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

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

v. — CASE NO. 1:06cv433-LTS-RHW

STATE FARM MUTUAL INSURANCE COMPANY — DEFENDANT/COUNTER-PLAINTIFF

and

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

DEFENDANT/COUNTER-PLAINTIFF
STATE FARM FIRE AND CASUALTY COMPANY'S
RESPONSE MEMORANDUM TO THIS COURT'S ORDER [266] AND
THE RIGSBYS' SUBMISSIONS [264] & [267] RE: RULE 56(f) DISCOVERY

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Defendant/Counter-plaintiff State Farm Fire and Casualty Company, improperly denominated in the First Amended Complaint as "State Farm Mutual Insurance Company" ("State Farm"), respectfully submits this Response Memorandum to this Court's Order ([266]) and the Rigsbys' submissions ([264] & [267]) regarding Rule 56(f) discovery.

PRELIMINARY STATEMENT

Without waiving its position that no discovery is appropriate with respect to the issue of whether the Rigsbys are an "original source," State Farm does not object to producing, subject to the entry of an appropriate protective order, certain documents that are responsive to the Rigsbys' document list. To this end, State Farm will produce:

(1) The McIntosh flood claim file;

(2) The McIntosh homeowner's claim file;

(3) Any photographs or video images of the McIntosh property in State Farm's possession;

(4) The repair invoices and related materials concerning the McIntosh property; and

(5) The prior deposition testimony of Brian Ford, Jack Kelly, Cori Rigsby, Kerri Rigsby, and Robert McVadon (the McIntoshes' construction contractor) taken in *McIntosh v. State Farm Fire & Casualty Co.*, No. 1:06-cv-1080-LTS-RHW (S.D. Miss.), and other proceedings.[1]

However, State Farm objects to certain of the depositions of the various witnesses the Rigsbys request to take. Those depositions do not satisfy the standards of Rule 56(f), since they are not essential to justify the Rigsbys' opposition to the pending motions, nor do they satisfy the well-delineated standards set forth in this Court's Orders.

[1] State Farm believes that the Rigsbys possess all of the exhibits attached to the complaint in *Shows v. State Farm Automobile Ins. Co.*, 1:07-cv-709-LTS-RHW (S.D. Miss. filed June 20, 2007), and, thus, already have copies of, among other things, all the correspondence to or from State Farm related to Forensic's assessment of the damage to the McIntosh property that State Farm could produce. *See* ([264-2] at 3 (Davidson Aff't)). State Farm thus objects to having to go through the unnecessary burden of reproducing such documents. State Farm reserves all potential objections to the admission into evidence of all potential exhibits, including, but not limited to, any produced by State Farm in this Action.

First, contrary to the suggestion made by this Court in its March 20, 2009 Order, ([266] at 1), State Farm employee Alexis "Lecky" King was not one of the individuals who supervised the McIntosh flood claim, she was not involved in the adjustment or payment of the McIntosh flood claim, and she has no firsthand knowledge of the flood damage to the McIntosh property. Nor did Ms. King even have any involvement with the McIntoshes' homeowner's claim until ***at least two weeks after the McIntoshes were paid their full flood policy limits on October 2, 2005***. And even then her knowledge of the damage to the McIntosh property was secondhand, based on her review of photographs and other documents.

Inasmuch as this Court stated in its March 20 Order that it "will not approve the deposition of any person who is not directly involved with State Farm's investigation and payment of the McIntosh flood claim," ([266] at 2), and because Ms. King has no firsthand knowledge of the flood damage to the McIntosh property, her deposition is not warranted with respect to the Rigsbys' presentation at the hearing on Defendants' consolidated dispositive motions. ***Nonetheless***, as explained in Section III below, subject to the entry of an Order pursuant to Fed. R. Civ. P. 26(c)(1)(D), State Farm does not oppose the Rigsbys taking the deposition of Ms. King for the purpose of confirming her lack of firsthand knowledge of the McIntosh flood claim.

Second, further depositions of former Forensic Analysis & Engineering Company ("FAEC") employees Brian Ford and Jack Kelly are not warranted. In addition to the fact that neither individual was involved with the McIntosh flood claim, both Messrs. Ford and Kelly were extensively deposed in *McIntosh* by the Rigsbys' former counsel. Both of their depositions addressed, among other things, FAEC policies, their inspections of the McIntosh property, and their engineering reports. The Rigsbys have not identified any areas previously unaddressed on which they require information necessary to prepare for the hearing and State Farm is producing the transcripts.

