**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

| | | |
|---|---|---|
| BLIV, INC<br>d/b/a LECTRO ENGINEERING<br>AND REAL BLIV, LLC | ) | |
| Plaintiff, | ) | Case No. 4:22-cv-00869-HEA |
| v. | ) | |
| THE CHARTER OAK FIRE<br>INSURANCE COMPANY | ) | |
| Defendant. | ) | |

**DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS *DAUBERT* MOTION TO EXCLUDE EXPERT REPORTS, TESTIMONY AND OPINIONS OF BRIAN JOHNSON, P.E.**

COMES NOW Defendant, The Charter Oak Fire Insurance Company, by and through undersigned counsel, pursuant to Local Rule 4.01, and for its Memorandum in Support of its *Daubert* Motion to Exclude Expert Reports, Testimony and Opinions of Brian Johnson, P.E., states as follows:

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

*Menz v. New Holland N. Am., Inc.,* 507 F.3d 1107 (8th Cir. 2007).

*Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir.1997).

*Taylor v. Cottrell*, 2014 WL 409186, No. 4:09CV536 HEA, at *1 (E.D. Mo. 2014).

*U.S. v. Nichols*, 416 F.3d 811 (8th Cir. 2005).

## I. INTRODUCTION

This case involves a first party property insurance claim dispute arising out of a storm event, which was reported to have occurred on or about July 9, 2021 (hereinafter "the Event"). At the time of the Event, BLIV, INC (hereinafter "Plaintiff") had a Commercial Insurance Policy underwritten by The Charter Oak Fire Insurance Company (hereinafter "Charter Oak"), having policy number Y-630-0S834428-COF-21, an effective date of April 30, 2021, and an effective cancellation date of February 14, 2022 (hereinafter "the Policy"). The Policy was issued on the commercial building located at 1643 Lotsie Blvd., in St. Louis County, Missouri.

On or about July 21, 2021, Plaintiff notified Charter Oak of the Event and alleged loss and damage to the property. Charter Oak subsequently began its investigation of the claim. During the claim investigation, Charter Oak retained a professional engineer from The Vertex Companies (hereinafter "Vertex") to inspect the property and determine the cause of the claimed loss and damage. After three inspections of the property occurring on August 31, 2021, September 21, 2021, and March 14, 2022, Charter Oak concluded the amount of covered loss and damage to the commercial building that was caused by the Event, did not exceed the Policy's $2,500 deductible. In addition, Charter Oak concluded the claimed loss and damage to the exterior and interior of the building were not caused by and did not result from the Event, or any other covered cause of loss.

During the course of litigation, Plaintiff disclosed professional engineer Brian Johnson, P.E. (hereinafter "Mr. Johnson") as a retained expert witness and provided a copy of Mr. Johnson's "Storm Damage Report." Plaintiff relies on Mr. Johnson to offer expert opinions and testimony regarding the alleged cause of the claimed exterior and interior damages. Significantly, however, Mr. Johnson did not inspect the roof of the property until May 30, 2023, almost two years after the Event. He did not inspect the interior of the building while on site. Nor did Mr. Johnson speak

with the building owner or any other employee of Plaintiff. Mr. Johnson did not review maintenance or repair records relating to the property. He also admittedly cannot state to a reasonably degree of scientific certainty what the cause of the alleged damage is. Mr. Johnson's expert report, opinions, and testimony must be excluded because his opinions are not based on sufficient facts or data, Mr. Johnson did not reliably apply accepted methodologies and principles to the facts of this case, and his purported opinions constitute mere speculation and conjecture.

## II. LEGAL STANDARD

Federal Rule of Evidence 702 governs the admissibility of expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The Rule provides that,

> …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.

FRE 702 (emphasis added).

Under *Daubert*, the Courts must act as a gatekeeper to ensure that expert testimony is "not only relevant, but reliable." *Daubert*, 509 U.S. at 589. See also *Anderson v. Raymond Corp.*, 340 F.3d 520, 523 (8th Cir. 2003). This gatekeeper role extends to the relevance and reliability of all expert testimony, not simply scientific testimony. *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). The reliability standard is established by Rule 702's requirement that an expert's testimony be grounded in science, methods, and procedures. *Taylor v. Cottrell*, 2014 WL 409186, No. 4:09CV536 HEA, at *1 (E.D. Mo. 2014) (citing *Daubert*, 509 U.S. at 590-91). The relevance standard, on the other hand, "is established by the Rule's requirement that the testimony assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.*

Under Rule 702, the trial court uses a three-part test when evaluating the admissibility of expert testimony. *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 686 (8th Cir. 2001). The three-part test provides:

> First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact. This is the basic rule of relevancy. Second, the proposed witness must be qualified to assist the finder of fact. Third, the proposed evidence must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires.

