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' OPPOSITION
TO DEFENDANTS' MOTIONS TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION

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Relators Cori and Kerri Rigsby (the "Rigsbys" or "Relators") respectfully submit this Opposition to Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction (docket entries [91], [106], and [160]) filed by State Farm Mutual Insurance Company ("State Farm"), Haag Engineering Co. ("Haag") and Jade Engineering ("Jade") (collectively, "Defendants").[1]

I. PRELIMINARY STATEMENT

State Farm bases its Motion to Dismiss on the assertion that the Rigsbys are "parasitic" plaintiffs who provided no valuable information to the government, but rather based this *qui tam* action on publicly-disclosed facts. State Farm's assertion is meritless. The Rigsbys are quintessential whistleblowers who, as insiders with direct and independent knowledge, put the government on the trail of State Farm's fraud. Accordingly, the Court should deny State Farm's motion and turn its attention to the central issue in this case: State Farm's fraudulent conduct.

* * *

On August 29, 2005, Hurricane Katrina struck the Gulf Coast with devastating force, causing unprecedented loss of life, bodily injury and property damage. Homeowners' insurance policies issued by State Farm obligated State Farm to pay property damage claims caused by

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[1] The Court's August 7, 2008 Order directed Relators to file responses by September 1, 2008 to Defendants' motions to dismiss for lack of jurisdiction, docket entries [91], [106], and [160], and Defendant Exponent Engineering, Inc.'s motion to dismiss pursuant to F.R.Civ.P. 12(b)(6) and 9(b), docket entry [156]. Since the Court directed Relators to file responses to all other motions to dismiss pursuant to F.R.Civ.P. 12(b)(6) and 9(b) on September 15, 2008, Relators and Exponent filed a consent motion to extend the filing date for that response to September 15th. *See* docket entry [215].

The Motions filed by Haag and Jade do not add any substantive arguments to State Farm's Motion to Dismiss. Accordingly, references to State Farm or State Farm's Motion to Dismiss should be read to include the Motions filed by Haag and Jade, where appropriate.

wind, but allowed it to deny claims caused by flood damage. From the outset, State Farm knew that this would be a heavily disputed issue involving billions of dollars, so State Farm decided to build a strong paper record by doing something that was unprecedented: ordering an engineering report for every homeowner's claim.

Contrary to State Farm's plan, however, the engineers found that much of the damage at issue was caused by wind rather than flood. When these reports began to come back with the "wrong" conclusions, State Farm knew that it faced a multi-billion dollar problem. Even a company as large as State Farm would have been materially damaged if it paid all of the claims that it owed. So State Farm made a decision: it would deny wind and hurricane claims under the policies' exclusions for flood damage, and then submit those claims to the federally funded National Flood Insurance Program ("NFIP") to appease angry homeowners wherever possible. By doing so, State Farm would make the federal government pay for damages that State Farm should have paid.

The Rigsbys were at ground zero when State Farm made its decision to defraud the government. They were managers working for E.A. Renfroe & Company, Inc. ("Renfroe"), a claims adjusting subcontractor, in State Farm's Gulfport, Mississippi catastrophe office. They saw and heard State Farm decision-makers trying to influence the adjustors and the engineers to find flood damage instead of wind damage. The Rigsbys' loyalty to their employer and to State Farm caused them initially to believe that State Farm's conduct was acceptable; but then State Farm crossed the line. With a heavy hand, State Farm reprimanded engineers and actually changed and canceled many engineering reports. At that point, the Rigsbys, like State Farm, had to make a decision. One alternative was to sit back passively and assist State Farm in characterizing everything as flood damage. That certainly would have been the easier choice.

The Rigsbys were highly compensated claims managers with job security and many close friends at State Farm.

But the Rigsbys took a different path. They spoke up with full knowledge that their careers and lives would never be the same. They took a stand against the country's largest insurance carrier and then braced themselves for the inevitable retaliation that would follow. After they made their decision, the Rigsbys lost their high-paying jobs and any hopes of ever again working in the insurance industry. They were sued by their employer for millions of dollars that they do not have. They were called thieves and liars, and even the most intimate aspects of their lives have somehow become the subject of depositions and news articles.

While the Rigsbys have been casualties of their own decision, they have unquestionably accomplished what they set out to do by putting the government on the trail of State Farm's fraud. Indeed, they provided the government detailed information far beyond anything in the public domain or in the government's possession. While other State Farm employees and engineers had expressed the same concerns and admitted their discomfort in private emails and conversation, only the Rigsbys broke the silence and told the government that it was being defrauded.

Despite this record, State Farm argues in its Motion to Dismiss that this Court has no jurisdiction over this action because the Rigsbys are not true whistleblowers, but rather are parasitic outsiders using what was already in the public domain for their own profit.
State Farm's motion attacks each of the three separate bases for this Court's jurisdiction under the False Claims Act ("FCA"). State Farm argues that (1) the Rigsbys' allegations were publicly disclosed before April 26, 2006; (2) the Rigsbys' complaint was "based upon" those public disclosures; and (3) the Rigsbys are not an original source for any of the allegations of

fraud in their complaint. Defendants must demonstrate that *each* of those arguments is correct; if even one fails, this Court clearly has jurisdiction. As set forth below, *none* of those arguments are correct.

First, none of the public statements identified by State Farm was a "public disclosure" under the FCA, because none of them could have put the government "on the trail" of the fraud engaged in by State Farm. The disclosures did not (1) identify State Farm or any of the other Defendants, or (2) allege that anyone was defrauding the government. Rather, the vague statements alleged nothing more than industry-wide, non-specific, potential insurer misconduct.

Second, the Rigsbys' complaint was not "based upon" public disclosures because the Rigsbys' allegations were derived entirely from the Rigsbys' direct and independent knowledge of State Farm's fraud. The Rigsbys never even knew of the public statements, let alone based their complaint on those statements.

And finally, the Rigsbys are an original source of information because their allegations are based on the direct and independent knowledge that they obtained while working on the inside as claims adjustment managers. At the very least, their allegations cannot be denied on a motion to dismiss: State Farm's efforts to introduce evidence of disputed issues of fact must be resolved in favor of the Rigsbys as the non-movants under the well-established summary judgment standards provided by Rule 56. Indeed, State Farm's argument – that the Rigsbys have not yet demonstrated that State Farm actually committed fraud – goes to the very heart of the merits of the action. As such, the parties should have the opportunity to prove or disprove that argument at trial.

Accordingly, Defendants' motions to dismiss must be denied.

II. STATEMENT OF FACTS

The Rigsbys were insiders with eyewitness accounts of State Farm's scheme to defraud the government. They set the government on the trail of State Farm's fraud by disclosing direct and independent knowledge of critical information that they acquired while working as claims adjusting managers for Renfroe and State Farm. As set forth below, they provided this information to the government and used it as the basis for this *qui tam* action under the False Claims Act.

A. The Relators Initially Believe State Farm's Fabricated Flood Model

Before Hurricane Katrina hit, the Relators had no reason to suspect that State Farm would engage in fraudulent behavior. *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.[2] They were experienced claims adjusters who had been promoted to supervisory positions with Renfroe, and they had always been "proud" of their years-long association with State Farm. *Id*. Accordingly, the Rigsbys did not think anything was out of the ordinary when State Farm commissioned Haag Engineering Co. to craft an engineering report (the "Haag Report"). *Id* at 1, 21; *see also McIntosh* Depo. of K. Rigsby, May 1, 2007, at 240:3-241:7.

The Haag Report decisively concluded that as a general matter, Katrina's "storm surge" water preceded the hurricane-force winds. Evidentiary Disclosure at 21; Am. Compl. (docket entry [16]) ¶ 43. State Farm gave the Haag Report to its adjusters and claims

[2] 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.

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, who are not engineers, believed the company they had long served and accepted 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 six to seven hours. Am. Compl. ¶ 44.[3]

Relying on 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 only exception to the blanket engineering report request was that if a policyholder with flood insurance was willing to accept a payment under their flood policy as payment-in-full for his or her losses, State Farm would offer to pay that amount without a site inspection and without an engineering report. Evidentiary Disclosure at 21. 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.

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[3] 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 hereto 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).

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

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 would save the company hundreds of thousands of dollars on each homeowner's insurance claim. Evidentiary Disclosure at 24. 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.

In particular, 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*. She tossed one of the reports 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 heard King issue these orders, but for awhile they still accepted King's explanation that State Farm needed more "scientific data" to evaluate the claims. *McIntosh* Depo. of C. Rigsby, May 1, 2007, at 130:14-131:9.

C. State Farm Submits Fraudulent Claims to the NFIP

State Farm told its adjusters that if they calculated a flood insurance claim and did not reach the policy limits, they should recalculate that claim in order to "hit the limits."[4] Evidentiary Disclosure at 26. This was not simply a desire to be generous with someone else's money, nor was it a desire to "be fair" to the policy holder. *Id*. at 26-27. Instead, it was a concerted effort to minimize costs by maximizing the amount of the flood insurance claim. *Id.* 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 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) and the costs of engineering reports by companies like Defendants Haag and Jade ($1,500 to $3,000) 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*.

D. The Rigsbys Discover the McIntosh Report

The Rigsbys' growing awareness of State Farm's fraud crystallized in October 2005, when Kerri Rigsby received a copy of an engineering report dated October 12, 2005, for the

[4] 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.*

McIntosh property in Biloxi, Mississippi. *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 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 an October 20, 2005 report that later concluded that the home had been damaged by flood waters. *McIntosh* Depo. of K. Rigsby, Nov. 20, 2007, at 513:24-514:7. Kerri copied both reports, then gave them 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.

E. Subsequent Events Further Illuminate State Farm's Fraud

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. And after discovering the McIntosh report and realizing its importance, the Rigsbys saw additional evidence that confirmed their suspicions.

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. *Id*.

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*. Relators 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.

F. The Rigsbys Reveal Defendants' Fraud to the Government

Before filing their complaint, the Rigsbys began discussions with the United States Attorney's Office for the Southern District of Mississippi and the Mississippi Attorney General's Office. *McIntosh* Depo. of K. Rigsby, Nov. 20, 2007, 525:5-15. 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. Later that same month, the Rigsbys submitted a formal evidentiary disclosure and filed their initial complaint in this matter.

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. They 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]). Defendants filed their motions to dismiss for lack of subject matter jurisdiction on April 8, 2008, to which the Relators now respond.

III. ARGUMENT

A. Legal Standards

1. Standards for a Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction

A challenge to the Court's subject matter jurisdiction can be resolved "on any of three separate bases: (1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). If the district court resolves disputed facts, it "must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss." *Id*. at 414. And it may not dismiss the suit for lack of subject matter jurisdiction based on a resolution of disputed facts "unless the alleged claim is immaterial or is wholly insubstantial and frivolous." *Clark v. Tarrant County, Texas*, 798 F.2d 736, 742 (5th Cir. 1986).