Third, as to Mike Church and Ron and Linda Muchk (or Mucha), the Rigsbys' summary, ([267]), fails to meet this Court's directive to "state clearly" what information these individuals have and how that information relates to the McIntosh flood claim, *see* ([266] at 2), and none of them was "directly involved with State Farm's investigation and payment of the McIntosh flood claim." ([*Id.*])

ARGUMENT

I. THE MCINTOSH FLOOD AND HOMEOWNER'S CLAIMS

The McIntoshes owned waterfront property located in close proximity to the Gulf of Mexico, and within a hundred feet of the Tchoutacabouffa River. ([264-3] at 3.) At the time of Hurricane Katrina, the McIntoshes' property was insured under a National Flood Insurance Program ("NFIP") Standard Flood Insurance Policy ("SFIP") issued by State Farm and under a State Farm homeowner's policy. The McIntoshes' property sustained significant damage during Hurricane Katrina and was subjected to catastrophic levels of floodwater, with exterior watermarks of approximately ten feet, and interior water marks approximately five and a half feet above the interior flooring. ([264-3] at 3; [264-4] at 2.)

A. The Adjustment and Payment of the McIntosh Flood Claim

On September 24, 2005, Cody Perry and Kerri Rigsby inspected the McIntosh property. ([264-3] at 3.) Mr. Perry and Ms. Rigsby observed "[a] general condition of flood ... due to ti[d]al flow from hurricane Katrina," with "[e]xterior water line approx 10' and interior 5'." ([*Id.*]) Interior photographs show intact shelving above the flood level with items still on the shelves, and undamaged lighting and fans hanging from the ceilings. (Ex. A.) Exterior photographs taken shortly after the storm also show that the trees around the property retained most of their leaves. (Ex. B.) Kerri Rigsby has admitted that there "[w]as a lot of damage to that home," that "[i]t was a large home" and she "thought there was $250,000 worth of flood damage to that home," and that the conclusion that damage to the first floor

walls and floors was caused by rising water from storm surge and waves was consistent with what she saw at the McIntosh home. ([91-7] at 139:9-23, 142:7-13.)

On September 29, 2005, State Farm's John Conser authorized the payment of flood policy limits. On October 2, 2005 State Farm issued a check to the McIntoshes for their full flood policy limits of $345,000 ($350,000 minus a $5,000 advance) for structure and contents. ([264-3] at 2; Ex. C, Checks for Flood Payment.) At the time, State Farm was processing daily reconciliations of NFIP flood payments and, thus, State Farm's flood payment to the McIntoshes was submitted for reimbursement from the federal government pursuant to the NFIP on or about October 2, 2005. State Farm's flood claim file Activity Log for the McIntosh property confirms that the flood claim was closed by 9:02 a.m. on October 4, 2005. ([264-3] at 2.)

B. <u>The Engineering Inspections for the McIntoshes' Homeowner's Claim</u>

The Activity Log in the State Farm flood claim file reveals that on September 24, 2005, Mr. McIntosh requested that State Farm send an engineer to evaluate the damage on their "companion" homeowner's claim as to which he had "issues on wind vs water." ([264-3] at 3.) On October 4, 2005, when State Farm contracted FAEC to inspect the McIntosh property in connection with that request, the flood claim had already been fully paid, closed, and submitted for reimbursement. On October 7, 2005, Mr. Ford inspected the McIntosh property. On October 12, 2005, Mr. Ford submitted his report, which documented an interior water mark of five and a half feet and attached photographic evidence of extensive flood damage, but did not address the flood damage in its conclusions. *See* ([264-4]).

On October 17, 2005, Ms. King, who read a copy of the October 12 report, reportedly contacted Mr. Ford seeking an explanation for the inconsistency and incompleteness of his report. *See* ([264-7]). During that conversation, Mr. Ford admitted to Ms. King that the damage to the McIntosh property "looks like floodwater." ([*Id.*] at 2.) That Ms. King's concerns were legitimate is reinforced by an e-mail sent to Mr. Ford that same day by his supervisor and FAEC's principal, Robert Kochan, who stated

that "when I did the peer review of this home loss, I wondered to myself how you found it to be a wind loss when so much of the structure appeared to be unaffected by the wind." *See* ([264-6]). Mr. Kochan's e-mail to Mr. Ford further stated that "we both have to admit that it looks very much like flood damage from the photos that you used in your report." ([*Id.*])

