

**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. 1:06-cv-433-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

**RELATORS' CONSOLIDATED PRE-HEARING  
RESPONSE TO ALL DISPOSITIVE MOTIONS**

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**RELATORS' CONSOLIDATED PRE-HEARING RESPONSE**  
**TO ALL DISPOSITIVE MOTIONS**

Cori and Kerri Rigsby (“Relators” or “Rigsbys”), through undersigned counsel, respectfully submit this Consolidated Pre-Hearing Response to All Dispositive Motions (docket entries [91], [96], [98], [106], [108], [115], [156], [160], [161], [179], and [181]) filed by State Farm Mutual Insurance Company (“State Farm”), Forensic Analysis Engineering Company (“Forensic”), Haag Engineering Company (“Haag”), and E.A. Renfroe, Inc. (“Renfroe”) (collectively, “Defendants”). Most of the issues raised by Defendants’ dispositive motions already have been briefed by Relators in docket entries [223], [224], [230], [231], and [235], which are incorporated herein by reference.

Over the past several months, Relators have agreed to dismiss voluntarily a number of claims and defendants in order to streamline this action. Most recently, Relators reached an agreement in principle to resolve all disputes with Renfroe. Upon execution of that agreement, Relators will seek consent to dismiss their claims against Renfroe and against the individual defendants Gene and Jana Renfroe. Thus, Relators oppose dismissal only of the following claims:

<u>State Farm</u>	Count I: Submitting false claims Count II: Making or using false records in support of false claims Count III: Conspiracy to submit false claims Count V: Retaliatory discharge
<u>Forensic</u>	Count III: Conspiracy to submit false claims
<u>Haag</u>	Count III: Conspiracy to submit false claims

Accordingly, Relators do not oppose the motions to dismiss Count IV against State Farm, Counts I, II, and IV against Haag and Forensic, and Counts I-V against Renfroe and Gene and Jana Renfroe.

## **I. PRELIMINARY STATEMENT**

In its February 12, 2009 Order, docket entry [261] (the “February 12 Order”), this Court converted all pending dispositive motions to summary judgment motions and scheduled an evidentiary hearing (the “May 20 Hearing”). The Court has focused the dispositive motions on one issue: whether the flood insurance payments related to the McIntosh property were justified as a matter of law. In order to prevail, the Defendants must establish “that there is no genuine issue of material fact and that the McIntosh flood insurance payments were justified, as a matter of law.” The Relators will demonstrate at the May 20 Hearing that the Defendants cannot meet their burden.

Testimony from the Relators and from expert witnesses will demonstrate that the flood payments were not justified, or at a minimum, that there is a material dispute of fact as to whether the payments were justified. The Relators will demonstrate through their own testimony that they possess material first-hand knowledge of State Farm’s fraudulent scheme to overcharge the federal government. They also will testify that they witnessed State Farm’s application of that fraudulent scheme to the McIntosh claim. Pursuant to the February 12 Order, Relators must identify experts and provide disclosures 30 days before the May 20 Hearing. Relators expect that the testimony of such experts will demonstrate that substantial wind damage preceded any flooding of the McIntosh home and that the flood damage submitted by State Farm to the government was overstated and not justified.

Accordingly, the Relators respectfully submit that after considering all motions and responses filed by all of the parties, and all testimony provided at the May 20 Hearing,<sup>1</sup> the Court

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<sup>1</sup> Relators also will submit a post-hearing brief if it pleases the Court.

should deny the pending dispositive motions and set a schedule for the parties to conduct discovery in this case.

## **II. STATEMENT OF FACTS**

### **A. Hurricane Katrina Hits the Gulf Coast**

On August 29, 2005, Hurricane Katrina struck the Gulf Coast. Expert testimony will demonstrate that the storm consisted of two distinct eyewalls. The first contained winds coming from the East and the second contained winds coming from the South. As a result of the two eyewalls, the McIntosh home was subjected to hurricane winds in excess of one hundred miles per hour for several hours before the rising waters reached the McIntosh home. These winds severely compromised the structural integrity of the house. They caused large holes in the roof, destroyed several windows, and inundated the house with rain water. The home was also damaged by wind-driven debris, some of which was created as portions of the McIntoshes' neighbors' homes were torn apart by wind.

