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

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

v. — CASE NO. 1:06cv433-LTS-RHW

STATE FARM MUTUAL INSURANCE COMPANY — DEFENDANT/COUNTER-PLAINTIFF

and

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

**STATE FARM FIRE AND CASUALTY COMPANY'S**
**REBUTTAL IN SUPPORT OF ITS**
**[98] MOTION TO DISMISS THE AMENDED COMPLAINT UNDER**
**FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6) AND 9(b)**


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## INTRODUCTION

A unanimous Supreme Court has made clear that "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). *Qui tam* relators are thus more likely to cling tenaciously to an action "that involve[s] no harm to the public fisc." *Id.* As the cases cited in State Farm's opening brief illustrate, "Rule 9(b) ensures that the relator's strong financial incentive to bring an FCA claim . . . does not precipitate the filing of frivolous suits." *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006). To accomplish this goal, Rule 9(b) is applied "with force, without apology." *Williams v. WMX Techs. Inc.*, 112 F.3d 175, 178 (5th Cir. 1997).

In this case, the Rigsbys spend the bulk of their Opposition arguing that the Court should evaluate their First Amended Complaint ("FAC") under a "relaxed" Rule 9(b) standard. Their argument is based on two false – and contradictory – assertions. First, the Rigsbys claim that they "do not need specific instances of false claims to satisfy Rule 9(b)" because the FAC was ostensibly based on "their eyewitness accounts." ([224] at 18.) However, the Rigsbys "cannot cure the deficiencies of their complaint simply by declaring that they have 'personal knowledge' of the defendants' fraud[]." *Barys v. Vitas Healthcare Corp.*, No. 04-21431-CIV, 2007 WL 2310862, at *7 (S.D. Fla. July 25, 2007).

Second, the Rigsbys contend that a "relaxed" standard is warranted because "many of the facts at issue are exclusively within State Farm's knowledge." ([224] at 13.) But this is not a case where facts are peculiarly within the defendant's knowledge. To the contrary, the Rigsbys allege that "they have been *personally* pressured . . . to change claims payments." ([16] at ¶ 27) (emphasis added). *Yet they never identify who pressured them, what properties were involved, how they were allegedly pressured, or when and where this occurred.*

Most importantly, the Rigsbys never plead that (i) they did, in fact, change a single claim payment from wind damage to flood damage because of any putative "pressure," (ii) the resulting flood damage claim was false, or (iii) State Farm submitted it for payment to the government. The Rigsbys' failure to plead these and other specific facts that they claim to have been personally involved in or "saw [] happening while they were managing State Farm claims adjusters" ([224] at 16) mandates dismissal

of this case. *See United States ex rel. Lacorte v. SmithKline Beecham Clinical Labs., Inc.*, No. CIV. A. 96-1380, 2000 WL 17838, at *4 (E.D. La. Jan. 10, 2000) (Vance, J.) (dismissing claims for failure to comply with Rule 9(b) because doctor-relator failed to allege particularized facts regarding false tests allegedly performed on his patients).

The Rigsbys' utter failure to allege a single instance of a false flood claim with anything even approaching specificity is particularly damning in this case because the Rigsbys allegedly spent *months* furtively combing through State Farm's files in an all-out effort to find "evidence of fraud on the federal government." ([16] at ¶ 30.) Yet the *only* properties that the Rigsbys identified are: (i) the Mullins property, *which did not even have flood insurance*; (ii) the Vela property, *where the Rigsbys admit that "fraud was not committed*" ([224] at 8); and (iii) the McIntosh property, *which indisputably sustained substantial flood damage as evidenced by a five and a half-foot interior watermark line*. Although the Rigsbys contend that the McIntosh claim is their clearest instance of alleged flood fraud, the Rigsbys still do not plead a single fact demonstrating that the adjustment of the McIntosh flood claim resulted in an overcharge to the federal government or the submission of a false claim.

Notably, even under Rule 8's far more deferential notice pleading standard, where, as here, the "[c]omplaint omits facts concerning pivotal elements of the pleaders' claim, the court is justified in assuming the nonexistence of such facts." *Ledesma ex rel. Ledesma v. Dillard Dep't Stores, Inc.*, 818 F. Supp. 983, 984 (N.D. Tex. 1993) (dismissing claim under Rule 12(b)(6)); *accord Nowell v. Conner*, No. Civ.A.2:05-CV-218-J, 2006 WL 36860, at *2 (N.D. Tex. Jan. 5, 2006).[1] Here, the Rigsbys have been given every opportunity to identify and plead a false claim. They have not and cannot. Accordingly, the Rigsbys' FAC should be dismissed with prejudice and – given their failure to show how their complaint could be amended to save their meritless claim – without leave to replead.