When a "challenge under the FCA jurisdictional bar is necessarily intertwined with the merits, [it is] properly treated as a motion for summary judgment." *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 173 (5th Cir. 2004). A motion for summary judgment should be granted only "if, viewing the evidence and inferences drawn from the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. And, "at 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 nonmoving party's favor." *Id.*; *see also United States ex rel. Wright v. Cleo Wallace Ctrs.*, 132 F. Supp. 2d 913, 921-924

(D. Colo. 2000) (converting a 12(b)(1) motion against an FCA claim into a motion for summary judgment, then denying the motion because it raised genuine issues of material fact).

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., Reagan*, 384 F.3d at 174. 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, (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 tests are met.

As set forth below, State Farm's Motion to Dismiss satisfies none of the tests and the jurisdictional bar does not apply.

B. The Allegations of State Farm's Fraud Were Not Publicly Disclosed Prior to the Filing of This Action.

State Farm asserts that allegations of its fraud were publicly disclosed before April 26, 2006, when the Rigsbys filed their initial complaint in this matter. *See* Mot. to Dismiss at 3-5 (citing 31 U.S.C. § 3730(e)(4)(A)). State Farm, however, cites only two purported sources of public disclosures: (1) congressional testimony that raises the *possibility* of misconduct by insurance companies generally, and (2) a civil class action complaint in the *Cox*/*Comer* suit brought by victims of Hurricane Katrina that accused insurance companies, oil companies, chemical manufacturers, and investment banks of injuring the putative class by denying claims improperly; producing oil products and halocarbons that accelerated global

warming and made Hurricane Katrina more likely and more severe; and failing to purchase insurance for homes obtained with sub-prime mortgages.[5] Neither of these so-called disclosures limit this Court's jurisdiction under the FCA.

The FCA's jurisdictional bar serves a dual purpose: "(1) promoting private citizen involvement in exposing fraud against the government and (2) preventing parasitic suits by opportunistic late-comers who add nothing to the exposure of the fraud." *Reagan*, 384 F.3d at 174 (internal citations omitted).[6] Determining whether a public disclosure triggers the jurisdictional bar requires balancing these purposes. Accordingly, courts assessing whether a public disclosure triggers the jurisdictional bar must determine whether those disclosures are detailed enough to "set government investigators on the trail of fraud." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995) (quoting *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1514 (8th Cir. 1994); *see also, e.g., Reagan*, 384 F.3d at 174 (same).[7] Accordingly, a disclosure that "states neither the type of impropriety or how they could be

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[5] As State Farm admits, the Motion to Dismiss cited two complaints in one case; the initial complaint in what was then styled as *Cox v. Nationwide Mutual. Insurance Co.*, No. 1:05-cv-436-LG-RHW (S.D. Miss.) ("*Cox*"), and the amended complaint filed after the case had been restyled as *Comer v. Nationwide Mutual Insurance Co.*, No. 1:05-cv-436-LTS-JMR (S.D. Miss.) ("*Comer*"). Mot. to Dismiss at 7, n.5.

[6] State Farm, citing *Reagan*, argues that the purpose of the "public disclosure bar" is to prevent "parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud." Mot. to Dismiss at 5. But State Farm omitted the first of the two goals articulated by the Fifth Circuit.

[7] Senator Charles Grassley, the principal sponsor of the 1986 amendments to the False Claims Act explained:

> [T]he benchmark for determining whether one or more public disclosure(s) warrant invocation of the statutory bar must be whether such disclosures provide sufficient indication of fraud so that the Government and the general public reasonably can be expected to have been alerted to the need for the Government to investigate specific conduct or transactions. Barring *qui tam* suits based on any public disclosure that fails to meet this minimum standard of disclosure defeats rather than serves the overriding interest of the United States in effectively combating fraud.

Brief of Senator Charles E. Grassley as Amicus Curiae in *Rockwell Intern. Corp. v. United States*, No. 05-1272, 2006 WL 3381296 (attached at Ex. 2).

found, can hardly be said to put the government on notice of the . . . fraud alleged in this suit." *United States v. Solinger*, 457 F. Supp. 2d 743, 754 (W.D. Ky. 2006).

The congressional testimony and the *Cox/Comer* complaints reference wrongdoing by insurers generally, but neither of them qualify as public disclosures because they could not have put the government "on the trail" of State Farm's fraud. The purported disclosures neither alleged actual fraud on the government, nor specifically identified State Farm or any other Defendant in any meaningful way. Accordingly, they did not trigger the jurisdictional bar of section 3730(e)(4)(A).

1. Congressional Testimony Warning About Hypothetical Problems In the Insurance Industry Did Not Disclose State Farm's Fraud Before the Rigsbys Filed Their Complaint.

State Farm argues that testimony from Dr. J. Robert Hunter ("Dr. Hunter") at two congressional hearings in October 2005 and February 2006 constituted public disclosures of its fraud. Oct. 18, 2005 Written Test. of Dr. Hunter, 2005 WLNR 16872930, at 6-8 (attached as Ex. 4 to State Farm's Mot. to Dismiss); *see also* Feb. 2, 2006 Written Test. of Dr. Hunter, 2006 WLNR 1848600 (attached as Ex. 9 to State Farm's Mot. to Dismiss). Although Dr. Hunter spoke generally about the *possibility* of fraud by insurance companies and the conflict of interest insurance companies have when assessing claims under flood policies, he never alleged that any fraud actually was taking place. Dr. Hunter's testimony also never identified State Farm (or any of the other Defendants) by name. Accordingly, his statements did not constitute public disclosures.

First, Dr. Hunter correctly testified that insurance companies have a conflict of interest when they adjust flood policies and home owners policies. He observed that, "*to the extent that* insurers under pay wind when allocating damage between their homeowners' policy and the NFIP policy, taxpayers will suffer," and he recommended that the Government Accounting

Office audit insurers' allocations of damage to wind and flood "so that *any tendency* of the insurers to diminish the wind losses for their own benefit is stopped quickly." Oct. 18, 2005 Written Test. of Dr. Hunter, 2005 WLNR 16872930, at 6-8 (emphasis added); *see also* Feb. 2, 2006 Written Test. of Dr. Hunter, 2006 WLNR 1848600 (again noting possibility of conflict). But Dr. Hunter never alleged that any insurance company was actually defrauding the government.

Second, Dr. Hunter's general remarks refer only to the insurance industry as a whole. Since Dr. Hunter's remarks did not specifically name State Farm, they were not public disclosures of its fraud. *See, e.g.*, *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566 (11th Cir. 1994) (holding that disclosures which did not name the defendant were not "public disclosures"); *United States ex rel. Found. Aiding the Elderly v. Horizon West, Inc.*, 265 F.3d 1011, 1016 n.5 (9th Cir. 2001) (same).

Notwithstanding the clear holding of cases like *Cooper* and *Foundation Aiding the Elderly*, State Farm contends that it is "of no legal significance" that the testimony did not specifically name State Farm. Mot. to Dismiss at 7, n.6. State Farm cites apparently contradictory holdings from other courts, including *Fine*. But the Tenth Circuit in *Fine* reached its conclusion only *after* it found that "the facts in *Cooper* are easily distinguishable [from the facts in *Fine*] . . . . When attempting to identify individual actors, **little similarity exists between combing through the private insurance industry in search of fraud [in *Cooper*] and examining the operating procedures of nine, easily identifiable, DOE-controlled, and government-owned labs [in *Fine*].**" 70 F.3d at 571-72 (citing *Cooper*, 19 F.3d at 566) (emphasis added). Thus, in finding that allegations of fraud had been publicly disclosed, the

court in *Fine* specifically distinguished the factual circumstance presented by Dr. Hunter's testimony – the need to comb through the entire insurance industry in search of fraud. *Id.*

2. Tangential Statements in the *Cox/Comer* Complaints Did Not Disclose State Farm's Fraud.

Although State Farm argues that allegations made in civil complaints constituted public disclosures of its fraud, it cited only one case to support its position: the *Cox*/*Comer* matter that once was pending in this Court. *See* Mot. to Dismiss at 6-7. But that case does not constitute a public disclosure because (1) like Dr. Hunter's testimony, the allegations in the *Cox*/*Comer* case are generic and industry-wide; and (2) the complaints in *Cox/Comer* do not contain allegations, or even the basic elements, of fraud on the federal government. Accordingly, the complaints from that litigation do not constitute public disclosures and do not bar this action.

The *Cox/Comer* lawsuit was a purported class action brought on behalf of homeowners whose homes had been damaged by Hurricane Katrina. *Cox* Compl. ¶ 4 (attached as Ex. 2 to State Farm's Mot. to Dismiss). The action was brought against:

- Seven named insurance companies and 100 other unknown insurance entities for failing to "adequately and properly adjust Plaintiffs' claims." *Comer* Am. Compl. ¶ 9.
- Six named Oil and Refining entities and 100 other unknown companies for (1) contributing to global warming by producing halocarbons when they fail to flare or inject methane from oil and gas wells (*Id.* ¶¶ 36, 39); (2) failing to "utilize state of the art technology" to reduce their production of harmful greenhouse gases (*id.* ¶ 42); and (3) raising the price of gasoline beyond market-driven levels in order to record higher profits (*id.* ¶ 43).
- Three chemical manufacturers and a chemical trade association who "contributed to Global Warming as a result of their chemical manufacturing activities." *Id.* ¶¶ 47, 50.
- Six named mortgage lending entities and 100 other unknown mortgage lenders for failing to use mortgage payments to purchase insurance on mortgaged property that was damaged by Hurricane Katrina. *Id.* ¶¶ 51, 54, 56.

Amid the hundreds of paragraphs on these incredibly diverse topics, State Farm identifies only the following from the *Cox* complaint as a public disclosure: "[i]n an effort to save money and pass on the costs of the loss to the federal flood insurance program, adjusters working on behalf of the Insurance Defendant Class have denied claims under the insurance policies at issue." *Cox* Compl. ¶ 12.

First, this allegation is directed at more than a hundred foreign and domestic insurance companies doing business in Mississippi. *See Cox* Compl. ¶ 1; *Comer* Am. Compl. ¶ 1. The complaint offers no reason to believe that the wrongful denial of claims, or any concomitant submission of fraudulent claims, was limited to named plaintiffs or any particular subgroup of the Insurance Defendant Class. As *Cooper* and *Fine* both noted, generic allegations that would require "combing through the private insurance industry in search of fraud" simply are not public disclosures. *Fine*, 70 F.3d at 572; *Cooper*, 19 F.3d at 566.