On October 18, 2005, Jack Kelly re-inspected the property. Mr. Kelly's analysis determined that the "damage to the first floor is extensive and includes floor, wall, and ceiling damage." ([264-12] at 3.) Mr. Kelly also noted marks on the McIntoshes' porch columns and trees, attendant with abrasion from water-borne debris. ([*Id.*]) Finally, Mr. Kelly concluded that "the damage to the first floor walls and floors appears to be predominately caused by rising water from the storm surge and waves." ([*Id.*] at 4.) Mr. Kelly's conclusions are supported by Mr. Ford's later deposition testimony in *McIntosh*, where, among other things, Mr. Ford stated that there is "no doubt" there was "five and a half feet" of water damage caused by storm surge on the main floor of the McIntoshes' house, and that he agrees with the conclusions of Mr. Kelly's October 20 report, including the conclusion that there was extensive water damage to the first floor. *See, e.g.,* ([225] at 12 (citing [225-2] (Ford Dep. in *McIntosh*) at 251:2-24, 270:22-271:14, 301:11-303:8.))

II. THE REQUESTED DEPOSITIONS FAIL TO SATISFY THE REQUIREMENTS OF RULE 56(F)

The Rigsbys' requests for certain depositions fail to meet the requirements of Rule 56(f). Initially, Rule 56 allows a defendant to seek summary judgment "at any time," and thus "does not require that any discovery take place before summary judgment be granted." *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990). Rule 56(f) expressly limits its application to parties who "for ***specified reasons*** ... cannot present facts ***essential*** to justify [their] opposition." Fed. R. Civ. P. 56(f) (emphasis added). "[V]ague assertions that additional discovery will produce needed, but unspecified, facts" are wholly inadequate. *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 719 (5th Cir. 1999). Where a party cannot show that "additional discovery will establish a genuine issue of

material fact," then it "may not invoke Rule 56(f)." *Mauldin v. Fiesta Mart*, 114 F.3d 1184, 1997 WL 255640, *2 (5th Cir. 1997) (table). As to their requested depositions, the Rigsbys have not presented any "specific facts explaining [their] inability to make a substantive response," or "specifically demonstrat[ed] 'how postponement of a ruling on the motion will enable [them], by discovery or other means, to rebut movant's showing of the absence of a genuine issue of fact.'" *Washington*, 901 F.2d at 1285 (citations omitted). Thus, the depositions are unwarranted.

The denial of some of the Rigsbys' deposition requests is further supported by this Court's Orders, which provide that the only relevant question before the Court at the upcoming hearing is "whether the payment of the flood insurance limits in the McIntosh case were justified," ([261] at 3), and that the Court "will not approve the deposition of any person who is not directly involved with State Farm's investigation and payment of the McIntosh flood claim." ([266] at 2.) ***None*** of the individuals the Rigsbys seek to depose was directly involved with State Farm's investigation and payment of the McIntosh flood claim. Thus, their depositions will not – and cannot – generate any genuine issue of material fact relevant to that issue.

Nor do certain of these individuals, such as Ms. King, have any firsthand knowledge of the damage to the McIntosh property. While Messrs. Ford and Kelly inspected the McIntosh property, they have already been extensively deposed by the Rigsbys' predecessor counsel and there is no need for them to be deposed again.

III. THE DEPOSITION OF LECKY KING IS NOT NECESSARY, BUT MAY BE TAKEN TO CONFIRM MS. KING'S LACK OF FIRSTHAND KNOWLEDGE OF THE MCINTOSH FLOOD CLAIM

As detailed above, Ms. King was ***not*** one of the individuals who supervised the McIntosh flood claim, she was ***not*** involved in the adjustment or payment of the McIntosh flood claim, and she has ***no*** firsthand knowledge of the damage to the McIntosh property. Ms. King's "knowledge" of the damage to the McIntosh property is limited to what she learned from secondhand sources, such as from reviewing photographs and reading Mr. Ford's report, which was not ordered, much less written, until

after the flood policy limits were paid and submitted under the NFIP. While Ms. King may have been critical of Mr. Ford's report – and justifiably so – those activities are of no moment with respect to the upcoming hearing before this Court. At bottom, because Ms. King was "not directly involved with State Farm's investigation and payment of the McIntosh flood claim," ([266] at 2), her deposition is not necessary in connection with the upcoming hearing.