[1] *See also Gen. Cable Indus. v. Zurn Pex, Inc.*, 561 F. Supp. 2d 653, 658 (E.D. Tex. 2006) (dismissing claim under Rule 12(b) and explaining that "'[w]hen a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist'") (quoting *McGregor v. Indus. Excess Landfill, Inc*., 856 F.2d 39, 43 (6th Cir. 1988)).

## REBUTTAL ARGUMENT

### I. THE RIGSBYS' OPPPOSITION CONFIRMS THAT THEY HAVE NOT COMPLIED WITH RULE 9(b)

#### A. The Rigsbys Rely on a Legal Standard That Has Been Overruled

The Rigsbys claim that the Court must not dismiss their complaint "'unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim.'" ([223] at 11) (citation omitted). This standard was repudiated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). The Court explained that under Rule 8, it is not enough to plead a "conceivable" claim. Rather, a plaintiff must plead "enough *facts* to state a claim to relief that is *plausible* on its face." *Id.* (emphasis added). The Court indicated that it is particularly important to insist on plausibility when evaluating the bona fides of a complaint that is likely to produce "sprawling, costly, and hugely time-consuming" litigation. *Id.* at 1967 n.6. *Twombly* further underscored that where, as here, Rule 9(b) applies, "a plaintiff must state factual allegations with greater particularity" in order to ameliorate the "high risk of abusive litigation." *Id.* at 1973 n.14 (citing Fed. R. Civ. P. 9(b)-(c)). The Rigsbys' allegation of federal flood fraud – based on the adjustments of the Mullins property, which did not even have flood insurance, and the McIntosh property, which indisputably sustained massive flood damage – flunks the plausibility test.

#### B. The Rigsbys Do Not Plead Facts of Which They Claim to Have Personal Knowledge

The Rigsbys' Opposition confirms that they base their entire False Claims Act ("FCA") claim on vague, factually unsubstantiated assertions that State Farm engaged in a broad scheme to shift wind damage to flood coverage. In doing so, the Rigsbys merely cite portions of the FAC that describe a general process by which a false NFIP claim *could* be submitted to the government. But they do not, *because they cannot*, cite to any allegations in the FAC that provide even the most basic specifics. For instance, the Rigsbys claim that "they were told that if their initial analysis of a claim found that the damage was below the flood policy's limits, then they should readjust the claim until they hit the limits." ([224] at 17-18.) Yet the Rigsbys fail to identify the basic details about these alleged instructions to "hit the limits," such as *what* properties were involved, *when* and *where* this occurred, *whether* they or

anyone else did, in fact, readjust even one flood claim, and *how* such a revised flood damage claim was false or resulted in a false claim for payment to the government.

The Rigsbys' contention that they heard Lecky King tell other unidentified claims adjusters to "hit the limits" is similarly deficient under Rule 9(b). Indeed, the Court and State Farm are left to guess *who* these unidentified claims adjusters were, *what* properties were at issue, *where* and *when* the statements were made, and *how* such an instruction resulted in a false claim to the government.

The Rigsbys similarly point to their contention that "King also tried to intimidate and coerce engineers and adjusters" to change reports. ([224] at 7.) But the FAC does not allege *what* King did, *which* engineers were "intimidated," *what* properties were involved, *when* and *where* this occurred, *why* the report was changed (or not), and *how* this constituted a fraudulent claim on the government. This failure to link any alleged "intimidation" with a single false claim is particularly troubling given that the Rigsbys (falsely) claim that State Farm cancelled the engineering reports because many of the engineering firms were *not* "intimidated" and did not "follow the Haag Engineering Report." ([*Id.*].)

In fact, the Rigsbys' allegations regarding their two "specific instances of false claims" demonstrate conclusively that they have *not* complied with Rule 9(b). Regarding the Vela claim – which the Rigsbys have apparently substituted for the Mullins claim as a "specific instance" after State Farm demonstrated that the Mullins property was not even covered by flood insurance – the Rigsbys ***admit that "fraud was not committed."*** ([224] at 8) (emphasis added). Instead, they speculate that State Farm *might* have submitted false flood claims for some of Ms. Vela's neighbors. But the Rigsbys do not identify a single neighbor and admit that they have no idea which of Ms. Vela's unnamed neighbors, if any, even had flood insurance, let alone flood insurance issued and adjusted by State Farm.