Second, and even more importantly, there is no allegation that the federal government was defrauded or that insurers submitted fraudulent flood claims. Rather, the plaintiffs in that action merely allege that the "Insurance Defendant Class" – which included many insurers who did not participate in the Write Your Own ("WYO") program – improperly denied claims. And as a result, policyholders who had flood insurance (and as State Farm repeatedly has noted, many did not) would have had to submit claims for those damages through the NFIP. Yet the *Cox* Complaint never says that the *insurers themselves* submitted false claims to the NFIP. And by including named defendants such as Mississippi Farm Bureau Insurance and Zurich American Insurance Company who do not participate in the WYO program, the complaint actually suggests that the insurance companies were *not* submitting false claims to the NFIP. *See* http://www.fema.gov/ nfipInsurance/companies.jsp (last visited August 29, 2008). By

definition, companies who did not participate in the WYO program could not have submitted false claims to the NFIP. The amended *Comer* complaint makes effectively identical allegations, and thus does not constitute a public disclosure either.[8]

Thus, to the extent they alleged any scheme at all by any carrier (which they did not), the *Cox/Comer* complaints certainly failed to provide the government with any of the specific allegations and/or transactions of fraud that could meaningfully provide the government with an opportunity to investigate the claims at issue in this case. Accordingly, those complaints are not public disclosures under the FCA. *See Found. Aiding the Elderly*, 265 F.3d at 1015 (prior lawsuit did not constitute a public disclosure of fraud against the government because "the plaintiffs only alleged that the defendants generally misrepresented to them the level of care provided by the particular nursing facility. . . . What are conspicuously missing from that complaint are any allegations that the named defendants misrepresented the level of care to the government and received payment for the alleged substandard care.")

In contrast to the scant, generic allegations in *Cox/Comer*, the Rigsbys provided the government with enough information to decide whether to investigate the claims at issue. For example, the Rigsbys provided first-hand information regarding how State Farm (1) caused Haag to write a report that was contrary to science and all normative models of hurricanes in order to lend credibility to adjusters who were assigning wind claims to water damage; (2) instructed

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[8] The *Comer* amended complaint alleged that

> Insurance Defendant Class have [sic] denied numerous claims by improperly relying on inapplicable exclusionary provisions in Plaintiff Class' policies. Insurance Defendant Class' actions are a transparent and bad faith attempt to avoid their contractual duties, shift repayment obligations to the Federal Flood Insurance Program, and maximize profits at policyholders' and taxpayers' expense. Thus, the Insurance Defendant Class violated their obligations of good faith and fair dealing with the Plaintiff Class.

Comer Am. Compl. ¶ 12. Thus, it likewise alleged only that the insurers improperly denied claims, which led to additional costs to the federal government and taxpayers.

adjusters to overstate the amount of damage when using the XACT Total program in order to "hit the limits" of the flood policies; (3) canceled engineering reports that would not reflect flood damage as the cause of loss; and (4) terminated engineering companies who refused to change their reports to reflect flood damage as the cause of loss. *See* Section II *supra*. The Rigsbys not only revealed the scheme, they also identified the players and provided the who, what, when and where of the fraud. Indeed, the Rigsbys provided the government with everything it needed, none of which it had before, to decide whether to investigate the claim.[9]

Accordingly, there were no public disclosures prior to this action.

C. <u>This Action Is Not Based Upon Publicly Disclosed Allegations.</u>

Section 3730(e)(4)(A) 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 information." Accordingly, even if the scant materials relied upon by State Farm constitute "public disclosures" under the FCA (which they do not), the Court still would have jurisdiction over this action because this action clearly was not "based upon the public disclosure of allegations[.]" *Id.*

The Fifth Circuit has not yet expressly defined the scope of the phrase "based upon." Some circuits have held that "based upon" actually means "substantially similar to." *See, e.g., United States ex rel. Findley v. FPC-Boron Emp. Club*, 105 F.3d 675, 685 (D.C. Cir. 1997). State Farm applies that standard and argues that this case is "based upon" publicly disclosed allegations because the suit is "substantially similar" to the allegations discussed in Section III.B, above. Mot. to Dismiss at 9-10. More compelling decisions from other circuits, however, apply

[9] As the United States District Court for the Eastern District of Louisiana found, "the [Rigsbys'] facts are legally sufficient to notice the government of the alleged fraud." *Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 06-cv-04091, at 3 (E.D. La. October 17, 2007).

the plain meaning of "based upon," which is "derived from" public disclosures (*i.e.*, where the relators knew about the public disclosures and used them as the basis for their *qui tam* claims.) *See, e.g., United States ex rel. Siller v. Beckton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994); *United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999). That reading is consistent with the unambiguous language of the FCA and best serves the underlying purpose of the statute. *See id*. But under either reading, the Rigsbys' action is not "based upon" any public disclosures.

1. This Action Was Not Derived From Any Publicly Disclosed Allegations.

It is undisputed that the Rigsbys' allegations of State Farm's fraud were not derived from any public disclosures because at the time they brought this action, the Rigsbys were unaware of any such disclosures. State Farm does not contest this point. Accordingly, pursuant to the plain meaning of the FCA, the Court should find that this action was not based upon public disclosures.

The plain meaning of the statutory language demonstrates that "based upon" must mean "derived from." In *Siller*, the Fourth Circuit explained:

> Section 3730(e)(4)(A)'s use of the phrase 'based upon' is, we believe, susceptible of a straightforward textual exegesis. To 'base upon' means to 'use as a basis for.' *Webster's Third New International Dictionary* 180 (1986) (definition no. 2 of verb 'base'). Rather plainly, therefore, a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based.

Siller, 21 F.3d at 1348; *see also, e.g., Bank of Farmington*, 166 F.3d at 863; *United States ex rel. Fowler v. Caremark RX*, 496 F.3d 730, 738 (7th Cir. 2007). The Seventh Circuit likewise explained in *Fowler* that "[i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into

the statute's meaning, in all but the most extraordinary circumstances is finished," and the plain language of the FCA dictates the "derived from" standard. *Id.* (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). As those courts have recognized, the "based upon" language clearly indicates that a *qui tam* action is "based upon" a public disclosure only if the action is derived from and depends upon that disclosure. *See id*.

This plain meaning interpretation is also consistent with the dual purposes of the FCA's public disclosure bar, which the Fifth Circuit has recognized as "(1) promoting private citizen involvement in exposing fraud against the government and (2) preventing parasitic suits by opportunistic late-comers who add nothing to the exposure of the fraud." *Reagan*, 384 F.3d at 174 (internal citations omitted). Defining "based upon" as "substantially similar to" would discourage private citizen involvement because potential relators would need to search all of the media, legislative hearings and court dockets for similar allegations in order to know whether the jurisdictional bar could potentially apply. And, an FCA suit that is not based on publicly disclosed allegations is in no way parasitic. *See Fowler*, 496 F.3d at 737 (a suit based upon "information which happens to be similar or identical to publicly disclosed allegations or transactions, but which derives from some other source than the public disclosure, is not parasitic, and should not be barred by a provision meant to bar parasitic suits") (internal quotation omitted); *see also Siller*, 21 F.3d at 1348 (same).[10]

Accordingly, this action was not based upon public disclosures.

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[10] In contrast, most of the cases relied upon by State Farm featured relators who derived their *qui tam* claims from previously disclosed allegations. Indeed, many of those relators had actually filed separate lawsuits disclosing their allegations before they filed their FCA actions. *See Federal Recovery Servs. Inc. v. United States*, 72 F.3d 447, 450-51 (Relator filed two complaints in state court before filing the *qui tam* suit); *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 553 (10th Cir. 1992)(allegations previously raised by relator in three previous lawsuits); *Reagan*, 384 F.3d at 174 (allegations previously disclosed by relator's FOIA requests and state court lawsuit).

2. This Action Is Not "Substantially Similar" to Any Public Disclosures.

In any event, even if the Court accepts State Farm's interpretation of the FCA, the allegations in this case are not substantially similar to any allegations that were publicly disclosed at the time the Rigsbys brought this action. As discussed above, the only purported public disclosures identified by State Farm are Dr. Hunter's congressional testimony and the *Cox/Comer* complaints. Dr. Hunter's testimony mentioned only a conflict of interest and raised the *possibility* that some unidentified insurers may at some point defraud the government. Dr. Hunter did not allege that any insurance companies were, in fact, defrauding the government, nor did he explain *how* insurance companies may have been defrauding the government. *See* section III.B.2, *supra*.

In contrast, the Rigsbys' complaint not only alleges that State Farm and the other Defendants were defrauding the government, it also explains how State Farm most often accomplished it: by creating false engineering reports, pressuring engineering companies to attribute property damage to water, forcing engineering companies to rewrite reports, and selectively canceling engineering reports from companies that found wind damage. *See* section II, *supra*. These allegations are not substantially similar to Dr. Hunter's testimony, which only posited the vague possibility of insurer misconduct.

For the same reason, the allegations in the Rigsbys' complaint are not substantially similar to the allegations in the *Cox/Comer* complaints. The *Cox/Comer* plaintiffs accused all the insurance company defendants (only some of whom even issued flood policies) of wrongfully denying coverage for claims submitted under homeowner policies. They did not allege that the insurers themselves were submitting fraudulent flood claims, nor did they allege the means by which those fraudulent flood claims were generated.

Accordingly, under any interpretation of the statute, this action was not based upon publicly disclosed allegations.

D. The Rigsbys Are an Original Source of the Information They Provided to the Government.

Even if State Farm's fraud has been publicly disclosed and the Rigsbys' claims are found to be "based upon" those public disclosures (neither of which is the case), the Court still has jurisdiction over this action because the Rigsbys are an "original source" who made timely disclosures to the government. *See* 31 U.S.C. § 3730(e)(4)(a). Defendants contest that status, but they use evidence outside the pleadings to do so. As a result, the Court must treat State Farm's motion as one for summary judgment and deny it because there are, at best for State Farm, genuine issues of material fact.

Congress amended the FCA in 1986 to allow *qui tam* claims filed by relators who are "an original source" of the information on which their claims are based, even if those claims already were publicly disclosed.[11] 31 U.S.C. § 3730(e)(4)(A); *see also* Grassley Statement (1986 FCA amendments "sought to resolve the tension between . . . encouraging people to come forward with information and . . . preventing parasitic lawsuits").

As set forth below, the Rigsbys are an original source under the FCA.

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[11] Congress created the original source exception as a reaction to overly restrictive *qui tam* jurisdictional requirements and as an encouragement to relators like the Rigsbys to come forward with hidden information. In 1943, abuses of the *qui tam* system led Congress to prevent parasitic suits by barring *qui tam* actions based on information that the government already possessed. *See* False Claims Act Implementation: Hearing Before the Subcommittee on Admin. Law and Gov. Relations of the House Committee on the Judiciary, 101st Cong., 2d Sess. 3 (1990) (statement of Sen. Grassley) (the "Grassley Statement"). The 1943 amendment addressed a valid concern, but in doing so, unnecessarily restricted the ability of legitimate relators to develop and bring valid *qui tam* claims. In 1984, *United States ex rel. Wisconsin v. Dean* brought that restriction under close scrutiny after the State of Wisconsin discovered a fraud, conducted an investigation, and produced the results of that investigation to the federal government, but was then barred from pursuing a *qui tam* claim because of its disclosure. 729 F.2d 1100, 1107 (7th Cir. 1984). The 1986 Amendments were a direct response to the problem highlighted in *Dean*.