Nonetheless, State Farm does not oppose the Rigsbys taking Ms. King's deposition for the purpose of confirming her lack of firsthand knowledge of the McIntosh flood claim. State Farm respectfully requests that the Court issue an Order, pursuant to Fed. R. Civ. P. 26(c)(1)(D),[2] limiting the Rigsbys' examination of Ms. King to her firsthand knowledge of whether "there was insufficient flood damage to the McIntosh property to justify payment of the applicable SFIP limits." ([261] at 4); *see* ([266] at 2) ("I do not want to allow the discovery or presentation of evidence that does not bear directly on the merits of the McIntosh flood claim"; "I will not approve the deposition of any person who is not directly involved with State Farm's investigation and payment of the McIntosh flood claim"). If the Rigsbys accept State Farm's invitation to depose Ms. King on this issue – the sole one before the Court at the upcoming hearing – they will very quickly confirm that this subject is one upon which she holds no firsthand knowledge.

IV. THE DEPOSITIONS OF BRIAN FORD AND JACK KELLY ARE NOT WARRANTED

As detailed above, Messrs. Ford and Kelly were not involved in the investigation and payment of the McIntosh flood claim. To the extent that Messrs. Ford and Kelly possess "knowledge of the storm forces that damaged the McIntosh property," ([266] at 1), their testimony on the issue has already been provided in extensive depositions that were taken in *McIntosh* by the Rigsbys' then-counsel.

[2] Rule 26(c)(1)(D) expressly empowers the Court in governing discovery to enter an order "forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters."

On October 10, 2007, Richard Scruggs and Derek Wyatt[3] appeared at the deposition of Mr. Ford in *McIntosh*, at which time he was extensively questioned by plaintiffs' counsel. *See* (Ex. F, Ford Dep. I in *McIntosh* at 2). On January 11, 2008, Mr. Ford's deposition in *McIntosh* was completed, at which time he was extensively questioned by State Farm's counsel. *See* (Ex. G, Ford Dep. II in *McIntosh*). Mr. Ford's deposition transcript in *McIntosh* runs over 600 pages, and includes testimony about the FAEC's policies, his inspection of the McIntosh property, his engineering report, and Mr. Kelly's report.

On September 17, 2007, Sidney Backstrom, Zach Scruggs, and Derek Wyatt appeared at the deposition of Mr. Kelly in *McIntosh*, at which time he was extensively questioned by plaintiffs' counsel. *See* (Ex. H, Kelly Dep. in *McIntosh* at 2). Mr. Kelly's deposition transcript in *McIntosh* runs over 200 pages, and includes testimony about FAEC's policies, his inspection of the McIntosh property, his engineering report, and Mr. Ford's report.

Any argument by the Rigsbys that their interests were not represented fully in these depositions would be implausible. As this Court has previously recognized, the Rigsbys' attorneys in *McIntosh* were "wearing 'two hats' – one as the Rigsbys' lawyer and the other as their employer." (*McIntosh*, Jan. 9, 2008 Order [988] at 2.) The reports from Messrs. Ford and Kelly were the centerpieces of *McIntosh*. Here, the Rigsbys misguidedly rely on those same reports and their interest in them is largely co-extensive with those of the plaintiffs in *McIntosh*.

Because the Rigsbys have not demonstrated any new issues on which Messrs. Ford and Kelly should be deposed, they have not shown that further depositions of these witnesses are essential to the Rigsbys' ability to raise a genuine issue of material fact. The previous depositions of Messrs. Ford and Kelly reveal that the knowledge of these two witnesses has already been extensively explored and that

[3] Though he did not appear as counsel of record for the Rigsbys in this matter, Mr. Wyatt was working cooperatively with the Rigsbys' former counsel in this case. *See* (Ex. D at 2 & Ex. E).

no additional depositions are warranted. Therefore, the Rigsbys' request to further depose Messrs. Ford and Kelly should be denied.

V. THE RIGSBYS' SUMMARY FAILS TO SATISFY THE REQUIREMENTS OF THIS COURT'S ORDER

In its Order [266] granting the Rigsbys the opportunity to explain the necessity of depositions they requested pursuant to Rule 56(f), this Court requested a "concise summary" that would "state clearly the information the Relators expect these individuals to have and the relationship that information has to the McIntosh flood claim." ([266] at 2.) While the Rigsbys' response is "concise," it is bereft of any meaningful information and fails to "state clearly" what information these individuals – *i.e.*, Mike Church and Ron and Linda Muchk (or Mucha) – have and how that information relates to the McIntosh flood claim. Moreover, none of these individuals was "directly involved with State Farm's investigation and payment of the McIntosh flood claim." ([*Id.*])