The Rigsbys also do not plead a single fact demonstrating that State Farm's adjustment of the McIntosh flood claim resulted in an overcharge to the federal government or the submission of a false claim. Rather, they merely allege that State Farm ordered a second engineering report, and describe the two reports as being "completely contrary." ([16] at ¶ 70.) Despite their erroneous characterization, the two reports are largely consistent and at least partially identical. Crucially, the first report, dated October 12, 2005 – which the Rigsbys advance as the correct report – expressly notes that "[t]he home is

on a waterfront lot" and the observable "watermark line in the house is approximately *five and one-half feet above the main floor interior flooring*." (Oct. 12. Report at 2 (emphasis added).)[2] The FAC does not even attempt to explain how State Farm's payment of a flood claim on a property that sustained devastating flood damage can constitute a false flood claim.

Faced with similarly vague allegations of fraud, courts in this and other circuits have consistently dismissed *qui tam* complaints for failure to comply with Rule 9(b). For instance, in *Lacorte*, relator was a physician who treated patients at healthcare facilities throughout New Orleans. He claimed that the defendant medical laboratory, SBCL, performed unordered and medically unnecessary urinalyses on patients in these facilities and improperly billed Medicare for them in violation of the FCA. Judge Vance dismissed relator's claim with prejudice, explaining:

> In the complaint, plaintiff states that he observed instances of SBCL's fraudulent testing and billing practices over a seven-year period while treating patients at several nursing homes . . . . However, he has failed to identify a single specific occasion when SBCL performed an unauthorized urinalysis test.
>
> This is not a case where the facts are peculiarly within the defendant's knowledge. Plaintiff alleges that SBCL performed urinalysis tests on *his* patients which *he* did not order. Nevertheless, he fails to identify a single fraudulent urinalysis test that was unordered or unauthorized, a single date on which such testing was performed, or a single patient on whom such a test was performed.

*Lacorte*, 2000 WL 17838, at *4 (emphasis in original) (citing *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (dismissing claims for failure to plead fraud with specificity where plaintiff did not identify any specific physicians who made referrals or any specific claims for medically unnecessary services)).

In *United States ex rel. Marlar v. BWXT Y-12, L.L.C.*, 525 F.3d 439 (6th Cir. 2008), relator – a nurse practitioner who worked at defendant's facility – alleged that managers pressured medical personnel to underreport work-related injuries in order to be paid by the government at a higher rate. *Id.*

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[2] This observation is wholly consistent with the conclusion in the October 20, 2005 report that "[t]he damage to the first floor walls and floors appears to be predominantly caused by rising water from the storm surge and waves." (Oct. 20 Report at 3.) Copies of the October 12 and October 20 Reports – which are extensively (but selectively) quoted in the FAC and are thus properly considered on a motion to dismiss – are attached hereto as Exhibits 1 and 2, respectively. *See United States ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 379 (5th Cir. 2003) ("In deciding a motion to dismiss [a FCA case] the court may consider documents attached to or incorporated in the complaint . . . .")

at 442-43. The Sixth Circuit held that the district court properly dismissed the complaint because the relator did not plead "concrete facts, rather than inferences based '[o]n information and belief.'" *Id.* at 446. The court was especially critical of relator's failure to specifically plead facts that were within her personal knowledge:

> Indeed, worse yet, she has even failed to plead with specificity the allegations of which she allegedly has personal knowledge; she has not identified any of the patients whose medical records were allegedly incomplete, ***nor has she identified any of the non-medical, safety employees who were allegedly pressuring the medical employees to falsify medical records.***

*Id.* (emphasis added).