1. The Rigsbys Made a Timely Disclosure to the Government.

State Farm argues that the Rigsbys were required to disclose its fraud to the government before any public disclosure to qualify as original sources. *See* Mot. to Dismiss 12-13. But as noted in section III.B, *supra,* State Farm has not demonstrated that any public disclosures of its fraud took place before the Rigsbys filed their complaint in April 2006. In any event, even if there were public disclosures, the language of the FCA unambiguously allows original sources to make their disclosures to the government after prior public disclosures.[12] As the Ninth Circuit noted, the FCA

> *explicitly* provides a time frame for when individuals wanting to take advantage of the "original source" exception to the "public disclosure" bar must "voluntarily provide[] information to the government," stating in no uncertain terms that they must do so "*before filing an action under this section.*"

United States v. Johnson Controls, Inc., 457 F.3d 1009, 1015 (9th Cir. 2006) (emphasis in original) (quoting 31 U.S.C. § 3730(e)(4)(B)); *see also Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1051 (8th Cir. 2002) (the "additional requirement has no textual basis in the statute"); *United States ex rel. Prawer v. Fleet Bank*, 24 F.3d 320, 329 (1st Cir. 1994) ("Congress has explicitly deemed a 'notice' regime insufficient to protect the government against false claims (indeed, it was *precisely such a regime* that Congress sought to abandon in enacting the 1986 amendments.)") (emphasis in original). Any additional time restriction would reverse the intention of Congress and discourage those with independently obtained evidence of a generally disclosed fraud from coming forward. *See Minn. Ass'n of Anesthetists*, 276 F.3d at 1051.

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[12] Indeed, if a Relator were to make her disclosure to the government prior to any public disclosures (as is the case here), there would be no need to even reach the original source inquiry.

Thus, there is simply no textual or logical support for State Farm's proposed interpretation. *See id*; *Johnson Controls*, 457 F.3d at 1015; *Prawer*, 24 F.3d at 320.[13]

2. The Rigsbys Have "Direct and Independent" Knowledge of the Allegations in Their Complaint.

The Rigsbys are original sources of the information in their complaint because they have "direct and independent knowledge of the information on which [their] allegations are based" and they "voluntarily provided the information to the Government before filing an action under this section[.]" 31 U.S.C. § 3730(e)(4)(b). The Fifth Circuit has explained that "[t]he plain meaning of the term 'direct' requires knowledge derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others." *Reagan*, 384 F.3d at 177 (internal quotation omitted). And knowledge is independent, "if it is not derived from the public disclosure." *Id.* (internal quotation omitted).

The Rigsbys' knowledge is independent because, as discussed above, it is undisputed that the Rigsbys did not derive their allegations of State Farm's fraud from any public disclosure because at the time the Rigsbys brought this action, they were unaware of any such disclosures. *See* Section C.1, *supra*.

The Rigsbys knowledge also is direct. They are not merely "disinterested outsiders who simply stumble[d] across an interesting court file". *See United States ex rel. DeCarlo v. Kiewit/AFC Enters., Inc.*, 937 F. Supp. 1039, 1049 (S.D.N.Y. 1996) (internal quotations omitted). But rather, they learned of State Farm's fraud "in their capacity as employees, and

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[13] In addition, the line of cases on which State Farm relies has been called into question by the Supreme Court's holding in *Rockwell Intern. Corp. v. United States*, 127 S. Ct. 1397, 1407 (2007). *See United States ex rel. McBride v. Halliburton Co.*, No. 05-00828, 2007 WL 1954441, at *7, n. 16 (D.D.C. Jul. 5, 2007). As *McBride* noted, "the continuing validity of this requirement announced in *Findley* is unclear" in light of *Rockwell*. *Id*. The *McBride* opinion also noted that *Findley's* holding "is also arguably at odds with the plain text of the statute, which only requires that the would-be relator provide the information to the government 'before filing an action.'" *Id*. (quoting 31 U.S.C § 3730(e)(4)(B)).

through no other source." Am. Compl., ¶ 27. Knowledge of fraud that whistleblowers obtain in the course of their employment is direct. *See, e.g., DeCarlo*, 937 F. Supp. at 1049 (relator "is the type of plaintiff envisioned by the *qui tam* provisions of the False Claims Act" because he witnessed the conditions directly in his capacity as a project manager for the defendant); *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992) (whistleblower had personal knowledge of how the defendants committed fraud in repairing transmissions "because he worked (however briefly) on trying to fix them" and as a result, "[his] knowledge of the transmission problems was 'direct and independent' because it was unmediated by anything but [his] own labor").

State Farm may try to distinguish between the knowledge of State Farm's fraud that the Rigsbys obtained accidentally and the knowledge of State Farm's fraud that the Rigsbys gained after they began consciously investigating and documenting State Farm's conduct. The Rigsbys are an original source for both types of knowledge because their investigation began only after they directly and independently obtained knowledge of State Farm's fraud. *See, e.g., United States ex rel. Farmer v. City of Houston*, No. 03-cv-3713, 2005 WL 1155111, at *5 (relator's "entire investigation began as a result of her independent knowledge" of the defendant's fraud, and relator had "direct" knowledge of everything learned during the investigation as a result); *Cooper*, 19 F.3d at 566 (knowledge learned during relator's investigation was "direct" when, after defendant processed his insurance claims, relator then researched laws governing insurance claims and corresponded with members of Congress and Health Care Financing Administration as part of investigation).

Indeed, based on their direct and independent knowledge, the Rigsbys provided to the government examples of specific claims as well as detailed, previously undisclosed allegations

regarding the mechanisms and artifices used by State Farm to defraud the government, including, but not limited to:

- causing Haag to write a report that was contrary to science and all normative models of hurricanes in order to lend credibility to adjusters who were assigning wind claims to water damage;
- seeking compliant and poorly-trained adjusters from Renfroe to assist in State Farm's handling of flood-related losses;
- instructing adjusters to overstate the amount of damage when using the XACT Total program in order to "hit the limits" of the flood policies;
- canceling engineering reports that did not reflect flood damage as the cause of loss;
- terminating engineering companies who refused to change their reports to reflect flood damage as the cause of loss.

Am. Compl. ¶¶ 43-45, 56, 61-62, 83-84.

State Farm's arguments to the contrary are without merit.[14] First, State Farm argues that the Rigsbys' knowledge is not "independent" because the Rigsbys "did not have evidence of the fraud prior to its public disclosure." Mot. to Dismiss at 13 (internal quotation omitted). State Farm's assertion is factually incorrect. The Rigsbys began working for State Farm just days after Katrina struck, and they saw State Farm's fraud first hand, as it unfolded. They had no knowledge of any publicly-disclosed facts regarding State Farm's fraud at that time.

Second, in arguing that the Rigsbys do not appear to have direct knowledge for "*one* of the two claims they rely on: Mullins," (Mot. to Dismiss at 14, emphasis added), State Farm concedes that the Rigsbys have direct knowledge of the McIntosh claim. A relator does not need

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[14] The cases on which State Farm relies simply do not involve true whistleblowers like the Rigsbys. *See Reagan*, 384 F.3d at 178 (relator did not have direct and independent knowledge because the relator's knowledge was "derived almost entirely from information that has been publicly disclosed"); *United States ex rel. Koerner v. Crescent City E.M.S., Inc.*, 946 F. Supp. 447, 452 (E.D. La. 1996) (relator was found not to have direct knowledge when he admitted that he was a "nominal plaintiff-relator"). Indeed, in *Koerner*, the relator actually admitted that he was not the original source. *See id*. ("in bold capitalized print, Koerner state[d] '**SAMPSON WAS THE ORIGINAL SOURCE OF THIS INFORMATION'"**) (emphasis in original).

direct knowledge of every false claim in the complaint. *See United States ex rel. Laird v. Lockheed Martin Eng'g and Science Servs. Co.*, 336 F.3d 346, 352-53 (5th Cir. 2003) ("we do not read the 'original source' exception to the jurisdictional bar to require that a relator have 'direct' and 'independent' knowledge of each false claim alleged in the complaint to have been submitted by the defendant"), *abrogated on other grounds by Rockwell Intern. Corp. v. United States*, 127 S. Ct. 1397, 1407 (2007).[15] Thus, even if State Farm were correct that the Rigsbys' direct knowledge is limited to the McIntosh claim, the Rigsbys would still be an original source of the allegations in their complaint, and the *qui tam* suit would not be affected by the jurisdictional bar. And, in any event, since the Rigsbys unquestionably are original sources of the documents they provided to the government in the initial disclosure statement, which included the details of the Mullins claims, they are original sources of that claim as well.

3. The McIntosh Claim Provides a Specific Example of the Rigsbys' Direct and Independent Knowledge of State Farm's Fraud.

The Rigsbys' fraud allegations are detailed and specific, and their clearest and best-documented example involves the McIntosh claim. While State Farm argues that Kerri Rigsby's deposition testimony from a different matter proves definitively that fraud was not committed regarding the McIntosh claim, State Farm, at best, raises a material dispute of fact that goes directly to the merits of this action.

As explained in the Amended Complaint, the evidentiary disclosure, and the statement of facts above, State Farm's entire fraud scheme is well-illustrated through the McIntosh claim.

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[15] As the Fifth Circuit implicitly has recognized, *Rockwell* did not reverse *Laird's* holding that a relator need not have direct and independent knowledge of each claim. *See Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 491 F.3d 254, 258 n. 11 (5th Cir. June 27, 2007) ("*Laird II*"). In *Laird II*, the Fifth Circuit noted that *Rockwell* had "held that the statutory phrase 'information on which the allegations are based' refers to the information on which the relator's allegations are based rather than the information on which the publicly disclosed allegations are based," rejecting Fifth Circuit precedent on that point. *Id*. (citing *Rockwell*, 127 S. Ct. at 1407). But the Fifth Circuit did not address *Laird I*'s holding that a relator need not have direct and independent knowledge of *each* claim. *Id*.

See Am. Compl. ¶ 69; Evidentiary Disclosure at 8-10; section II, *supra*. The Rigsbys personally witnessed and voluntarily disclosed to the government the initial engineering report that found wind to be the cause of the damage, the note written by Lecky King that directed adjusters not to pay the claim, and the fraudulent second engineering report. Am. Compl. ¶¶ 68-70; Evidentiary Disclosure at 9-10.