A. The Deposition of Mike Church Is Not Warranted

As to Mike Church, the Rigsbys merely state that he "is cited in Brian Ford's October 12, 2005 engineering report as 'report[ing] that houses were blown apart and debris was thrown into the McIntosh house at approximately 8 AM and floodwater began rising at 11 AM.'" ([267] at 1.) But the "citation" in Mr. Ford's report is not to a firsthand account from Mr. Church. Rather, it is at best a secondhand statement relayed by Mr. McIntosh to Mr. Ford and attributed to Mr. Church. *See* ([264-4] at 3) ("According to Mr. McIntosh, a neighbor – Mr. Mike Church – reported …").[4] Though Mr. Ford tried to contact Mr. Church in an effort to verify whether he actually witnessed any damage to the McIntosh property, he was unable to do so. (Ex. F, Ford Dep. I at 290:2-4.) Had Mr. Ford successfully contacted Mr. Church then he would have likely learned that, in fact, Mr. Church was not in a position to see

[4] Mr. Ford's report does not state that Mr. McIntosh heard this story from Mr. Church and thus invites the inference that this story was just an embellished neighborhood rumor.

things happening at the McIntosh house and did not see any debris being thrown into the McIntosh house during Hurricane Katrina. *Cf.* (*id.* at 292:17-293:17).

The Rigsbys' threadbare reason for taking Mr. Church's deposition, which is based on tertiary hearsay and an erroneous assumption, fails to meet this Court's requirement that it "bear directly on the merits of the McIntosh flood claim." ([266] at 2.) Indeed, even if it were true that Mr. Church had seen that "debris was thrown into the McIntosh house at approximately 8 AM and the floodwater began to rise at 11 AM," that vague statement does not demonstrate that he possesses relevant and essential information as to "the McIntosh flood claim," ([*id.*]), or as to whether "there was insufficient flood damage to the McIntosh property to justify payment of the applicable SFIP limits." ([261] at 4.) The Rigsbys have failed to satisfy the requirements of Rule 56(f).

B. <u>The Depositions of the Muchks (or Muchas) Are Not Warranted</u>

The Rigsbys' request to depose "Ron and Linda Muchk (or Mucha)," ([267] at 2), is devoid of detail and fails to establish any nexus between the Muchas and the McIntosh flood claim. As such, their request fails to meet the requirements of Rule 56(f) and this Court's Orders. In their submission, the Rigsbys advert solely to the vague and generalized statement in the expert report of Dr. Ralph Sinno in *McIntosh* that the Muchas were "next-door neighbors of the McIntoshes who provided eye witness accounts that 'confirm wide-spread structural failures before the water surge' and 'describe intense winds on the early morning of August 29.'" ([267] at 2) (citing Sinno Report in *McIntosh*).) Indeed, the Rigsbys do not assert – and Dr. Sinno's report does not claim – that the Muchas witnessed any damage, whether by wind or by water, to the McIntosh property. Because the Rigsbys have not identified any essential evidence they expect from a deposition of the Muchas, nor connected it to the McIntosh flood claim, their request falls well short of this Court's requirement that they "state clearly the information the Relators expect these individuals to have and the relationship that information has to the McIntosh flood claim." ([*Id.*]) (emphasis added). Their request for these depositions should be denied.

VI. REQUEST FOR IN-PERSON PRE-HEARING CONFERENCE

State Farm respectfully requests this Court to hold an in-person pre-hearing conference similar to a pre-trial conference in order to discuss the orderly presentation of evidence as well as the exchange of witness and exhibit lists. State Farm believes that a significant number of stipulations concerning the authenticity of various documents and other evidence would help to streamline the presentations of all parties and also allow the Parties to better anticipate the Court's evidentiary requirements at the hearing.[5] If the Court is so inclined, State Farm respectfully suggests that a date shortly after the April 20, 2009 expert witness designation deadline would make sense for a pre-hearing conference.

CONCLUSION

While not waiving its position that the Rigsbys have failed to satisfy Rule 56(f) or the terms of this Court's Order [266], for the foregoing reasons, State Farm does not object to certain discovery, on the terms State Farm respectfully suggests herein. Further, State Farm respectfully requests this Court to set an in-person pre-hearing conference.

This the 2nd day of April, 2009.

Respectfully submitted,

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[5] State Farm will be requesting the Rigsbys to stipulate to the authenticity of certain documents in advance of the hearing.

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CERTIFICATE OF SERVICE

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

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This the 2nd day of April, 2009.

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