After several hours of sustained winds, the McIntosh home was flooded. The McIntosh home is adjacent to the Biloxi River, the Tchoutacabouffa River and the Big Lake, but it is several miles inland from the Gulf of Mexico. Due to the home's location and the elevations between it and the Gulf Coast, the home was not subjected to the devastating storm surge that developed along the coast. Instead, it was slowly flooded by rising water that arrived as the bay and rivers began to flood. Unlike the storm surge along the coast, this rising water could not have caused the structural damage that the McIntosh home sustained.

Accordingly, the expert testimony will demonstrate that most of the damage to the home and its contents already was done by wind and driving rain before the flood water reached the

home. Specifically, the testimony will show that flooding did not cause \$350,000 of damage to the McIntosh home and its contents.

**B. State Farm Has a Motive to Overbill the Government for Flood Claims**

The United States Government, acting through the Federal Emergency Management Agency (“FEMA”), is the only entity in the United States that underwrites flood insurance. Am. Compl. (docket entry [16]) ¶ 46. While the government acts as the funding source, the coverage is sold through private insurance companies called “WYO” or Write Your Own companies. *Id.* ¶ 47. In addition to selling the flood policy, the WYO also acts as the claims adjuster for the government with respect to claims under the policies. *Id.* ¶ 49.<sup>2</sup> Thus, when a private insurance company submits a claim for payment under a flood policy, the claim is submitted to an officer or agent of the United States Government, and any reimbursement is a direct charge on the United States Treasury. *Id.*

State Farm serves as a WYO for thousands of flood policies in Mississippi and other states along the Gulf Coast and often sells both flood policies and homeowners’ policies to the same policyholders. *Id.* ¶ 54. Because State Farm adjusted claims under both the flood policies and the homeowners’ policies with respect to many properties, State Farm had an incentive to characterize damage to those properties as flood damage (covered by the flood policy) rather than wind damage (covered by the homeowners’ policy), because the former would be reimbursed by the United States while the later would be State Farm’s sole responsibility. *Id.* ¶ 51.

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<sup>2</sup> The applicable regulation provides that “A WYO Company issuing flood insurance coverage shall arrange for the adjustment, settlement, payment and defense of all claims arising from policies of flood insurance it issues under the [National Flood Insurance Program], based on the terms and conditions of the Standard Flood Insurance Policy.” Am. Compl. ¶ 48.

**C. State Farm and Haag Engineering Fabricate a Flood Model**

Shortly after Hurricane Katrina, State Farm commissioned Haag Engineering Co. to craft an engineering report (the “Haag Report”). *See* Relators’ Evidentiary Disclosure Pursuant to 31 U.S.C. § 3730 (the “Evidentiary Disclosure,” attached as Exhibit 14 to State Farm’s Motion to Disqualify Relators’ Counsel, docket entry [103]) at 1, 21; *see also McIntosh* Depo. of K. Rigsby, May 1, 2007, at 240:3-241:7.<sup>3</sup> The Haag Report concluded that as a general matter, Katrina’s “storm surge” water preceded and accompanied the strongest hurricane winds. Evidentiary Disclosure at 21; Am. Compl. ¶ 43. State Farm gave the Haag Report to its adjusters and claims handlers and adopted it as the “bible” for handling Katrina claims. Am. Compl. ¶ 44; *McIntosh* Depo. of K. Rigsby, May 1, 2007, at 240:3-241:7.