Nonetheless, State Farm cites Kerri Rigsby's deposition testimony in *Marion v. State Farm*, No. 06-cv-969, to argue that there was no fraud in the McIntosh case because she believed at the time that there was at least $250,000 of flood damage to the McIntosh home. Mot. to Dismiss at 16. In that deposition, Kerri Rigsby testified that she believed there was a significant amount of flood/water damage to the McIntosh home from Hurricane Katrina. But Kerri, who is not an engineer, also testified that she initially reached those conclusions at a time when she still believed State Farm's carefully fabricated storm model. Indeed, she testified that State Farm presented the Haag Report to its adjusters and claims handlers as scientific fact and claimed that the storm surge had preceded Katrina's devastating winds. *McIntosh* Depo. of K. Rigsby, May 1, 2007, 239:16-240:7. Kerri further testified that she "bought right into the presentation [of the Haag report]," and "believed everything they told [her]." *Id.* at 240:3-5. Most importantly, Kerri admitted in her May 2007 deposition that she should not have approved the payment of the McIntosh flood claim. *Id*. at 238:6-17.

In any event, State Farm's argument that it did not defraud the McIntoshes and the federal government goes directly to the merits of the Rigsbys' allegation of fraud regarding the McIntosh claim, and where the jurisdictional issue "cannot be decided without the ruling constituting at the same time a ruling on the merits of the case, the case should be heard and determined on its merits through regular trial procedure." *United States ex rel. Coppock v.*

Northrup Gruman Corp. No. 98-cv-2143, 2003 WL 21730668, at *8 (N.D. Tex. Jul. 22, 2003) (internal quotation omitted); *see also Montez v. Dep't of the Navy*, 392 F.3d 147, 157 (5th Cir. 2004) (where "issues of fact are central both to subject matter jurisdiction and the claim on the merits, . . . the trial court must assume jurisdiction and proceed to the merits."). In addition, because State Farm's arguments raise factual issues that have not been subjected to full discovery, they should be "decided, if necessary, in the contexts of a merits-based summary judgment motion." *Coppock*, 2003 WL 21730668 at *8.

To prevail on a summary judgment motion, State Farm must demonstrate that there is no genuine issue of material fact. Fed. R. Civ. P. 56; *see also Cleo Wallace Ctrs*, 132 F. Supp. 2d at 921-24 (D. Colo. 2000) (converting a 12(b)(1) motion against an FCA claim to a motion for summary judgment and then denying the motion because there were genuine issues of material fact). It cannot do so. Kerri Rigsby's deposition testimony, combined with the evidence of altered engineering reports, creates a clear issue of material fact: whether the McIntoshes' property sustained $250,000 of flood damage. As a result, State Farm's motion to dismiss must be denied, or at the very least, this Court should allow discovery for the Rigsbys to demonstrate the full scope of the material they presented to the federal government, including the material included in the December 2006 supplemental disclosure. *See* Relators' Reply In Support of Their Motion for Expedited Document Requests Related to Defendants' Pending Dispositive Motions, docket entry [221] (the "Reply in Support of Discovery"), at 3-5; *see also McAllister v. F.D.I.C.*, 87 F.3d 762, 766 (5th Cir. 1996) (when a court "makes factual determinations decisive of a motion to dismiss for lack of jurisdiction, it must give plaintiffs an opportunity for discovery") (internal citation omitted).

4. The Rigsbys Are Original Sources of Information Related to Other False Claims, Including the Vela Claim.

State Farm's third and fourth arguments both contend that the Rigsbys must produce direct and specific evidence of a fraud being committed, and that this Court should look beyond the Rigsbys' allegations to determine their merits. Mot. to Dismiss at 14-15. State Farm asserts that the Rigsbys produced only "two specific instances where State Farm allegedly misallocated the burden of paying claims to the federal treasury." *Id.* at 15. But the Motion to Dismiss blissfully ignores the broader evidence of State Farm's systematic fraud that the Rigsbys provided to the government and alleged in their complaint.

Although the Rigsbys indisputably are original sources of information regarding State Farm's fraud on the McIntosh claim, their direct knowledge is far broader and was obtained firsthand "in their capacity as [Renfroe and State Farm] employees" and as a result of their efforts to gather evidence that documented State Farm's fraud after having observed that fraud. Am. Compl. ¶ 27.

For example, the Rigsbys' description of the claim by Ana Vela ("Vela"), a Biloxi, Mississippi homeowner, provides further support for the jurisdictional basis of their claim. Vela was quite fortunate; State Farm actually paid her claim. But she received that boon only after Lecky King left on vacation and Mark Drain decided to overrule King's order not to pay the claim. Vela's neighbors were not so lucky. As explained in the Rigsbys' evidentiary disclosure and amended complaint, Vela's neighbors to her left, right, and across the street all had their claims denied under their policies' flood exclusions. *See* Evidentiary Disclosure at 21-23; Am. Compl. ¶¶ 86-91. State Farm knows where Vela's home is located, and it knows the policies it issued to her neighbors. As a result, although the Rigsbys know that State Farm defrauded Vela's neighbors in Biloxi, Mississippi in or around October 2005, State Farm has

particular reason to know the specific details of any fraudulent claims it made to the NFIP for Ms. Vela's neighbors, and the Rigsbys' complaint adequately states a fraud claim. *See United States ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 308 (5th Cir. 1999).

5. Discovery Would Allow the Rigsbys to Further Substantiate Their Role as Original Sources.

As the Relators discussed in their Reply in Support of Discovery, they are the original sources of documents and information that they no longer have in their possession. Docket entry [221] at 3-5. Although the facts and authorities described above demonstrate that the Rigsbys do not even need to be an original source, and, in any event are an original source for the allegations regarding the details of State Farm's fraudulent scheme, which includes the McIntosh, Mullins, and Vela-related claims, the Rigsbys respectfully submit that they will be able to provide even more information that will further support their status as original sources when State Farm produces documents pursuant to the Rigsbys' expedited discovery requests. Indeed, the Rigsbys believe that those documents will reveal further specific instances of fraud, as will general discovery that will be taken in this case.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss should be denied and attorney fees should not be assessed.

THIS the 2nd day of September, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, 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 or as otherwise set forth below:

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Exhibit 1

IN THE DISTRICT COURT OF GRADY COUNTY
STATE OF OKLAHOMA

DONALD L. WATKINS, JR. and BRIDGET WATKINS, individually and as representatives of a class of similarly situated individuals,	)	
Plaintiffs,	)	
vs.	)	No. CJ-2000-303
STATE FARM FIRE & CASUALTY COMPANY, and DANNY WALKER, and other similarly situated agents of State Farm Fire & Casualty Company,	)	
Defendants.	)	

FILED IN DISTRICT COURT
Grady County, Oklahoma
MAY 25 2006
Glenda Fenimore, Court Clerk
By ~~Deputy~~

VERDICT FORM ON CLASS QUESTIONS

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find in favor of the class members as follows:

1. We do ✓ do not ____ (Check One) find by clear and convincing evidence that the defendant, State Farm, **recklessly disregarded** its duty to deal fairly and act in good faith with class members in its use of Haag Engineering Company.

2. We do ✓ do not ____ (Check One) find by clear and convincing evidence that the defendant, 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.

3. We do ✓ do not ____ (Check One) find by clear and convincing evidence that the defendant, State Farm, **recklessly disregarded** its duty to deal fairly and act in good faith with class members in its use of independent adjustors from E. A. Renfroe Company.

4. We do ✓ do not ____ (Check One) find by clear and convincing evidence that the defendant, State Farm, **intentionally and with malice** breached its duty to deal fairly and act in good faith with class members in its use of independent adjustors from E. A. Renfroe Company.

Michelle Banks McHugh
Foreperson

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

I, GLENDA FENIMORE, Court Clerk for Grady County, OK, hereby certify that the foregoing is a true, correct, and complete copy of the instrument herewith set out as appears of record in the Court Clerk's Office of Grady County, Okla.
this 25 day of May 20 06
GLENDA FENIMORE, Court Clerk
By Glenda Fenimore Deputy

Exhibit 2

For Opinion See 127 S.Ct. 3037, 127 S.Ct. 2300, 127 S.Ct. 1397, 127 S.Ct. 754

U.S.,2006.

Supreme Court of the United States.
ROCKWELL INTERNATIONAL CORP. and BOEING NORTH AMERICAN, INC., Petitioners,
v.
UNITED STATES OF AMERICA, andUNITED STATES ex rel. James S. STONE, Respondents.
No. 05-1272.
November 20, 2006.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief of Senator Charles E. Grassley as Amicus Curiae in Support of Respondents

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***1** INTEREST OF AMICUS CURIAE[FN*]

FN* In accordance with Rule 37.6, *amicus curiae* certifies that counsel for a party did not author this brief in whole or in part and that the only monetary payment for preparation or submission of this brief was by the law offices of John Clark for its printing. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief. Petitioners have filed a letter with the Clerk granting blanket consent to any party filing an *amicus* brief in support of either petitioners or respondents, and letters reflecting respondents' consent to the filing of this brief have been filed with the Clerk.

Amicus Curiae Senator Charles Grassley was the principal sponsor in the Senate of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, *codified as amended* at 31 U.S.C. §§ 3729-3733. That Act substantially revised the original False Claims Act, which was first enacted in 1863 to draw on the information and resources of private citizens in combating fraud against the Government. Since the enactment of the 1986 amendments, *qui tam* relators have assisted in returning well over $15 billion to the United States Treasury.[FN1] As a principal sponsor of this important legislation, Senator Grassley has a strong interest in presenting his purpose in crafting the 1986 amendments to the Act generally and specifically the public disclosure bar and its original source exception at issue in this case.

FN1. *See* www.usdoj.gov/opa/pr/2005/November/05-civ-595. html (reporting recoveries though fiscal year 2005); http://www.taf.org/statistics.htm (reporting additional recoveries).

SUMMARY OF ARGUMENT

The *qui tam* provisions of the False Claims Act have always had as their central purpose enlisting the information and resources of private citizens to assist the Government in its efforts to combat fraud. That purpose is as essential to the Government today to confront fraud in Government programs from reconstruction in Iraq to aid for victims of Hurricane Katrina, as it was when the Act was first adopted in 1863 to redress profiteering during the Civil War. As a result of the 1986 Amendments, the Government has recovered billions of dollars taken from it by fraud, which the Government might never have learned about or pursued without the assistance of private citizens.

As originally enacted, the False Claims Act authorized a private person, or *qui tam* relator, to pursue a fraud claim on behalf of the United States Government, without regard to the source of the person's information. The Act did not authorize the Government to intervene in the relator's case, and a successful relator was entitled to fifty percent of the total recovery.