*Lauzon*, 270 F.3d at 686 (quoting *Arcoren v. U.S.*, 929 F.2d 1235, 1239 (8th Cir. 1991) (internal citations omitted)). Additionally, to ensure that all expert testimony is reliable and relevant, a trial court should consider whether the expert's theory or technique, (1) can be tested; (2) has been subjected to peer review and publication; (3) has a known or potential "rate of error" and "standards controlling the technique's operation," and (4) enjoys "general acceptance" within a "relevant scientific community." *Daubert*, 509 U.S. at 592-94. "*Daubert*'s progeny provides additional factors [to consider] such as: whether the expertise was developed for litigation or naturally flowed from the expert's research; whether the proposed expert ***ruled out*** other alternative explanations; and whether the proposed expert ***sufficiently connected*** the proposed testimony with the facts of the case." *Lauzon*, 270 F.3d at 687 (emphasis added).

The objective of the gatekeeper requirement is "to protect juries from being swayed by dubious scientific testimony" by ensuring "that expert evidence 'submitted to the jury' is sufficiently relevant and reliable." *In re Zurn Plex Plumbing Products Liability Litig.*, 644 F.3d 604, 613 (8th Cir 2011). This purpose is served by applying Rule 702 in conjunction with Rule 403, which permits the exclusion of expert testimony where its probative value is substantially outweighed by the risk of unfair prejudice. *See e.g.*, *U.S. v. Nichols*, 416 F.3d 811, 824-25 (8th Cir. 2005) (quoting *Daubert*).

Federal Rule of Evidence 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FRE 403. Unfair prejudice is an undue tendency to suggest a decision upon an improper basis. *See Block v. R.H.Macy & Co., Inc.*, 712 F.2d 1241, 1244 (8th Cir. 1983) (citing Advisory Comm. Note to Rule 403). Thus, expert testimony must be relevant under Rule 702 in that it "assist[s] the trier of fact to understand the evidence or determine a fact in issue." *Daubert*, 509 U.S. at 591. If it is not relevant, it is not admissible. *Id.* Then, if relevant, the evidence is only admissible if its prejudicial effect does not substantially outweigh its probative value. FRE 403.

Accordingly, for expert testimony to be admissible, the proponent must establish by a preponderance of the evidence both that the expert is qualified to render the opinion, the opinion(s) is based on sufficient and reliable facts and data, **and** that the methodology and principles underlying his opinion(s) are scientifically valid. *Barrett v. Rhodia, Inc.*, 606 F.3d 975, 980 (8th Cir. 2010). The admission of expert testimony lies within the broad discretion of the District Court. *Giles v. Miners, Inc.*, 242 F.3d 810, 812 (8th Cir. 2001).

Furthermore, "[a]n expert's opinion must be based upon his or her own application of principles within his [or] her expertise to the facts of the case." *Hill v. Fikes Truck Line, LLC*, 2012 WL 5258753, at *3 (E.D. Mo. Oct. 24, 2012). "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *J.B. Hunt Transport, Inc. v. Gen. Motors Corp.*, 243 F.3d 441, 444 (8th Cir. 2001) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). "A court may conclude that there is simply too great an analytical gap between the data and the opinion

offered." *Id.* "Expert testimony that is speculative is not competent proof and contributes nothing to a legally sufficient evidentiary basis." *J.B. Hunt Transport, Inc.*, 243 F.3d at 444 (holding that an accident reconstruction expert's opinion was properly excluded because the deficiencies at the core of his opinion, including his own admission concerning his inability to scientifically reconstruct the accident, rendered his resulting conclusion mere speculation and pure conjecture) (internal citations omitted). *See also*, *e.g.*, *Menz v. New Holland N. Am., Inc.,* 507 F.3d 1107, 1114–15 (8th Cir. 2007) (holding an accident reconstruction expert's conclusion regarding the accident were mere speculation and conjecture because of his inability (or his apparent indifference to need) to reconstruct the accident scientifically).