The Rigsbys were experienced claims adjusters who had been promoted to supervisory positions with Renfroe. The Rigsbys, who are not engineers, did not initially attach particular significance to the commissioning of the Haag Report, and they had no reason to doubt State Farm’s version of events. *Id.*

In fact, however, the Haag Report was refuted by a century of science and engineering that had long ago determined that hurricane winds precede a storm surge by several hours. Am. Compl. ¶ 44; *Ruiz v. State Farm Fire & Cas. Co.*, No. 1:07cv89 LTS-RHW, 2007 WL 1514015, at \*4 (S.D. Miss. May 21, 2007) (noting that “Every expert who has rendered an

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<sup>3</sup> Pursuant to the Court’s Order dated August 7, 2008 (docket entry [205]), Relators are not attaching documents previously produced as exhibits in this matter or excerpts for the Relators’ deposition testimony quoted or cited in this Response.

opinion in the Hurricane Katrina cases [the Court has] heard has acknowledged that the storm's maximum winds preceded the storm surge flooding.”<sup>4</sup>

Nonetheless, armed with the conclusions of the Haag Report, in September 2005, Alexis “Lecky” King and Richard “Rick” Moore, State Farm’s catastrophe managers for the Mississippi region, ordered engineering reports on every property where a claim involved a “slab” (a loss where there was nothing left but foundation), a “popsicle stick” (a loss where only beams or pilings remained standing), or a “cabana” (a loss where a roof remained but the main interior of the building had been damaged due to wind, flood, or otherwise). Evidentiary Disclosure at 17, 20. The Rigsbys noticed that this blanket engineering report request differed from State Farm’s usual procedure for handling claims after hurricanes; in the past, State Farm had ordered engineering reports only if they were requested by the claims adjusters. *Renfroe* Depo. of K. Rigsby, Jan. 26, 2007, at 37:11-22.

**D. State Farm Directs Adjusters to Inflate Reported Flood Damage and Submits Fraudulent Claims to the NFIP**

The Rigsbys will testify that State Farm told its adjusters that if they calculated a flood insurance claim and did not reach the flood policy limits, they should recalculate that claim in order to “hit the limits” as part of a concerted effort to minimize State Farm’s costs by

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<sup>4</sup> This was not the first time that State Farm and Haag worked together to deny homeowners’ claims based on false engineering reports. In *Watkins v. State Farm, et al.*, Case No. CJ-2000-303 (Okla. Dist. Ct. Grady County) (attached to Relators Opposition to Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction (docket entry [256]) at Exhibit 1), State Farm was found to have engaged in a scheme to underpay or deny homeowner’s claims for tornado-related damage. State Farm relied on Haag engineering reports that undervalued home damage caused by tornadoes and attributed home damage to other sources like faulty construction. The jury’s verdict found that “State Farm, intentionally and with malice breached its duty to deal fairly and act in good faith with class members in its use of Haag Engineering Company.” *Id.* (May 25, 2006).

maximizing the amount of the flood insurance claim.<sup>5</sup> Evidentiary Disclosure at 26-27. Not only did a large flood payment appease policyholders whose wind damage claims were denied, but it also allowed State Farm to pass claims adjusting costs to the government.

If minimal losses were attributable to a flood insurance policy (for example, a \$40,000 payment under flood insurance), the payment from the government to State Farm for adjusting expenses would be small (\$750). *Id.* On the other hand, if flood coverage was maximized (\$250,000 for structure and \$100,000 for contents), then the fixed adjusting costs charged by the independent adjusting firms (\$7,000 per claim) would be passed along to the NFIP. *Id.* Thus, by inflating flood claims submitted to the government, State Farm made money not only by avoiding a charge against its reserves, but also by having all of its claims adjustment expenses paid for by the federal government. *Id.*

**E. State Farm Adjusts the McIntosh Claim**

On September 28, 2005, Cody Perry adjusted the McIntosh claim under the supervision of Kerri Rigsby. Cody Perry noted in the McIntoshes' activity log that the roof had been damaged by wind, that wind-driven rain entered the second floor around the windows and upstairs door, and that there was structural damage to the walls of the home. *See* Exhibit 1, Affidavit of Benjamin R. Davidson dated March 12, 2009 ("Davidson Aff."), and Tab A thereto. Cody Perry estimated that the home had sustained roughly \$40,000 in damage caused by wind. Consistent with State Farm's directives, Cody Perry requested an engineer to assess the home and attribute the rest of its damage to wind or water.