Similarly, in *United States ex rel. Joshi v. St. Luke's Hospital, Inc.*, 441 F.3d 552 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 189 (Oct. 2, 2006), relator, Dr. Joshi, was an anesthesiologist who claimed that the hospital at which he worked and a supervising physician, Dr. Bashiti, defrauded Medicaid and Medicare by billing certified registered nurse anesthetists ("CRNAs") at a higher reimbursement rate and billing for unnecessary medication. Although relator claimed to have personally witnessed this practice on many different occasions, the Eighth Circuit held that the district court properly dismissed the complaint under Rule 9(b) because of the complaint's failure to specify the particulars, such as:

> (1) the particular CRNAs who allegedly performed patient care and administered anesthesia services unsupervised, (2) when Dr. Bashiti falsely claimed to have supervised or directed CRNAs, (3) who was involved in the fraudulent billing aspect of the conspiracy, (4) what services were provided and to which patients the services were provided, (5) what the content was of the fraudulent claims, (6) what supplies or prescriptions were fraudulently billed and to which patients the supplies or prescriptions were provided, (7) what dates the defendants allegedly submitted the false claims to the government, (8) what monies were fraudulently obtained as a result of any transaction, or (9) how Dr. Joshi, an anesthesiologist, learned of the alleged fraudulent claims and their submission for payment.

*Id.* at 556; *see also United States ex rel. Willis v. Hughes Aircraft Co.*, 3:93-cv-693-WHB (S.D. Miss. Feb. 5, 1998) (Barbour, J.) (dismissing claims of former employee at defense contractor for failure to comply with Rule 9(b) where relator claimed to have inside knowledge that contractor sold U.S. Navy defective torpedoes, but failed to specify how this resulted in false claim).[3]

[3] A copy of Judge Barbour's opinion in *Willis* is attached hereto as Exhibit 3.

Relying primarily on the Eleventh Circuit's decision in *United States ex rel. Walker v. R&F Properties of Lake County, Inc.*, 433 F.3d 1349 (11th Cir. 2005), *cert. denied*, 127 S. Ct. 554 (Nov. 6, 2006), the Rigsbys argue that they "do not need to provide specific instances of false claims [because they] directly experienced the alleged fraud while being employed by the defendants." ([224] at 16.) The Rigsbys are improperly seeking to apply a gloss that *Walker* does not support. As the *Barys* court explained in rejecting this precise argument:

> [P]laintiffs cannot cure the deficiencies of their complaint simply by declaring that they have "personal knowledge" of the defendants' fraudulent re-certification and submission practices. Without factual support, such a general and conclusory statement does not provide the plaintiffs with an automatic ticket to discovery. The "clear intent of Rule 9(b) is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed." ***The weight of a plaintiff's "firsthand knowledge" must be determined in light of the facts provided elsewhere in the complaint.***

*Barys v. Vitas Healthcare Corp.*, No. 04-21431-CIV, 2007 WL 2310862, at *7 (S.D. Fla. July 25, 2007) (citation omitted; emphasis added); *see also Marlar*, 525 F.3d at 446-47 (relator's allegation that her former employer was defrauding the government failed to comply with Rule 9(b); contrasting the "concrete factual allegations" in *Walker*).[4]

The Rigsbys are also quite wrong when they claim that *Walker* renders State Farm's reliance on *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301 (11th Cir. 2002), and *United States ex rel. Karvelas v. Melrose-Wakefield Hospital*, 360 F.3d 220, 226 (1st Cir. 2004), "misplaced" because "Relators were corporate insiders like the relator in *Walker*." ([224] at 17 n.9.) The holdings in *Clausen* and *Karvelas* – that a *qui tam* relator is not permitted to use discovery to supplement pleadings that do not otherwise strictly comply with Rule 9(b) – apply to claims brought by "insiders" like the Rigsbys. For instance, in *Joshi*, the Eighth Circuit quoted extensively from *Karvelas* and *Clausen* and held that the district court properly refused to permit the relator – who worked for the

[4] In *Walker*, relator, a nurse practitioner, had "firsthand knowledge" of the defendant healthcare facility's allegedly improper Medicare billing practices because she billed her services under a physician's number throughout her employment and did not even have her own billing code (which would have been a necessary requirement under the Medicare law). *Walker*, 433 F.3d at 1353-54. The defendant readily *admitted* that it instructed the nurses to bill under a physician's number, but challenged the assertion that using this practice violated the Medicare laws. *Id.* On these facts, the Eleventh Circuit permitted an inference that false claims that the nurse billed were actually submitted to the government. *Id.* at 1360.

defendant – to bolster his claim through discovery or to apply a "relaxed" pleading standard. *Joshi*, 441 F.3d at 559-60.

