's fees and other expenses that were reasonably foreseeable." ***Essinger*, 529 F.3d at 270**; see also ***Broussard v. State Farm Fire and Casualty Company*, 523 F.3d 618, 628**

(5th Cir. 2008); *United American Insurance Co. v. Merrill*, 978 So. 2d 613, 630 (Miss. 2007); *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290, 295 (Miss. 1992).

CONCLUSION

State Farm alleges that plaintiffs' insurance claim is "a pocketbook dispute and nothing more," a mere negotiation of some sort. Plaintiffs' respectfully disagree. State Farm refused to pay at all. A refusal to honor their obligations under the insurance policy when their insureds have suffered a total and significant loss, under the circumstances of this case, is not a mere pocketbook dispute. Plaintiffs have alleged and have sought extra contractual damages, attorneys' fees and punitive damages in addition to the underlying claim. The factual inquiry if the actions give rise to a recovery of punitive damages is a question for the finder of fact and not an appropriate issue to be resolved by summary judgment.

Accordingly, considering the submission above, State Farm's motion should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, John H. Denenea, Jr., do hereby certify that I have this day electronically filed the foregoing *Response Brief in Opposition to State Farm's Motion for Partial Summary Judgment*, with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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THIS the 10th day of May, 2010.

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