In 1943, at the request of the Attorney

General, Congress amended the *qui tam* provisions of the False Claims Act to bar *qui tam* suits that were based upon information about fraud already in the Government's possession. The Attorney General had expressed concern that relators were abusing the Act by copying criminal indictments and filing them as complaints to claim a reward, without contributing any information of their own. Although some members of Congress questioned the extent of the problem, Congress was persuaded to bar such parasitic suits. The 1943 amendment required a relator to provide all information in the relator's possession to the Government before filing suit and allowed a relator to pursue a case only if the Government elected not to do so. If the Government declined to pursue the case, the *qui tam* suit could not be pursued if the Government possessed information about the fraud at the time the case was filed.

Courts applied the literal language of the 1943 amendment to bar any *qui tam* suit where the Government was already aware of the fraud, even if the only source of the Government's knowledge was the information the relator provided before filing suit, as the law required. As a result, *qui tam* relators whose lawsuits were not in any sense parasitic were barred from pursuing a civil action on the Government's behalf, and the *qui tam* provisions of the statute largely fell into disuse.

In 1986, Congress sought to revitalize the False Claims Act and make it a more effective means of combating fraud. The 1986 Congress agreed with the policy choice of the 1943 Congress that parasitic actions should be barred. To ensure that only parasitic suits were barred, however, Congress discarded the Government knowledge bar and replaced it with the public disclosure bar. The public disclosure bar was intended to exclude only suits actually based upon revelations about specific instances of fraud that were publicly disclosed in certain Government proceedings or the news media. In order to limit such exclusion only to truly parasitic *qui tam* actions, Congress added the "original source" exception to the bar. The exception allows a relator to proceed with a case based upon publicly disclosed allegations of fraud, if the relator brought his own information underlying his allegations, independent of the public disclosure, to the Government before filing his suit.

Courts have since interpreted the public disclosure bar and its original source exception to bar a wide range of suits that are not parasitic in any sense, in conflict with both the language of the law and congressional intent. In the process, courts have created an increasingly complex and burdensome set of requirements that unnecessarily deter private citizens from assisting the Government. Unless a suit is truly parasitic of disclosures made public in certain Government proceedings or the news media, the suit serves Congress's purposes in authorizing *qui tam* actions. The Act seeks to encourage persons with information about fraud to provide that information to the Government and to bring their resources to bear on the problem. The Act provides other ways to address concerns about the level of the relator's contribution to the ultimate resolution of the case. The public disclosure bar and its original source exception were never intended to be used to deprive the Government of the assistance of relators whose actions are not parasitic.

ARGUMENT

I. THE PARAMOUNT PURPOSE OF THE *QUI TAM* PROVISIONS OF THE FALSE CLAIMS ACT IS TO ENLIST PRIVATE CITIZENS TO CONTRIBUTE THEIR INFORMATION AND RESOURCES TO ASSIST THE GOVERNMENT IN ITS ANTI-FRAUD LAW ENFORCEMENT EFFORTS.

Since the inception of the False Claims Act, the central purpose of the *qui tam* provisions has been to enlist private citizens in combating fraud against the Government in several important ways. First, the provisions hold out the promise of a reward to the private citizens who file suits on the Government's behalf to encourage them to disclose their information about fraud to the Government, notwithstanding the considerable personal risks that can entail. Second, and equally important, by providing the relator an ongoing role in the case, the Act enhances the ability of the Government to pursue cases it might otherwise need to abandon for lack of resources. Finally, authorizing private citizens to pursue cases on the Government's behalf provides a measure of public oversight when the Government fails to act.

Within this framework, the public disclosure bar serves the limited purpose of preventing parasitic suits based on fraud that has already been publicly exposed in a manner that is likely to alert the Government to the misconduct alleged and to spur it to appropriate action. The sole purpose of the original source exception to the public disclosure bar is to ***5** further limit the reach of the public disclosure bar. The exception preserves cases involving publicized fraud allegations that were brought by persons who gave their own information underlying their complaint's allegations to the Government before filing suit. As courts have noted, in enacting the 1986 Amendments to the False Claims Act, Congress sought to balance the Government's interests in enlisting the information and resources of private citizens with the need to discourage opportunistic suits by persons who did not contribute their own information. However, Congress did not afford those interests equal weight. The Act Congress adopted weighs heavily in favor of pursuing fraud against the Government, while providing narrow filters to exclude only truly parasitic actions.

A. As Originally Enacted in 1863, the False Claims Act Authorized Private Persons To Pursue Fraud Claims on Behalf of the Government Regardless of the Source of the Person's Knowledge.

Congress first adopted the False Claims Act in 1863 during the Civil War.[FN2] The measure had been introduced in Congress at the "urgent solicitation of the officers who [were] connected with the administration of the War Department and Treasury Department" in response to complaints about "the frauds and corruptions practiced in obtaining pay from the Government during the [Civil] War."[FN3] Congress sought to enact "a more speedy and vigorous remedy" that would seek the assistance of private citizens in prosecuting fraud. As the sponsor explained, "The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class."[FN4]

FN2. Act of March 2, 1863, ch. 67, 12 Stat. 696.

FN3. Cong. Globe, 37th Cong., 3d Sess. 952 (1863).

FN4. Cong. Globe, 37th Cong., 3d Sess. 955 (1863).

The 1863 Act authorized private individuals, or "*qui tam* relators," to bring a suit on behalf of the United States to ***6** redress fraud against the Government. The Act provided for double damages and a $2,000 civil penalty per false claim. A private individual who successfully pursued a claim was entitled to half of the Government's recovery. The Act did not authorize the Government to intervene in the private individual's case, nor did the Act preclude *qui tam* actions based upon the source of the relator's information.[FN5] The Government thus sought both to encourage private citizens to report their information about fraud and to use their own resources in pursuing claims on the Government's behalf.

FN5. Act of March 2, 1863, 12 Stat. 696.

B. Congress Amended the False Claims Act in 1943 To Address a Perceived Problem with Parasitic Suits by Prohibiting *Qui Tam* Actions When the Complaint Was Based Upon Information Already in the Government's Possession.

Nearly 80 years later, in the midst of another war, Attorney General Francis Biddle wrote to Congress to seek a change to the False Claims Act based on his concern that lawyers were filing *qui tam* complaints that were copied straight from criminal indictments.[FN6] These types of suits, the Attorney General urged, did not serve the original purposes of the *qui tam* provisions. Relators who copied the Government's own work contributed little or no information to the Government and interfered with the Government's criminal cases.[FN7] The example the Department cited was a case from the Third Circuit, *United States ex rel. Marcus v. Hess*, 127 F.2d 233, where the appellate court had reversed a trial court award in favor of a relator.[FN8] The Attorney General pressed Congress to repeal the authorization for *qui tam* actions.

FN6. S. Rep. No. 1708, 77th Cong., 2d Sess. (1942) (reprinting letter).

FN7. *Id.*

FN8. *United States ex rel. Marcus v. Hess*, 127 F.2d 233, 235 (3d Cir. 1942) (observing that because informer statutes have been regarded with disfavor, they must be construed with utmost strictness, and concluding that the relator had not established that a claim had been submitted to the United States).

***7** Although the Senate quickly responded to the Attorney General's entreaty by adopting a measure to repeal the *qui tam* provisions in their entirety, the House did not act before the close of the 77th Congress.[FN9] At the commencement of the 78th Congress, the House took up H.R. No. 1203, which was identical to the earlier Senate bill proposing repeal of the *qui tam* provisions.[FN10] The House Committee on the Judiciary reported the measure without substantive amendment,[FN11] and the House passed H.R. 1203 on April 1, 1943.[FN12]

FN9. S. 2754, 77th Cong., 2d Sess. (1942), passed, Nov. 27, 1942, 88 Cong. Rec. 9138 (1942). The Senate Report recommending passage consisted solely of the Attorney General's letter. *See* S. Rep. No. 1708, *supra* note 6.

FN10. H.R. 1203, 78th Cong., 1st Sess. (1943).

FN11. H.R. Rep. No. 263, 78th Cong., 1st Sess. 2 (1943). Like the earlier Senate Report, the House Report consisted solely of a letter from the Attorney General requesting the repeal, this time citing the Supreme Court's then very recent decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), which reversed the Third Circuit and allowed the relator to recover.

FN12. 89 Cong. Rec. 2801 (1943).

When the Senate took up the proposed repeal this time, acquiescence in the Attorney General's request was not immediately forthcoming. The Committee on the Judiciary did not recommend approval of the repeal, but instead reported the measure with amendments. The proposed amendments would have maintained the *qui tam* provisions, but would have provided a bar to parasitic suits. The proposed bar would have provided that no court "shall have power or jurisdiction" over a *qui tam* action unless:

***8** • the case was "based upon information, evidence, and sources original with such person and not in the possession of or obtained by the United States in the course of any investigation or proceeding instituted or conducted by it;"

• prior to commencement of the action the person "made full disclosure in writing to the Attorney General of the grounds thereof, and has requested the Attorney General to cause such suit to be brought;" and

• the Attorney General has "declined in writing to comply with such request, or has allowed six months to elapse after receipt of such disclosure and request without causing a suit to be brought."[FN13]

FN13. S. Rep. No. 291, 78th Cong., 1st Sess. 1-2 (1943).

The report explained that the Committee had amended the House proposal "to protect and compensate genuine informers who comply with the provisions respecting notice to the Attorney General."[FN14] At the same time, the proposal sought to address the concerns of the Department of Justice that:

FN14. *Id.* at 1.

many persons who have filed suits and may file suits under this section, have no information or facts of their own, but prepare and file complaints which obviously are based on information and alleged facts obtained bodily from indictments returned in United States courts, from newspaper stories, and congressional investigations. In some of the cases filed the indictment was ***9** copied in the complaint filed, the only difference being the caption and the prayer of the complaint.[FN15]

FN15. *Id.* at 2-3.

The report included the minority views of Senator William Langer of North Dakota,

who took issue with the Department of Justice's claim that there was a crisis caused by parasitic *qui tam* suits. Senator Langer observed that it appeared from the records of the cited lawsuits that the Government had been letting defendants plead to small criminal fines and leaving the civil damages and penalties untouched.[FN16] Noting that the opportunities for contractor fraud were greater than ever before, Senator Langer championed the *qui tam* actions as a way for citizens to act as a check on the Government, so that Government officials could not let favored individuals off lightly.[FN17]

FN16. S. Rep. No. 291, Pt. 2, 78th Cong., 1st Sess. 1 (1943).

FN17. *Id.* at 4.