Similarly, in *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350 (11th Cir. 2006) – a case brought by a former employee – the Eleventh Circuit reaffirmed its previous decision in *Clausen*, explaining that "'[t]he particularity requirement of Rule 9 is a nullity if Plaintiff gets a ticket to the discovery process without identifying a single claim.'" *Id.* at 1359 (citation omitted). The court cautioned that:

> [i]f given such a ticket, the next stage of [the] litigation is clear. The Plaintiff will request production of every . . . claim submitted by the Defendant [during the time period corresponding to Plaintiff's claims]. . . . The particularity requirement of Rule 9(b), if enforced, will not only protect defendants against strike suits, but will result in claims with discernable boundaries and manageable discovery limits.

*Id.* at 1359-60 (first alteration in original; citation omitted). So, too, here.

**C. The Law Does Not Entitle the Rigsbys to a "Relaxed" Pleading Standard**

The Rigsbys further argue that the Court should "relax" Rule 9(b)'s particularity requirements supposedly because (i) "the facts at issue are exclusively within State Farm's knowledge" and (ii) "Relators allege a complicated scheme by State Farm." ([224] at 12-13.) As a threshold matter, the Fifth Circuit has sternly admonished that this exception to Rule 9(b)'s requirements "'must not be mistaken for a license to base claims of fraud on speculation and conclusory allegations.'" *Thompson*, 125 F.3d at 903 (citation omitted). Even where Rule 9(b)'s requirements are relaxed with respect to an *element* of the claim and the allegations are based on information and belief, the complaint must still set forth a factual basis for the belief. *Id.*

Moreover, there is no basis for relaxing the Rule 9(b) pleading requirement here. This is not a case where facts are peculiarly within the defendant's knowledge. To the contrary, the very first sentence of the Rigsbys' Opposition states that their "allegations are based on their eyewitness observation and direct knowledge obtained as insiders at State Farm." ([224] at 1.) The Rigsbys further claim that they "*know* that State Farm defrauded the government because they saw it happening while they were managing State Farm claims adjusters." ([224] at 16) (emphasis in original). They also claim they "are quintessential whistleblowers *with direct and independent knowledge* . . . of State Farm's

fraud." ([223] at 1) (emphasis added). And the Rigsbys allege that they spent months searching through State Farm's files and databases collecting "evidence of fraud on the federal government." ([16] at ¶ 30.)

In *United States ex rel. Lam v. Tenet Healthcare Corp*., 481 F. Supp. 2d 673 (W.D. Tex. 2006), the court found that relators were not entitled to a relaxed pleading standard under Rule 9(b) because they were company "insiders" who had access to information upon which their claims depended. *Id.* at 688. And as noted above, in *Lacorte*, the court refused to relax the pleading standard because relator failed to plead facts regarding testing done on *his* patients. *See Lacorte*, 2000 WL 17838, at *4.

The Fifth Circuit also refused to relax the pleading requirements in *Sealed Appellant I v. Sealed Appellee I*, 156 F. App'x 630 (5th Cir. 2005). There, the relator argued that he was entitled to a relaxed Rule 9(b) standard because his former employer locked him out of his office after he fired him, thus preventing him from taking the evidence that he had gathered of the employer's alleged fraud. *Id.* at 634. The Fifth Circuit rejected the relator's assertion, explaining that "it defies credulity that he is unable to identify any details of a single false claim submitted to the government." *Id.* The court further admonished that "a plaintiff is not entitled to the relaxed standard where the information is available from another source or where the defendant fails to allege a factual basis for his beliefs." *Id.*

Here, the only alleged "fact" that the Rigsbys contend is uniquely within State Farm's control is "how many duplicate engineering reports were kept under lock and key by Lecky King and Richard Moore." ([224] at 3.) But they most assuredly do not need this information to plead facts establishing that "they have been *personally* pressured . . . to change claims payments." ([16] at ¶ 27) (emphasis added). Moreover, in an effort to transform into a smoking gun the unexceptional fact that Lecky King kept certain *duplicate* engineering reports in a locked file drawer, the Rigsbys fundamentally misrepresent the contents of an innocuous staff e-mail as "instructing . . . that *original* engineering reports were to be kept under lock and key and accessible only by King and Moore." ([224] at 8) (emphasis added) (citing [16] at ¶ 79). Read in its entirety, the e-mail states:

> When we get two copies of any Engineer Report, please give one to the [claims representative] for the file copy. Pay the bill and then return the 2nd to me for safe keeping. These will be kept in a locked file drawer and either Rick or I will have the key.

(Oct. 21, 2005 E-mail (Exhibit 4.) In other words, the only thing "kept under lock and key" was duplicative of what was also part of the claim files that the Rigsbys allege they spent months searching.