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<sup>5</sup> State Farm used a computer program called "XACT TOTAL" to calculate flood claims and help them hit the policy limits. *Id.* The program, which permitted the agent to enter the square footage and amenities to "rebuild" the home, was first developed for "slabs" but was later used for "cabanas" and other structures without total losses. One of the Relators witnessed an elevated house that had no damage to its roof, siding, or other structural elements. *Id.* The house was submitted as a total flood loss (to hit the limits) using the XACT TOTAL software. *Id.*

**F. Brian Ford Inspects the McIntosh Home**

On October 4, 2005, State Farm commissioned Forensic Engineering to inspect the McIntosh home. Brian Ford, a Forensic engineer inspected the home on October 7, 2005, and he wrote a report on October 12, 2005. Davidson Aff., Tab B. In his report, Ford observed that the roof and ceilings were damaged, the doors and windows were missing, and the lower right front corner of the house wall was missing. *Id.* Ford also quoted Mike Church, one of the McIntoshes' neighbors, as reporting that "houses were blown apart and debris was thrown into the McIntosh house at approximately 8 AM and the floodwater began rising at 11 AM." *Id.* His report concluded that the "interior damage of the structure is primarily the result of the failure of the windows, walls, and doors due to wind." *Id.*

The expert testimony at the May 20 Hearing will support the conclusions that Brian Ford initially reached.

**G. State Farm Orders Changes to Engineering Reports That Do Not Support Its Position On Flood Damage**

As the Rigsbys pointed out in their Evidentiary Disclosure, State Farm had ordered blanket engineering reports with the belief that the engineers would follow the Haag Report and conclude that most or all of the policyholders' homes had been damaged by flooding rather than wind. State Farm was willing to pay \$1,500 for an engineering report in those circumstances because a conclusion that a home was damaged by flood rather than wind could save the company hundreds of thousands of dollars on each homeowner's insurance claim. Evidentiary Disclosure at 24. The Rigsbys believed that having made that investment, however, State Farm was not willing to accept any engineer's independent finding of wind damage in areas that also had been flooded. *Id.* at 25. Instead, State Farm coerced the engineering companies to change the contents of their reports. *Id.* at 24-25.

The Rigsbys will testify that Lecky King routinely ordered reports changed when they attributed damage to wind rather than flooding. *Id.* at 25. At one point, the Rigsbys were in a meeting with King, who was reviewing engineering reports. *Id.* King tossed a report on to the table and announced that the engineer must have known, or been related to, one of the residents on the street because the report did not conclude that the cause of damage was flood. *Id.* Accordingly, she said that the report would need to be rewritten. *Id.*

The Rigsbys' first-hand observations are directly supported by a chain of emails between Forensic and State Farm that are available in the public record.<sup>6</sup> After meeting with Lecky King on October 17, 2005, Forensic President Robert Kochan instructed his engineers to no longer rely upon eye witness statements in developing opinions. Davidson Aff., Tab D. Earlier that day, Lecky King had criticized Brian Ford, a Forensic engineer for relying on an eye witness account to conclude that a home had been damaged by wind debris before the storm surge arrived. According to Ford, King said, "You weren't there and didn't see that. You have to base your opinions on what you see." Davidson Aff., Tab E.

In an October 17, 2005 email, Adam Sammis, a Forensic employee, recounted a conversation with Lecky King where King stated that Forensic's engineers "could not tell the difference between wind and water in our reports" and that State Farm was "not accepting our opinion and would now have to send another firm to get it right." Davidson Aff., Tab F.

On October 17, 2005, State Farm terminated its contract with Forensic and ordered it to cease writing engineering reports. Lecky King wrote Nellie Williams at Forensic an email

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<sup>6</sup> Attorney General Jim Hood's testimony before a United States House of Representatives Committee further confirms the Rigsbys' description of State Farm's fraud. He refers to the McIntosh case as "particularly egregious and outrageous." Davidson Aff., Tab C.

confirming an earlier conversation and directing Forensic to halt all inspections. Davidson Aff., Tab G. Brian Ford and Adam Sammis both reported having conversations with King earlier that day in which King explained that she would be pulling all engineering work from Forensic based on two engineering reports that attributed hurricane damage to wind rather than flooding. Davidson Aff., Tabs E, F.

After King terminated State Farm's arrangement with Forensic, Bob Kochan called King and persuaded her to give Forensic another opportunity. After the conversation, Kochan noted that Forensic has "an opportunity to earn their respect back by reworking the two contested reports." Davidson Aff., Tab D.