When the measure proceeded to the Senate floor, this debate continued. On the one hand, Senator Van Nuys urged that the measure as amended by the committee would "stop racketeers, who are springing up like mushrooms all over the United States, from taking advantage of this antiquated statute."[FN18] On the other hand, Senator Langer questioned whether a problem with parasitic suits even existed. Pointing out that the committee had not contacted any of the parties or lawyers in these cases, he read into the record telegrams explaining the nature and extent of the fraud alleged in the cases, and efforts of relators to pursue fraud.[FN19] In his view, the current effort was an attempt "not merely to amend the act but to emasculate it to such an extent as to amount to its practical repeal."[FN20] Senator Langer was not alone in ***10** protesting the amendment. Other Senators pointed out that the proposed amendment created a catch-22 for potential relators because the person would have to give the information to the Attorney General before filing suit, but once the Government had the information, the person would be barred from bringing a suit.[FN21] Although efforts to recommit the measure were rejected,[FN22] the Senate did agree to delete the requirement that the relator's information be "original with such person." As one Senator explained, "taken literally," this language could be understood to prohibit a person from bringing or conducting a suit "unless all the information originated with himself."[FN23] There were no objections to the change, which would not have altered the expressed purpose of the amendment's sponsors, which was to preclude parasitic suits based on information about fraud that was already in the Government's possession.

FN18. 89 Cong. Rec. 7439 (1943) (statement of Sen. Van Nuys).

FN19. 89 Cong. Rec. 7578-79, 7601-02 (1943) (remarks of Sen. Langer).

FN20. 89 Cong. Rec. 7438 (1943) (statement of Sen. Langer).

FN21. 89 Cong. Rec. 7614 (1943) (statements of Sens. Clark and Wheeler).

FN22. 89 Cong. Rec. 7608, 7614-15 (1943).

FN23. 89 Cong. Rec. 7614 (1943) (statement of Sen. Wheeler).

The measure was sent to conference to reconcile the Senate and House proposals.[FN24] The amendment that emerged

provided that if the United States proceeded with a case, the case would be prosecuted solely by the United States and the relator would have no role. If the United States failed to join the case after 60 days, the person could continue on his or her own. The Government had no ability to join the case at a later date. Critically, however, if the Government did not join the case, no court would have "jurisdiction" to proceed with a relator's case "whenever it shall be made to appear that such suit was based upon evidence or information in the ***11** possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."[FN25]

FN24. 89 Cong. Rec. 7806 (1943).

FN25. H.R. Rep. No. 933, 78th Cong., 1st Sess. (1943), *reprinted in* 89 Cong. Rec. 10844 (1943); Act of December 23, 1943, ch. 377, 57 Stat. 608.

As one congressman pointed out, this proposal placed "limitations upon the prosecution of true informer actions which defeat the very purpose and in practical effect nullify true informer suits."[FN26] He explained that, if a person with information about fraud was about to file an informer suit but was subpoenaed to testify before Congress, that person could not bring a suit because the Government would already have the information before the suit was brought.[FN27] "This is the vice of this [conference] report, or of this bill. Instead of encouraging the disclosure of frauds perpetrated against the Government, it places a premium upon secrecy, because what potential informer would dare disclose the information he had when he had not filed a suit if by disclosing it he is forever precluded from the prosecution of the action?"[FN28]

FN26. 89 Cong. Rec. 10847 (1943) (statement of Rep. Miller).

FN27. *Id.*

FN28. *Id.*

C. In 1986 Congress Sought To Correct the 1943 Version of the Law By Carefully Crafting a Limited Bar to Certain Parasitic Suits.

While it was never clear how significant a problem parasitic suits were, predictions that the 1943 amendments would put an end to informer actions proved prescient. Following the 1943 amendment, courts construed the literal terms of the Act to preclude a *qui tam* action if the Government had information about the fraud in its possession, even if the relator had provided that information. *See* *United States ex rel. Lapin v. Int'1 Bus. Machines Corp.*, 490 F. Supp. 244 (D. Haw. 1980); *United States v. Aster*, 275 F.2d 281 (3d Cir.), *cert. denied*, 364 U.S. 894 (1960); *United* ***12** *States v. Rippetoe*, 178 F.2d 735, 738 (4th Cir. 1949). Thus the provision was interpreted to effectively bar all suits the Government did not take over, including suits that were in no sense parasitic.

In a case that epitomized the way in which the exception undermined the Act itself, in 1984 the Seventh Circuit held in *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), that the Government knowledge bar precluded the relator from bringing a *qui tam* action. In *Wisconsin v. Dean*, the only reason the Government was

already aware of the fraud allegations contained in the relator's complaint was because the relator, the state of Wisconsin, had provided the information to the federal Government as required under another federal law. Precluding Wisconsin from pursuing the case did not protect the Government from a parasitic suit, but rather deprived the Government of a significant partner in pursuing a well-documented case of fraud. The United States had in fact wanted Wisconsin to proceed as the relator because Wisconsin was in the best position to prosecute the case.[FN29] Following the decision, the National Association of Attorneys General adopted a resolution to urge Congress to "rectify the unfortunate result of the *Wisconsin v. Dean* decision."[FN30]

FN29. *United States ex rel. Wisconsin v. Dean*, 123 F.2d at 1103, n.2.

FN30. False Claims Amendments Act of 1986, S. Rep. No. 345, 99th Cong., 2d Sess. 13, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5278.

At about the same time, members of Congress had begun to study the problem of fraud against the Government. The General Accounting Office had reported in 1981 that the known cases of fraud against the Government totaled between $100 million and $200 million, but that that number was likely very low because most fraud goes undetected.[FN31] The ***13** Department of Justice informed Congress that fraud was draining between one and ten percent of the federal budget.[FN32] In an effort to stem this tide, Congress decided to revisit the Government's "primary weapon against fraud."[FN33] Examining the existing law, and finding a number of flaws, Congress set out to breathe new life into the law to "establish a solid partnership between public law enforcers and private taxpayers."[FN34]

FN31. *See* S. Rep. No. 345, *supra* note 30, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267 (citing GAO Report to Congress, Fraud in Government Programs: How Extensive is it? How Can it be Controlled? (1981)).

FN32. S. Rep. No. 345, *supra* note 30, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5268.

FN33. 132 Cong. Rec. 20535 (1986) (statement of Sen. Grassley).

FN34. 132 Cong. Rec. 28580 (1986) ("Primary in the original 'Lincoln Law' as well as this legislation is the concept of private citizen assistance in guarding taxpayer dollars. The expanded *qui tam* provisions of this bill will serve to establish a solid partnership between public law enforcers and private taxpayers in the fight against fraud.") (statement of Sen. Grassley).

Senate bill 1562, introduced on August 1, 1985,[FN35] would have amended the False Claims Act to, among other things, replace the 1943 "Government knowledge bar" which had undermined the *qui tam* provisions.[FN36] The proposed amendment would have replaced the Government knowledge bar with a more limited "public disclosure" bar. Under S. 1562 as introduced, a *qui tam* action could not

proceed if it was based on specific evidence or information that the Government had disclosed as a basis of allegations in a prior administrative, civil, or criminal proceeding, or specific information disclosed during the course of a congressional ***14** investigation or disseminated in the news media, unless the Government failed to act within a certain time.[FN37] If the Government intervened in the *qui tam* action, the bar would not have applied.[FN38] Unlike the 1943 bar, this proposal would not have prohibited the filing of a *qui tam* action simply because it was based on information somewhere in the vast Government bureaucracy.

FN35. 131 Cong. Rec. 22322 (1985).

FN36. *Id.* (observing that change was necessary in part because "the teeth of President Lincoln's law were removed during World War II, and the provision has been little used since") (statement of Sen. Grassley).

FN37. S. 1562, *reprinted in* False Claims Reform Act: Hearing Bef. the Subcomm. on Admin. Prac. and Proc. of the Sen. Comm. on the Judiciary, 99th Cong., 1st Sess. (Sept. 17, 1986).

FN38. *Id.*

The Senate Judiciary Committee reported a substitute measure, which the Senate adopted, along with some modifications.[FN39] Among other changes, the Senate proposal addressed the Department of Justice's concern that the *qui tam* provisions would give rise to a greater number of actions filed against public officials for political purposes. Accordingly, the Senate proposal provided that *qui tam* actions could not be brought against public officials if the Government already had the information about the fraud in its possession. This provision essentially retained the Government knowledge bar for suits against public officials.[FN40] In addition, the Senate proposal limited the reward for persons who brought an action based on information of fraud of which they did not have independent knowledge.[FN41]

FN39. 132 Cong. Rec. 20530-42 (1986).

FN40. S. Rep. No. 345, *supra* note 30, at 29, *reprinted in* 1986 U.S.C.C.A.N. at 5294 ("This provision actually reflects current law in that any *qui tam* suit based on information already known to the Government is currently without jurisdiction. While S. 1562 repeals that jurisdictional bar for most suits, the Committee, at the request of the Justice Department, retained the bar for those suits which might be politically motivated.").

FN41. 132 Cong. Rec. 20536 (1986) (statement of Sen. Grassley).

***15** The Senate proposal also altered the public disclosure bar to provide that no court would have jurisdiction over a *qui tam* action that was "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing

the action is an original source of the information."[FN42] The proposal defined "original source" as an individual who has "direct and independent knowledge of the information on which the allegations are based and has voluntarily informed the Government or the news media prior to an action filed by the Government."[FN43] The exception would have allowed a *qui tam* action based on publicly disclosed allegations or transactions to be maintained by relators who, like the relator in the *Dean* case, brought information, independent of the public disclosure, to the Government.

FN42. S. 1562, as amended, *reprinted in* 132 Cong. Rec. 20531 (1986).

FN43. *Id.*

The Senate subsequently adopted a revision to the definition of original source to require that the person "voluntarily provided the information to the Government before filing an action under this section which is based on the information," rather than before the Government filed an action.[FN44] This final version, which Congress adopted, barred a *qui tam* action based upon allegations or transactions publicly disclosed in certain Government proceedings or the news media, unless the person bringing the suit was an original source of the information on which the allegations in his own complaint were based, as Congress had defined that term.[FN45]

FN44. 132 Cong. Rec. 28533 (1986).

FN45. Pub. L. No. 99-562, 100 Stat. 3153 (1986).

***16** II. THE PUBLIC DISCLOSURE BAR PROVIDES A LIMITED FILTER TO PRECLUDE *QUI TAM* ACTIONS THAT ARE BASED UPON SPECIFIC FRAUD ALLEGATIONS ALREADY AVAILABLE TO THE GOVERNMENT IN ITS OWN PROCEEDINGS AND INVESTIGATIONS OR THROUGH THE NEWS MEDIA.

As the history of the public disclosure bar demonstrates, Congress intended this provision to serve a narrow purpose, and the original source exception was intended to make the bar more narrow still. If a *qui tam* suit is not parasitic, nothing in the Act, its legislative history, or the policies underlying it suggest that Congress had any interest in precluding it. The complex requirements that have been grafted onto this simple concept create a landscape of hidden pitfalls that can disqualify relators whose suits are clearly not parasitic, based on so-called "public disclosures" of which neither the relators nor the Government were, or could even reasonably be expected to be, aware. Such harsh and unjust results serve only to discourage relators with meritorious cases from taking the risk of coming forward, which is precisely the opposite of the statute's purpose.