Nor is this a "case[] involving complex and numerous allegations of fraud occurring over an extended period of time." *See Lacorte*, 2000 WL 17838, at *3. The alleged fraudulent scheme – the shifting and misallocation of damage from homeowners policies to flood policies – is simple, not complex. Moreover, the Rigsbys only worked on Katrina claims for ten months, and they allege that one person, Lecky King, directed *all* of the fraudulent activity. ([16] at ¶ 26.)

Moreover, even if this presumption were applicable (which it is not), it would still not save the Rigsbys' claims. "Where a complaint alleges a 'complex and far-reaching fraudulent scheme,' then that scheme must be pleaded with particularity and the complaint must also 'provide[] examples of specific' fraudulent conduct that are 'representative samples' of the scheme." *Marlar*, 525 F.3d at 444-45 (citation omitted; alteration in original). Here, the Rigsbys have neither pled a fraudulent scheme with particularity nor provided representative examples of any flood fraud.

## II. THE RIGSBYS' NUMEROUS AND EGREGIOUS SEAL VIOLATIONS JUSTIFY DISMISSAL

### A. The Rigsbys Tellingly Do Not Deny Knowledge and Approval of the Seal Violations

Facing potential dismissal and possible sanctions for egregious seal violations, any reasonable person – *if she could do so truthfully* – would vehemently deny having authorized and participated in such misconduct. The fact that the Rigsbys have offered no such denial – *let alone any admissible evidence disputing their involvement* – is a glaring, implicit admission of their personal complicity.[5]

[5] While the Rigsbys carefully state that "[t]here is no ***allegation*** that Relators themselves had any knowledge of any violation or any malice or bad faith in connection therewith[,]" ([224] at 32) (emphasis added), they do not even once deny actual knowledge and approval of the violations uncovered by State Farm. Regardless, under Fifth Circuit precedent, the Rigsbys are bound by their former counsel's actions whether they pre-approved them or not:

> There is no question, however, that a party is bound by the acts of his attorney. "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the *defendant[s]*."

*Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1418 (5th Cir. 1995) (alterations in original; footnotes omitted) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632-34 (1962) ("Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent")).

Thus, the Rigsbys' argument that "the appropriate sanction for the violations, if any, was the disqualification of the Scruggs Law Firm" ([*id.*]) misses the mark on at least two counts. First, the seal violations were not known to the Court at the time of the SKG disqualification; therefore, the disqualification was necessarily not punishment for *this* misconduct. Second, *the Rigsbys* have not suffered any consequences for *their* numerous and egregious violations of the FCA and this Court's Seal Order. Dismissal is the only remedy that will serve the ends of justice.

### B. Dismissal Is the Appropriate Remedy for the Rigsbys' Repeated Violations

Having not once denied their personal approval of and complicity in the calculated campaign of strategic seal violations, the Rigsbys argue that "[n]o provision of the [FCA] explicitly authorizes dismissal for seal violations." ([224] at 28-29.) This statutory fact is irrelevant. Although the FCA does not explicitly address the appropriate sanction for such violations, the Fifth Circuit has held that:

> federal courts are vested with the inherent power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." This power is necessarily incident to the judicial power granted under Article III of the Constitution. This includes the power of the court to control its docket by dismissing a case as a sanction for a party's failure to obey court orders.

*Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1417 (5th Cir. 1995) (citation omitted).

### C. *Lujan* Does Not Control, But Dismissal Would Be Justified in Any Event

Apparently conceding the Court's inherent authority to dismiss, the Rigsbys next argue that "[a] court must consider" the three *Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995), factors "in deciding whether dismissal is warranted." ([224] at 28-29.) They then posit that dismissal is not justified under *Lujan* because the government was supposedly not harmed by their strategic leaking.[6] The primary response to this argument is simple: the Ninth Circuit's permissive *Lujan* test has not been adopted by any other circuit,[7] including the Fifth Circuit, and *Woodson* contains no "government harm"

[6] The Rigsbys' outrageous assertions that "State Farm . . . had already begun shredding documents and spoliating evidence before the Relators filed their complaint" and that "State Farm directed Relators and other employees to shred materials in conflict" ([224] at 29) are yet further examples where the Rigsbys made false allegations that are contrary to their own sworn testimony. For example, Kerri Rigsby has admitted that she has no such evidence. *See* (11/20/07 *McIntosh* K. Rigsby Dep. at 509:19-510:18).