Randy Down, another Forensic employee, immediately recognized the ethical implications of State Farm's tactics. Davidson Aff., Tab H. In an October 18, 2005 e-mail he replied, "Lecky... seems to be a very highly qualified adjuster to be making engineering conclusions that are more accurate than ours. I really question the ethics of someone who wants to fire us simply because our conclusions don't match hers." *Id.*

Notwithstanding Down's comments, Robert Kochan and other forensic employees began reviewing engineering reports and systematically changing the reports' conclusions in order to please State Farm. Two days later, on October 19, 2005, Kochan reported to other Forensic employees, "I have reviewed and edited all three reports and found a large number of wordsmithing needed to be performed to clarify and keep FAEC out of further hot water." Davidson Aff., Tab I.

#### **H. Forensic Reinspects the McIntosh Home**

On October 18, 2005, Forensic engineer John Kelly reinspected the McIntosh home, and on October 20, 2005, Kelly wrote an engineering report. Davidson Aff. Tab J. His engineering

report did not mention the previous inspection or the prior engineering report, though it contradicted its conclusions.<sup>7</sup>

Kelly concluded that there was damage to the structure, the second story floor, and the first floor ceilings caused by wind and intruding rainwater, but that the damage to the first floor walls and floors was caused predominately by rising water from the storm surge and waves. *Id.* at 3. Kelly quoted Craig Robertson, the McIntoshes' yardman who mentioned that a portion of the McIntoshes' neighbors roof had become dislodged and transported to the McIntoshes' yard. *Id.* at 2. Kelly explained that as being consistent with the roof being carried by water. *Id.* Kelly also attributed the structural damage to the first floor walls as being caused by "waterborne debris" hitting the wall. *Id.* Kelly did not mention that Mike Church, the McIntoshes' neighbor, saw debris being blown into the McIntosh house well before the floodwater began rising.

The expert testimony will show that Kelly's conclusions as to the source of damage to the first floor are incorrect. The McIntosh home was subjected to hurricane winds in excess of one hundred miles per hour for several hours before any floodwater reached the house. These winds caused large holes in the roof, destroyed several windows, and caused debris to strike the house. The wind, wind-driven debris, and wind-driven rain damaged the first floor walls and floors to a point where those walls and floors would have had to be replaced regardless of any subsequent flooding. The expert testimony will also show that the floodwater that reached the McIntosh home rose slowly and did not damage the first floor walls with waterborne debris.

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<sup>7</sup> Indeed, the stark differences between the two engineering reports are enough to raise genuine issues of material fact.

## **I. The Rigsbys Discover the McIntosh Report**

The Rigsbys will testify that in October 2005, Kerri Rigsby received a copy of the first McIntosh engineering report dated October 12, 2005. *McIntosh* Depo. of C. Rigsby, May 1, 2007, at 131:8-131:15; *Renfroe* Depo. of K. Rigsby, Jan. 26, 2007, at 40:24-43:20. The report concluded that the home had been damaged by wind, but a sticky note on the report, written by Lecky King, directed “Put in Wind File – Do NOT Pay Bill Do NOT discuss.” Am. Compl. ¶ 69; Evidentiary Disclosure at 9-10. When Kerri accessed the McIntosh file to refile the report, she noticed the October 20, 2005 report that now concluded that the home had been damaged by flood waters. *McIntosh* Depo. of K. Rigsby, Nov. 20, 2007, at 513:24-514:7. Kerri made copies of both reports, then gave the originals to Lecky King. *Id.* at 518:22-519:22. Kerri told King that she guessed she was not supposed to see the October 12, 2005 report; King agreed. *Id.* at 520:4-8.

After her experience with the McIntosh report, Kerri spoke with her sister, Cori, about her concerns. *Renfroe* Depo. of K. Rigsby, Jan. 26, 2007, at 49:1. The Rigsbys began collecting emails and other documents that demonstrated the extent of State Farm’s fraud. *Id.* at 55:17-22. They were not aware of other allegations made in civil complaints or congressional testimony; their knowledge of State Farm’s fraud came entirely from their capacity as employees. Am. Compl. ¶ 27.