## III. ARGUMENT

Here, Mr. Johnson's report, testimony, and opinions must be excluded because his "Storm Damage Report" is not "based upon sufficient facts or data," "the product of reliable principles and methods," nor "applied reliably to the facts of the case," as required by Rule 702. Rather, his opinions and Storm Damage Report are admittedly based on a brief inspection of the roof of the property, almost two years after the Event. Additionally, the Storm Damage Report is partly inaccurate, is not based on any personal observations, facts, or data, and omits a variety of pertinent facts regarding the condition of the property as it was shortly after the Event. As such, Mr. Johnson's report, opinions, and testimony are neither reliable, nor trustworthy in an evidentiary sense, and must be excluded.

### i. Mr. Johnson's opinions are not supported by sufficient facts or data.

Mr. Johnson does not rely on sufficient facts or data in forming his opinions and conclusions. Thus, his opinions, including his Storm Damage Report, are unreliable because they

amount to nothing more than speculation and conjecture. Specifically, Mr. Johnson testified to the following:

- Mr. Johnson did not inspect the building until May 30, 2023, almost two years after the Event. (Def. Ex. A, Johnson Dep. 19:11-14, 20:1-3, 23:3-10, July 10, 2023).
- Mr. Johnson's May 30, 2023 visit to the property was his first visit to the property. (Def. Ex. A, Johnson Dep. 23:22-23). Mr. Johnson was at the property approximately an hour and a half. (Def. Ex. A, Johnson Dep. 23:24-24:1).
- Mr. Johnson did not conduct any interior inspection to evaluate potential interior damage and/or determine the amount of possible water intrusion into the building. (Def. Ex. A, Johnson Dep. 24:2-16, 64:4-7, 76:2-7).
- Mr. Johnson did not conduct any interviews with the building owner or employees, either while on site or after his inspection. (Def. Ex. A, Johnson Dep. 30:8-17).
- Mr. Johnson did not review any property maintenance records from any time before the Event. (Def. Ex. A, Johnson Dep. 30:18-20, 55:18-21, 64:4-7).
- Mr. Johnson did not review any property maintenance records from any time after the Event, nor does he know if any work or repairs were completed at the property after the Event. (Def. Ex. A, Johnson Dep. 30:21-23, 33:8-11, 120:11-16).
- Mr. Johnson does not know what mitigation or repair efforts were performed at the building at the time of his inspection. He admittedly "assumed" that any repairs to the roof of the property were performed *before* the Event. (Def. Ex. A, Johnson Dep. 31:19-22, 32:7-17).

- Mr. Johnson admits his opinions relating to sublayer roofing materials are based on photographs taken by *others*.[1] (Def. Ex. A, Johnson Dep. 39:21-24, 40:5-8).
- Mr. Johnson admittedly cannot offer an opinion as to whether any previous roof layers or materials exist within the roof system. (Def. Ex. A, Johnson Dep. 59:3-8).
- Mr. Johnson admittedly does not know what roofing materials are currently installed and/or exist on the roof of the property. (Def. Ex. A, Johnson Dep. 103:10-14).

Here, it is clear Mr. Johnson's report, opinions, and conclusions are not based upon sufficient facts or data, or sufficient and reliable personal observations, to meet the standards of Rule 702 and *Daubert*. Specifically, he did not consider the actual conditions at the property at the time of the Event. He cannot say what the condition of either the exterior or interior of the property was ***before***, at the time of, or ***shortly after*** the Event. Mr. Johnson did not consider the maintenance or repair history of the property between the Event and his inspection, which occurred almost two years after the Event. (Def. Ex. A, Johnson Dep. 55:18-21). As such, Mr. Johnson cannot reasonably offer an opinion that the conditions he observed in May of 2023 were the same, or substantially similar to the conditions of the property, as it existed at the time of the Event. Therefore, his purported opinions are based on speculation and conjecture.

Additionally, Mr. Johnson testified that he did not observe or identify any failed seams, flashings, punctures, splits, or tears on the roof during his inspection of May 30, 2023. (Def. Ex.

[1] Mr. Johnson relies upon photographs of the Vertex engineer and Access Restoration Services ("ARS"), Plaintiff's initial contractor. He was not present when the photographs were taken. Nor did he contact the Vertex engineer or ARS to inquire about the photos.