[7] *Cf. United States ex rel. Le Blanc v. ITT Indus., Inc.*, 492 F. Supp. 2d 303, 308 (S.D.N.Y. 2007) (noting that it is not clear that other circuits would adopt the *Lujan* test, stating "*even if* the Second Circuit were to adopt this same [*Lujan*] balancing test for a relator who violates the seal in a *qui tam* case") (emphasis added).

condition precedent for dismissal. Nonetheless, dismissal is warranted even under *Lujan*, which focuses on: (1) whether the government was harmed by the disclosure; (2) the nature and severity of the violation; and (3) the presence or absence of bad faith or willfulness. *Lujan*, 67 F.3d at 245-46.

Harm to the Government. In *Lujan*, the relator disclosed only the general nature of the FCA suit to the media. *Id.* at 246. In stark contrast, the Rigsbys and their then-counsel unlawfully, *repeatedly*, and manipulatively disclosed the actual sealed evidentiary disclosure and pleadings in this action to major news organizations in this country – ABC News, the Associated Press, the New York Times and CBS News – up to a year before this Court lifted the seal.[8] ([203] at 4-7.) These disclosures began[9] as early as August 8, 2006, when, in violation of the seal, Scruggs's assistant e-mailed the Rigsbys' Evidentiary Disclosure to Joe Rhee at ABC News – apparently for him to use as background information in advance of the Rigsbys' then-upcoming *20/20* story. Just days later, on August 25, 2006, ABC News aired its *20/20* story featuring the Rigsbys, which aired allegations against State Farm substantively identical to those raised in the then-sealed *qui tam* Complaint and Evidentiary Disclosure. ([203] at 4-5.) The Rigsbys further secretly leaked information about this action to Congressman Taylor in advance of a congressional hearing on February 28, 2007 – five months *before* the seal was lifted. ([94] at 23-25.)

While the Rigsbys' allegations against State Farm are baseless, the multiple public outings of the Rigsbys' theory harmed the government by depriving it of the opportunity to consider intervention in this matter (or the declination of same) without publicity and potential public pressure generated by the Rigsbys' false allegations. Further, when opposing the Rigsbys' request to unseal this action in toto ([17] & [19]), the government represented in no uncertain terms that "*unsealing would be inappropriate at this time and would compromise the Government's ability to conduct an adequate civil investigation of this case*." ([24] at 2) (emphasis added). Yet unbeknownst to the government, the Rigsbys had already effectively unsealed this action through their numerous strategic seal violations – unlawfully, and without leave of Court.

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[8] Whenever a relator fails to comply with the seal provisions of the False Claims Act, the congressional goals underlying those provisions are irreversibly frustrated. *See, e.g.*, *Erickson ex rel. United States v. Am. Inst. of Biological Scis.*, 716 F. Supp. 908, 912 (E.D. Va. 1989); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 996 (2d Cir. 1995).

[9] August 8, 2006 is the first instance of which State Farm is currently aware. Other similar disclosures might have preceded it.

Nature and Severity of Violation. In *Lujan*, the court noted that the disclosure of the *qui tam* complaint was in very general terms and the relator had otherwise fully complied with the FCA. *Lujan*, 67 F.3d at 245-46. The severity of the Rigsbys' violations is far greater; through their attorney, they forwarded a copy of their Evidentiary Disclosure and pleadings, detailing their allegations against State Farm and other Defendants, to numerous media well before the seal was lifted by this Court.

Presence of Bad Faith. Finally, there can be no question that the Rigsbys' violations were willful disclosures of this action while it was still under seal. Further, they were committed for a patently bad-faith reason, to poison the media (and thereby the public) against State Farm before State Farm was even served with process. The Rigsbys' seal violations were calculated, methodical, intentional, and in bad faith. Thus, even if *Lujan's* permissive analysis applied in this Circuit, dismissal is warranted.