After discovering the McIntosh report and realizing its significance, the Rigsbys witnessed additional facts that confirmed their suspicions. For example, the Rigsbys will testify that in November, State Farm realized that its blanket order for engineering reports was producing inconsistent results, so State Farm directed adjusters not to request any other engineering reports on Slabs or Popsicle-Sticks. Evidentiary Disclosure at 23-24. Where

engineering reports already had been requested, State Farm sent a fax to the engineers that directed them to cancel the request, send along the investigation materials, and not write a report, though the engineers would be paid in full. *Id.*

Moreover, Lecky King continued to pull engineering reports that did not match her predetermined expectations of flood damage and directed that they be revised. Evidentiary Disclosure at 25. At one time, the pile of reports that required revision was at least one foot tall. *Id.* King and Rick Moore sent an email that told everyone that the original engineering reports were to be kept under lock and key, and that only she and Moore would have access to these reports. *Id.* Once the reports were re-written, the original reports were segregated. *Id.* The Rigsbys believe that many, if not all, of the original reports that were rewritten have since been destroyed by State Farm. *Id.* Engineering companies who did not produce reports with the “right” conclusion were either coerced into changing their reports or terminated. *Id.* at 24-25 and n.13.

On April 12, 2006, the Rigsbys observed the arrival of “Shred-It” document disposal trucks and saw documents disappear from the claims files. Evidentiary Disclosure at 15. The Rigsbys were told by at least one State Farm employee that claims data and/or engineering reports associated with State Farm’s fraudulent conduct were being shredded. Am. Compl. ¶ 78.

#### **J. The Rigsbys Reveal Defendants’ Fraud to the Government**

In April 2006, the Rigsbys submitted an evidentiary disclosure to the government and filed their initial complaint in this matter under seal.

After filing their complaint, the Rigsbys continued to work for Renfroe and State Farm. They learned more about the fraud and collected additional information from inside the company. Am. Compl. ¶ 30. Over the weekend of June 2-4, 2006, the Rigsbys worked steadily

to copy claims files and create a record of what remained. *Id.* ¶ 31. The Rigsbys provided the additional documents to the federal government. *Id.* ¶ 33.

On or about June 5, 2006, the Rigsbys informed State Farm that they had taken documents and given them to federal prosecutors on the advice of their attorneys. *Id.* ¶ 32. The next day, State Farm’s attorneys attempted to interrogate the Rigsbys, who refused to answer questions. *Id.* ¶ 33. The Rigsbys left that day for a scheduled vacation. *Id.* When they returned, State Farm retaliated against them by not allowing them to enter their offices, escorting them from the building under a security escort, and telling them that they would not be allowed back into the building. *Id.* After State Farm discharged the Rigsbys from employment, Renfroe claimed to “accept their resignations,” despite the fact that resignations had never been tendered. *Id.* ¶ 152.

The Relators filed their Amended Complaint on May 22, 2007, and the Court entered an Order formally unsealing the case on August 1, 2007 (docket entry [25]).

### **III. ARGUMENT**

As Relators described in their Amended Complaint, State Farm knowingly presented false claims and, with the aid of documents made by Haag and Forensic, conspired to defraud the Government on the McIntosh claim and other claims. Am. Compl. ¶¶ 108-145. When Relators attempted to bring that conspiracy to light, State Farm retaliated against them. *Id.* ¶¶ 146-154.

#### **A. Legal Standards**

##### **1. Standard for A Claim Under the False Claims Act**

A claimant is liable under the FCA if it:

1. knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval;

2. knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; or
3. conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.

31 U.S.C. 3729(a). In addition, an employee who is “discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section . . . shall be entitled to all relief necessary to make the employee whole.” 31 U.S.C. 3730(h).