A. The Public Disclosure Bar Has no Application When the Government Joins the Case.

Because the public disclosure bar is intended to protect the Government's interest, the bar has never had any application to a *qui tam* action that the Government joins and decides to pursue on its merits. From its inception, the 1986 public disclosure bar was intended to arise only when the Government did not proceed with the case.[FN46] The final version of the public

disclosure bar enacted into law expressly provides that the bar does not apply if the Attorney ***17** General brings the case, as occurs when the Attorney General elects to join and proceed with a *qui tam* action.[FN47]

FN46. *See supra* at 13-14, discussing S. 1562, 99th Cong., 2d Sess. (1986).

FN47. *See* 31 U.S.C. § 3730(e)(4); *see also* 31 U.S.C. § 3730(b)(4)(A) (providing that when the Government elects to proceed "the action shall be conducted by the Government"). Similarly, the 1943 Government knowledge bar came into play only if the Government declined the case. *See* Act of December 23, 1943, ch. 377, 57 Stat. 608. *See also* *United States v. Pittman*, 151 F.2d 851 (5th Cir. 1945) (holding that the 1943 bar did not apply when the Government pursued the case), *cert. denied*, 328 U.S. 843 (1946).

Nothing in the text of the False Claims Act or its legislative history suggests that the public disclosure bar was ever intended to aid defendants in dismissing a *qui tam* relator from a case that the Government had joined and was pursuing on its merits. Under those circumstances, dismissing a relator at the defendant's request would serve only to deprive the Government of resources to assist it in pursuing the case, contrary to the purposes of the Act. To the extent the Government has concerns about the relator's participation or contribution to the case, the statute provides other ways for the Government to address those concerns.[FN48]

FN48. *See, e.g.*, 31 U.S.C. § 3730(d) (providing courts discretion in making awards based upon the contribution of the relator); 31 U.S.C. § 3730(c)(2)(A) (authorizing the Government to dismiss action); 31 U.S.C. § 3730(d) (authorizing reduced relator's reward where *qui tam* complaint is based primarily on publicly disclosed information).

B. The Public Disclosure Bar Precludes Only Parasitic Suits.

The public disclosure bar was intended only to bar certain parasitic suits that did not contribute to the Government's knowledge about, and ability to pursue, claims against a ***18** particular defendant.[FN49] For this reason, Congress limited the bar to situations in which a relator's complaint is based upon allegations or transactions that have been disclosed in a limited set of Government proceedings or the news media, where public disclosure of fraud allegations or transactions would mean that the federal Government and the general public were aware of the allegations.[FN50] There is no reason to assume that disclosures of fraud allegations in local government proceedings,[FN51] private lawsuits,[FN52] or other types of proceedings not listed in the statute make the federal Government aware of the fraud allegations and put it in a position to pursue them. Congress did not list those types of proceedings in the public disclosure bar because they were not relevant to the purpose of the section. Applying the public disclosure bar to these types of disclosures would expand the public disclosure bar even beyond the broad "Government knowledge bar" that Congress sought to replace.

FN49. 145 Cong. Rec. 16025, 16031

(1999) (reprinting letter from Rep. Berman and Sen. Grassley to Attorney General Reno).

FN50. *See* 31 U.S.C. § 3730(e)(4)(A).

FN51. *See, e.g.*, *A-1 Ambulance Service, Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir.), *cert. denied*, 529 U.S. 1099 (2000).

FN52. *See, e.g.*, *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326 (6th Cir. 1998).

Similarly, the primary fraud-fighting objective of the Act must be considered when determining whether a relevant "public disclosure" of "allegations or transactions" involving False Claims Act violations exists. To remain consistent with that purpose, the benchmark for determining whether one or more public "disclosure(s)" warrant invocation of the statutory bar must be whether such disclosures provide sufficient indication of fraud so that the Government and the general public reasonably can be expected to have been ***19** alerted to the need for the Government to investigate specific conduct or transactions. Barring *qui tam* suits based on any public disclosure that fails to meet this minimum standard of disclosure defeats rather than serves the overriding interest of the United States in effectively combating fraud.

Thus, for example, mere awareness on the part of the Government that a particular type of fraud occurs, without information that a specific defendant engaged in that conduct, does not put the Government in a position to pursue a case. The Government is well aware that practices such as overbilling, or failure to test, do occur in certain industries. It is unrealistic to conclude, however, that awareness that a general practice occurs means the Government is aware of fraud by a particular defendant and is in a position to pursue it.[FN53]

FN53. False Claims Act Implementation: Hearing Bef. the Subcomm. on Admin. Law and Government Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 6 (1990) ("The publication of general, non-specific information does not necessarily lead to the discovery of specific, individual fraud which is the target of the *qui tam* action.") (statement of Sen. Grassley).

When a public disclosure occurs in one of the fora enumerated in the Act, specific allegations of fraud committed by identifiable wrongdoers obviously provide the level of notice necessary to alert the Government and spur it to action. Determining whether exposure of bits and pieces of information about "transactions" suffices to trigger the Act's public disclosure bar must begin with consideration of the extent to which the "disclosure(s)" at issue actually can be expected to have provided the kind of alert needed to effectively combat fraud. As the D.C. Circuit correctly noted, pieces of information about a defendant and some of its actions, even when publicly disclosed, rarely add up to an allegation of fraud. There must be "enough information … ***20** in the public domain to expose the fraudulent transaction."[FN54] This analysis, however, cannot always be reduced

to a simple, formulaic inquiry. Even if all the critical elements of the fraud or the fraudulent transaction appear somewhere in the public domain, if the information needed to piece together a discernible picture of actionable fraud must be gathered from several places, it may be unrealistic to assume that the Government is aware or likely to become aware of the apparent fraud. The issue remains whether clear enough indications or allegations of fraud were disclosed in one of the ways Congress specified in the Act so that the Government can proceed with the case if it wants, or be held accountable if it does not. A relator who collects and analyzes dispersed public information and brings an otherwise unrecognized fraudulent transaction to light is not a parasite. Congress intended to encourage such persons to bring the fruits of their labor to the Government's attention.[FN55]

FN54. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994).

FN55. *See United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) (observing that "to a certain degree, Congress wanted to encourage busybodies who, through independent efforts, assist the government in ferreting out fraud").

C. The Original Source Exception Prevents the Public Disclosure Bar from Excluding Persons Who Brought to the Government Their Own Information That Was Independent of the Public Disclosure.

The original source exception to the public disclosure bar serves a very limited function under the False Claims Act. Like the relator in *Wisconsin v. Dean*, some relators whose complaints are based on allegations or transactions of fraud that have been publicly disclosed are not parasites. A person's disclosure of information to the Government could itself result in a public disclosure, as, for example, when a criminal ***21** indictment was the result of the relator's information. A leak to the press about a Government investigation based on information provided by a relator could also result in a public disclosure. Under these circumstances, Congress did not want the relator to be barred from bringing a *qui tam* case.[FN56] Such relators are precisely the types of individuals the Government should reward.

FN56. 145 Cong. Rec. 16025, 16031 (1999) (reprinting letter of Rep. Berman and Sen. Grassley to Attorney General Reno).

Congress expressly decided not to limit the original source exception to persons whose information led to the particular public disclosure.[FN57] Congress adopted a specific definition of "original source" that requires only that the information upon which the relator bases the allegations in his or her complaint be provided to the Government before the relator files suit.[FN58] The reason Congress required no more is clear. If before filing suit, the relator provides to the Government direct information about the allegations in his complaint that is independent of the publicly disclosed allegations, that suffices to demonstrate that the person's *qui tam* action is not parasitic. Such a case does not implicate the concerns underlying the public disclosure bar, even

though the complaint involves publicly disclosed allegations or transactions of fraud. Congress also recognized that in some cases this could potentially result in a relator proceeding in a case that was based only in small part on his or her own information. The statute addresses this concern as well, by permitting a lesser reward when the action is primarily based on publicly disclosed allegations or transactions of fraud.[FN59]

FN57. *See, e.g.*, *United States ex rel. Longstaffe v. Litton Industries, Inc.*, 296 F. Supp. 2d 1187 (C.D. Cal. 2003) (requiring relator to be the source of the disclosure).

FN58. 31 U.S.C. § 3730(e)(4)(B) (requiring that information be provided to the Government "before filing an action" based on the information).

FN59. 31 U.S.C. § 3730(d).

***22** Because the original source requirement serves the narrow function of ensuring that persons who bring their own information to the Government before filing suit are not improperly filtered out by the public disclosure bar, as they were under the 1943 version of the law, no stringent requirements are necessary to qualify as an original source. There is no need for a person to have seen the fraud with his or her own eyes or to have received no information from other people or sources. Someone who sees a fraudulent transaction take place has direct and independent knowledge of the fraud, but that is not the only way such knowledge may be obtained. For example, a relator who learns of false claims by gathering and comparing data could have direct and independent knowledge of the fraud, regardless of his or her status as a percipient witness to the fraud and regardless of whether some of the information was filtered through other people. The purpose of the original source inquiry is simply to confirm that the person's complaint, which was based on publicly disclosed allegations or transactions of fraud, was not in fact parasitic because the person had his or her own information about the fraud that was not dependent upon the public disclosure. Congress had no interest in preventing persons with their own information about fraud from assisting the Government in its efforts to pursue that fraud.

CONCLUSION

The False Claims Act balances the need for information with concerns about opportunistic behavior, but the 1986 amendments did not assign equal weight to those interests. The overriding purpose of the Act is to enlist the information and resources of the public to assist the Government in pursuing fraud. The 1986 Amendments have been highly effective in achieving those goals.

As Congress recognized in 1986, "[t]he Federal Government has a big job on its hands as it attempts to ensure the integrity of the nearly $1 trillion we spend each year on various programs and procurement. That job is simply too big ***23** if Government officials are working alone."[FN60] Reading the public disclosure bar too broadly, and the original source exception too narrowly, undermines the central purpose of the *qui tam* provisions of the Act.

FN60. 132 Cong. Rec. 20535 (Aug. 11, 1986) (statement of Sen. Grassley).

Where the Government joins a *qui tam* case, no jurisdictional bar based on potential public disclosure can apply. The Act provides other tools to protect the Government's interests in cases in which it intervenes despite potential public disclosures. In a non-intervened case, once a court has found that the complaint is based upon allegations or transactions of fraud disclosed in one of the ways enumerated in the statute (and is therefore potentially parasitic), the only issue is whether the person brought supporting information, about which he or she had direct knowledge independent of the public disclosure, to the Government before filing the case. A person who merely copied an indictment or a government report would not have such direct and independent knowledge. If the person did have direct information about fraud independent of the public disclosure, then the goal underlying the public disclosure bar, precluding parasitic suits, is not implicated and Congress had no interest in barring the suit.

U.S.,2006.
Rockwell International Corp. v. United States of America
2006 WL 3381296 (U.S.)

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