A, Johnson Dep. 62:10-18, 63:12-16, 65:16-19, 67:6-12). Therefore, Mr. Johnson "ruled out" failed roof seams as a cause of the damage. (Def. Ex. B, Storm Damage Rep., p. 40). Notably, however, Mr. Johnson candidly admits he did not review Vertex's Roof Condition Assessment Supplement and corresponding photographs, dated March 21, 2022 (hereinafter "Vertex Supplement"). (Def. Ex. A, Johnson Dep. 25:23-26:1). The Vertex Supplement includes a photograph clearly depicting a failed roof seam with visible water buddling from the roof seam. (Def. Ex. C, Gaetz Dep. 38:1-3; Def. Ex. D, Vertex Suppl.).

Moreover, Mr. Johnson took 163 photographs of the roof during his inspection. (Def. Ex. A, Johnson Dep. 26:9-14). Yet, he only includes **one** of his photographs in the Storm Damage Report. (Def. Ex. A, Johnson Dep. 73:19-25). The Storm Damage Report, and Mr. Johnson's unfounded opinions contained therein, are based entirely on photographs taken by other entities and/or individuals including ARS, the contractor initially hired by Plaintiff, and the Vertex engineer hired by Charter Oak. *See Barker v. AmGuard Ins. Co.,* 2022 WL 19661314, at *2 (W.D. Mo. Nov. 1, 2022) (reasoning that plaintiff's expert's opinions were not based on sufficient facts or data due to his reliance on photographs of the property and observations made by and communicated to him by plaintiffs and other experts). Therefore, Mr. Johnson's reliance on the photographs and observations of ARS and Vertex cannot be "sufficient facts or data."

Most significantly, Mr. Johnson did not inspect the interior of the building. (Def. Ex. A, Johnson Dep. 24:2-16, 64:4-7, 76:2-7). He did not photograph the interior of the building. (Def. Ex. A, Johnson Dep. 24: 2-7). He only entered the building via the entryway of the building for a moment. (Def. Ex. A, Johnson Dep. 24:11-16). He did not inspect the underside of the metal roof decking. (Def. Ex. A, Johnson Dep. 76:2-7). He also admittedly cannot state whether there were leaking or moisture intrusion issues at the property *before* the Event. (Def. Ex. A, Johnson Dep.

64:24-65:2). Yet, Mr. Johnson concludes "interior components are included in the [ARS] estimate" and, therefore, "it appears the interior was damaged by the storm." (Def. Ex. A, Johnson Dep. 75:14-23).

In short, Mr. Johnson's opinions with respect to the interior of the property are based on **zero** facts or data, let alone sufficient facts or data. Mr. Johnson's opinions as to the cause of the alleged interior damage require no scientific, technical, or other specialized training. His opinion is simply speculation and conjecture, *i.e.*, he read the ARS estimate and assumed the inclusion of "interior components" demonstrates there were interior damages caused by the Event.

Mr. Johnson's report and opinions are, by his own admissions, not based on reliable facts or data – most notably his opinions are not based on personal observations and evidence of facts or data supporting his opinions that the claimed damage was caused by or resulted from the Event. Mr. Johnson's opinions do not meet Rule 702's "sufficient facts or data" requirement and, as such, must be excluded.

**ii. Mr. Johnson's opinions are not the product of reliable principles or methods applied reliably to the facts of the case.**

Mr. Johnson did not reliably apply any principles and methods to the facts of the case, as required by Rule 702. Mr. Johnson testified several times that he did not observe **any** hail punctures or fractures on the roof. (Def. Ex. A, Johnson Dep. 51:7-15, 62:10-18, 63:12-16). He did not observe any roof punctures consistent with two-inch diameter ice spheres or hail. (Def. Ex. A, Johnson Dep. 51:7-15). Mr. Johnson speculates hail *may* have damaged the roof membrane via "anvil strikes." (Def. Ex. A, Johnson Dep. 52:12-17). Notably, however, he did not see or find any evidence of "anvil strikes" on the roof of the property at issue. (Def. Ex. A, Johnson Dep. 52:12-17). He also did not observe or photograph any storm-created openings on the roof of the property. (Def. Ex. A, Johnson Dep. 62:10-18, 63:12-16, 65:16-19, 71:24-72:1). Notably, Mr.