## 2. The False Claims Act’s Jurisdictional Bar Standards

The FCA provides that “[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations . . . unless . . . the person bringing the action is an original source of the information.” 31 U.S.C. § 3730(e)(4)(A). This provision is commonly referred to as the “jurisdictional bar.” *See, e.g., United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg’l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004). Courts use a three-step inquiry to determine whether the jurisdictional bar precludes an FCA suit: “(1) whether there has been a public disclosure of allegations or transactions,<sup>8</sup> (2) whether the *qui tam* action is ‘based upon’ such publicly disclosed allegations, and (3) if so, whether the relator is the ‘original source’ of the information.” *Id.* (internal citation omitted). The jurisdictional bar applies only if all three steps are met.

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<sup>8</sup> After the parties submitted their initial briefs, and after this Court issued its February 12, 2009 order, the Fifth Circuit held that the Relators’ allegations in this suit precluded a later-filed False Claims Act case only against the defendants the Rigbys specifically named. *See U.S. ex rel Branch Consultants*, --- F.3d ---, No. 07-31191, 2009 WL 388947, at \*7 (5th Cir. February 18, 2009). Although the decision was based on the first-to-file bar, the Fifth Circuit addressed when allegations of fraud that do not specifically identify the defendants constitute public disclosure, and it approvingly cited *United States ex rel. Cooper v. Blue Cross and Blue Shield of Florida*, 19 F.3d 562, 566 (11th Cir. 1994). This decision supports the Relators’ position that there has not been a public disclosure of the allegations at issue in this case.

### **3. Standard for Summary Judgment**

A motion for summary judgment should be granted only “if, viewing the evidence and inferences drawn from that evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Reagan*, 384 F.3d at 173. As the Mississippi Supreme Court recently reiterated, a dispute regarding the nature of damage in a wind/flood claim is a question of fact that must be decided by the jury if there is any evidence in support. *See Fonte v. Audubon Ins. Co.*, -- So.2d --, No. 2008-CA-00222-SCT, 2009 WL 468584, at \*5 (Miss. Feb. 26, 2009) (where plaintiff presented evidence of insurer’s misconduct, “[w]hether an arguable or legitimate basis” existed for insurer’s decision on claim was a question of fact for the jury). And, “[a]t the summary judgment stage, a court may not weigh the evidence or evaluate the credibility of witnesses, and all justifiable inferences will be made in the non-moving party’s favor.” *Reagan*, 384 F.3d at 173.

#### **B. Defendants’ Fraud Related to the McIntosh Claim Precludes Summary Judgment**

As set forth in the Statement of Facts above, the McIntosh claim is the clearest example of Defendants’ violation of the False Claims Act: State Farm, using documents created by Haag and Forensic, improperly allocated wind damage to the federally provided flood policy. Defendants do not contend that Relators are not original sources as to the McIntosh claim or that the McIntosh claim was not pled with particularity, only that the McIntosh property actually was damaged almost entirely by flooding. As a result, Defendants’ argument as to counts I through III rests entirely on their factual allegation that the McIntosh home suffered more than \$250,000 in structural damage and \$100,000 in contents damage from flooding alone. Accordingly, summary judgment must be denied unless Defendants can show that there is no genuine issue of

material fact on either of those issues. *Reagan*, 384 F.3d at 173. Likewise, State Farm must show that there is no genuine issue of material fact regarding its retaliatory discharge of the Rigbys. *Id.* Defendants cannot meet those burdens.

Relators already have offered evidence that State Farm commissioned fraudulent engineering reports, suppressed honest engineering reports, and attempted to conceal its actions. Moreover, Relators will offer further evidence at the May 20 Hearing regarding the actual, wind-driven cause of much of the damage to the McIntosh home. Relators' first-hand knowledge of State Farm's fraudulent practices and expert testimony regarding the actual cause of the damage to the McIntosh home will require assessments of credibility and the weighing of inferences. As the Mississippi Supreme Court again noted, that task must be left to the jury as the ultimate finder of fact. *See Fonte*, -- So.2d --, No. 2008-CA-00222-SCT, 2009 WL 468584, at \*5.