Johnson relied on "marketing materials" from a manufacturer in concluding fiberboard is more susceptible to hail impact damage. (Def. Ex. A, Johnson Dep. 51:16-52:11). Yet, he is not aware of any literature supporting such an opinion or conclusion. (*Id.*). *See e.g.*, *Marmani v. Sanchez Berzain* 2018 WL 1090546, at *4 (S.D. Fla. Feb. 28, 2018) (excluding one expert's testimony because he failed to verify his reliance on another expert's opinions in any meaningful way); *In re TMI Litig*., 193 F.3d 613, 716 (3d Cir. 1999) (holding that an expert witness' "failure to assess the validity of the opinions of the experts he relied upon together with his unblinking reliance on those experts' opinions, demonstrates that the methodology he used to formulate his opinion was flawed under *Daubert* as it was not calculated to produce reliable results.")

Here, Mr. Johnson's opinions are not even based on another expert's opinion, but the "marketing materials" from a manufacturer. (Def. Ex. A, Johnson Dep. 51:16-52:8). Mr. Johnson also did not perform any independent testing to verify or otherwise confirm the applicability of the "marketing materials" and information he claims to have relied on in forming his opinions. (Def. Ex. A, Johnson Dep. 51:16-52:11). Therefore, Mr. Johnson's methodology in forming his opinions is blatantly flawed.

Furthermore, Mr. Johnson testified to the following regarding alleged interior water damage and long-term moisture intrusion issues at the property:

***

Q Do you have any photographs of any storm-related openings in the roof?
A No.

***

Q …but it's your opinion that the photos taken by ARS and Vertex are not Indicative of long-term moisture issues. Is that right?
A Correct.

***

Q Okay. You said that the rings that appear in the moisture staining can really only need two rain events. Is that right?
A If you've got two concentric rings, all you really need are two separate rain events.

Q And you can't tell me one way or the other whether any of those rings in those photographs predated the July 2021 storm?
A I can't say that. Their inclusion inside the estimate from Access Restoration that I would – it would be my understanding that those are representing damage from or after the storm.
Q But you cannot say for certain that that is the case?
A Correct.

***

Q Okay. You have on page 37, second to last sentence where it says, "I would not rule out presence of moisture in the fiberboard as a result of storm-created openings," right?
A Right.
Q And, again, did you observe any storm-created openings where moisture could have saturated the fiberboard?
A I did not.

***

(Def. Ex. A, Johnson Dep. 71:24-72:1, 72:3-7, 73:3-17, 74:3-11).

Mr. Johnson's opinions in this regard are not the result of reliable principles and methods applied reliably to the facts of the case. He did not conduct independent testing to confirm or rule out any of his alleged "theories" regarding potential causes of the interior damage. (Def. Ex. A, Johnson Dep. 39:21-24, 52:9-11, 53:22-24, 67:2-5, 70:12-13, 76:2-9). He also did not conduct moisture testing from the interior ***or*** the exterior of the building. (*Id.*). Indeed, Mr. Johnson ***assumes*** numerous property conditions in forming his opinions and conclusions, based on his two-hour site inspection, as well as his review of photographs taken by others.

Accordingly, any theories Mr. Johnson offers regarding the interior damage to the building must be considered conclusory and unreliable because he fails to provide any **reliable** basis for the conclusions. *See Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.,* 829 F. Supp. 2d 802, 826 (D. Minn. 2011) (holding that an otherwise qualified expert cannot simply offer conclusory opinions without providing a basis for the conclusions) (cited approvingly in *Jaycox v. Terex Corp.,* 2021 WL 2438875, at *4 (E.D. Mo. June 15, 2021)).

In the instant case, Mr. Johnson's ultimate conclusions and opinions are: (1) the damage to the soft metals and components of the roof sustained hail damage; (2) it is "more likely than not" that the "observed damage" resulted from the Event; and (3) the ARS estimate includes interior damage and, therefore, the alleged interior damage, which Mr. Johnson did not personally observe, was caused by the Event. Mr. Johnson reaches these ultimate conclusions despite his own admissions that he did not observe any storm created opening on the roof during his inspection. The conclusions are also based on his failure to locate and observe any two-inch diameter hail impacts (or other fracture or puncture) consistent with the alleged hail size he claims to have relied upon in forming his opinions and conclusions. (Def. Ex. A, Johnson Dep. 51:10-15).

Obviously, Mr. Johnson's opinions are not the product of reliable principles and methods, nor applied reliably to the facts of the case. Rather, his opinions constitute a plethora of possibilities and theories, improperly couched as opinions. Importantly, Mr. Johnson testified he ruled out failed seams or flashings as a cause of the damage. (Def. Ex. A, Johnson Dep. 82:20-22). Yet, Mr. Johnson did not review and consider a significant piece of information regarding the condition of the property—the Vertex Supplement—which identifies at least two roof penetrations caused by failed seams and/or flashings. (Def. Ex. A, Johnson Dep. 25:23-26:1; Def. Ex. D, Vertex Suppl.). His failure to consider and rely on pertinent information demonstrates Mr. Johnson did not apply reliable principles and methods to the facts of the case. This is further borne out by Mr. Johnson's admissions that he did not observe, and his tactile examination did not reveal, any punctures, splits, or tears in the roof membrane indicative of hail and/or storm damage. (Def. Ex. A, Johnson Dep. 51:7-15, 62:10-18, 63:12-16, 65:16-19, 71:24-72:1). He also cannot state one way or another whether there were any leaking or moisture intrusion issues at the property ***before*** the Event. (Def. Ex. A, Johnson Dep. 64:24-65:2).

In short, Mr. Johnson's identification of the potential possible and theoretical explanations for the cause of the claimed damage live in the realm of speculation and conjecture because he does not provide **any** personal observations, evidence, facts, or data which give an iota of support to any of his purported possibilities or theories. *See Knepfle v. J-Tech Corp.,* 48 F.4th 1282, 1296 (11th Cir. 2022) (finding that plaintiff's entire claim distills to the contentions that the expert is an expert, he looked at the available evidence, and deduced what happened).

In the instant case, Mr. Johnson's factual conclusions regarding the alleged damage are primarily based on his "qualifications" as an expert, his review of photographs taken by ARS and Vertex, and his contention that he deduced what happened. However, the facts and data collected by ARS, Vertex, and Charter Oak clearly demonstrate Mr. Johnson's belief there were no failed seams or flashings is blatantly inaccurate.

**iii. Mr. Johnson's testimony and Storm Damage Report will not be helpful to a jury and therefore must be excluded.**

Mr. Johnson's testimony and Storm Damage Report will not be helpful to a jury. An expert's opinion should be excluded if it is so "fundamentally unsupported that it can offer no assistance to the jury." *Cole v. Homier Distrib. Co.*, 599 F.3d 856, 865 (8th Cir. 2010) (quoted citations omitted). An expert must "substantiate his opinion; providing only an ultimate conclusion with no analysis is meaningless." *Clark v. Takata Corp*., 192 F.3d 750, 757 (7th Cir. 1999) (quoting *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997)). Simply put, an expert does not assist the trier of fact in determining whether a product failed if he starts his analysis based upon the assumption that the product failed (the very question that he was called upon to resolve). *Takata*, 192. F.3d at 757.

Mr. Johnson's report, opinions, and testimony, as well as the basis therefore, are conclusory and amount to nothing more than speculation and conjecture. Mr. Johnson titles his report "Storm

Damage Report." By doing so, he begins his analysis with the basic assumption that the damage to the building was caused by a storm, *i.e.*, the very question he was called upon to resolve. Furthermore, Mr. Johnson has done little, if anything, to substantiate his opinion that the damage to the building was caused by Event. In fact, he cannot identify a single storm created opening that he personally observed, or that he identified via photograph, test, or other observation by any party who personally inspected the building. (Def. Ex. A, Johnson Dep. 51:7-15, 62:10-18, 63:12-16, 65:16-19, 71:24-72:1).

By providing little to no independent analysis and investigation, Mr. Johnson's ultimate conclusion, that the damage was caused by the Event, is meaningless and would not be helpful to the trier of fact. Accordingly, Mr. Johnson's opinion should be excluded because it is so fundamentally unsupported that it can offer no assistance to the jury.

## IV. CONCLUSION

WHEREFORE Defendant, The Charter Oak Fire Insurance Company respectfully requests this Honorable Court grant Defendant's *Daubert* Motion to Exclude Expert Reports, Testimony, and Opinions of Brian Johnson, P.E., exclude Mr. Johnson's report, opinions, and conclusions from any further proceedings in this case, and further award this Defendant any such other and further relief this Honorable Court deems just and proper under the circumstances.

**WATTERS, WOLF, BUB & HANSMANN, LLC**

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 9th day of October, 2023, the foregoing was filed electronically with the Clerk of Court using the Court's CM/ECF System, which sent notice of electronic filing to all counsel of record.

*/s/ Alexa L. Lester*