**C. In the Alternative, Summary Judgment Should be Denied Under Rule 56(f)**

While the Court does not need to reach this issue, the Court should, in the alternative, deny the Defendants' summary judgment motions pending an opportunity for the Relators to take discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. Rule 56(f) requires the movant to demonstrate (1) why the movant needs additional discovery; and (2) how the additional discovery will create a genuine issue of material fact. *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 534 (5th Cir. 1999). Rule 56(f) motions are "generally favored, and should be liberally granted." *Id.* (internal citation omitted). When a party is "not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation [of discovery] is reversible error." *Brown v. Mississippi Valley State Univ.*, 311 F.3d 328, 332-34 (5th Cir. 2002) (reversing district court for granting summary judgment on a converted motion to dismiss before the conclusion of discovery) (quoting *Access*

*Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 720 (5th Cir. 1999)); *see also, e.g., Benchmark Elec., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 726 (5th Cir. 2003) (same); *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991) (same).

In its February 12 Order, this Court denied the Relators' previous requests for discovery. The Court explained that the Relators do not need discovery to demonstrate their first-hand knowledge of the Defendants' alleged systematic submission of false claims. The Court also stated, however, that it intended "to allow the parties to present evidence concerning the question whether the payment of the flood insurance limits in the McIntosh case was justified, as a matter of law." *Id.* at 3. The court noted that because the McIntosh home was not reduced to a shell, "there was physical evidence from which the extent of flood damage could be reasonably estimated." *Id.* at 3. Without discovery, the Relators have either limited or nonexistent access to some of the evidence from which the Court could determine whether the payment of flood insurance limits in the McIntosh case was justified.

For example, when State Farm adjusts claims under either its homeowner policies or under federal flood policies, it prepares a "damage estimate" that contains an itemized list of the covered damages. The Relators have obtained a copy of State Farm's damage estimate for building damage to the McIntoshes' home that was covered by the McIntoshes' State Farm policy. *McIntosh v. State Farm*, 1:06-cv-1080, Response in Opposition to Motion to Strike Plaintiff's Expert David J. Favre docket entry [897], Exhibit E. But the Relators have only been able to obtain the first page of State Farm's damage estimate for building damage to the McIntoshes' home that was covered by the McIntoshes' flood policy. *McIntosh v. State Farm*, Memorandum in Support of Motion for Summary Judgment, docket entry [821], Exhibit A. And although Relators know that State Farm claimed that the McIntoshes' contents loss covered

under their flood policy amounted to \$105,156,70, Relators do not have the damage estimate that supports that calculation. *Id.* Comparing these damage estimates will reveal exactly which portions of the damage to the McIntosh home State Farm attributed to wind and flood.<sup>9</sup> This information is clearly relevant to whether the flood payments on the McIntosh home were justified as a matter of law.

Similarly, Relators have excerpts of the activity logs for the McIntoshes' wind and flood files, but they do not have the entire logs. *Id.* at Exhibits D-E. The conflicting McIntosh reports both mention testimony from eye witnesses, but the Relators do not have any record of the witnesses' testimony.

Accordingly, and pursuant to the Rule 56(f) Affidavit attached hereto, the Court should allow the Relators to obtain all documents in State Farm's possession relating to its adjustment of the McIntoshes' claims following Hurricane Katrina. This includes but is not limited to: complete damage estimates, transaction logs, digital photographs of the McIntosh home, and correspondence relating to Forensic's engineering assessments of the McIntosh home. The Relators also request that they be allowed to depose individuals with direct knowledge of the damage to the McIntosh home and its claims adjustment. Specifically, the Court should allow the Relators to depose: Alexis King, Brian Ford, John Kelly, Mike Church, Craig Robertson, and Ron and Linda Muchk.

#### **IV. CONCLUSION**

State Farm has not yet been called to account for its systematic efforts to defraud both the federal government and its own policyholders. At the hearing before this Court on May 20,

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<sup>9</sup> State Farm may have attributed contents damage to the flood policy in the same portion of the house that it attributed structural damage to the wind policy, or State Farm may have attributed the same structural damage to both policies.

Relators expect to provide evidence demonstrating the scope of that fraud as it affected the McIntosh home.

THIS the 12th of March, 2009

Respectfully submitted,

/s/ C. Maison Heidelberg  
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**CERTIFICATE OF SERVICE**

I, C. Maison Heidelberg, attorney for Cori Rigsby and Kerri Rigsby, 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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