**D. The Rigsbys' Violations Are the Functional Equivalent of a Complete Failure to Meet the Sealing Requirement**

The Rigsbys next contend that "Courts properly are reluctant to dismiss an FCA claim unless a relator completely failed to meet any of the sealing requirements." ([224] at 31.) Yet the Rigsbys altogether fail to mention the recent decision in *United States ex rel. Salmeron v. Enterprise Recovery Systems, Inc.*, No. 05C4453, 2008 WL 3876135 (N.D. Ill. Aug. 18, 2008) ([219-1]), in which the court dismissed a *qui tam* suit with prejudice due to *post-sealing* strategic leaking – exactly what the Rigsbys have done here on a far grander scale. *See id.* at *3 ("the unprofessional and irresponsible conduct of . . . counsel . . . leaves this Court no considered choice but to dismiss this case with prejudice so as to protect the integrity of the judicial system" (quoting *Salmeron*, 2008 WL 3876135, at *1)), 17 & 20-23.

Additionally, for at least two reasons beyond the decisions in *Woodson* and *Salmeron*, the Rigsbys' misconduct rises to a level functionally equivalent to "fail[ing] to meet any of the sealing requirements." ([224] at 31.) First, the Rigsbys' violations were not only egregious and numerous, but were also carefully calculated for an improper strategic purpose: to prejudice State Farm's ability to obtain a fair trial by poisoning media coverage with false information, including the nationally broadcast August 25, 2006 ABC News *20/20* story that featured the Rigsbys and aired allegations substantively identical to those raised in this then-sealed matter. *See* ([99] at 23-26 & [203] at 4-7); *see also* ([203-1]) (quoting R. Scruggs) (the Rigsbys have "used every trick in the book, political, public opinion and

legal"); Joseph Treaster, *A Lawyer Like a Hurricane*, N.Y. Times, March 16, 2007 ([203-3]) (quoting R. Scruggs) ("'These are not legal wars. . . . They are public relations and political wars'").[10] A central purpose behind the FCA's strict seal provision is "protecting the defendants from damaging reputational injuries associated with possibly baseless public accusations." *United States ex rel. Windsor v. DynCorp, Inc.*, 895 F. Supp. 844, 847-48 (E.D. Va. 1995). Here, the Rigsbys and their attorneys purposely engaged in an elaborate media campaign specifically designed to *cause* such injuries.

Second, the Rigsbys have alternatively played sword and shield with the seal, depending on which approach they believed best suited their ends at that moment. For example, despite having secretly leaked information about this action to Congressman Taylor in advance of a congressional hearing, when questioned about the source of Congressman Taylor's knowledge of this then-sealed action, the Rigsbys' counsel instructed them not to answer. *E.g.*, (K. Rigsby 6/20/07 *Marion* Dep. at 206). Further, the Rigsbys have disingenuously used the seal to excuse their and their former counsel's misconduct regarding their sham "consulting" payments from the Scruggs firm. *E.g.*, ([207-6] at 25-26).

As succinctly stated by the Rigsbys' former counsel, "[o]nly by maintaining the seal on the case and the secrecy of the government's investigation could the [Rigsbys] qualify for the statutory compensation Congress provided for qui tam whistleblowers." ([207-6] at 25.) Yet the Rigsbys did not do so, instead violating the letter and spirit of 31 U.S.C. § 3730(b)(2) as well as this Court's Seal Order – thus justifying the forfeiture of any right they may have had to bring this *qui tam* action.

## III. BY ACCEPTING UPFRONT FEES TO SERVE AS "LITIGATION CONSULTANTS," THE RIGSBYS BREACHED THE *QUI TAM* PROVISION OF THE FCA

In its opening brief, State Farm demonstrated that the sham "consulting payments" of $150,000 a year that each of the Rigsbys received from their former lawyers in *this case* violated section 3730(d)(2), which strictly limits the monetary awards to *qui tam* plaintiffs. In support of this argument, State Farm cited the statute itself and two decisions from this Court. In their Opposition, the Rigsbys claim that State Farm's argument is "wishful thinking" lacking "any logical or precedential support." ([224] at 32.)

[10] *Compare with* Miss. R. Prof'l Conduct 3.6(a) (2008) ("A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.").

The Rigsbys are wrong, as the FCA explicitly states that payment can only be made from "the proceeds of the action or settlement and ***shall be paid out of such proceeds***." 31 U.S.C. § 3730(d)(2) (emphasis added).

Here, the Rigsbys' former counsel explicitly violated that rule by paying them hundreds of thousands of dollars while the case was pending. The Rigsbys also explicitly violated that rule by accepting these sham payments knowing that they were both litigants *and* witnesses in this action. In addition, while the ethical rules do not impose an obligation on a lay witness to refrain from accepting payments, the United States Code does. *See* 18 U.S.C. § 201(c)(3) (prohibiting, *inter alia*, "accept[ing] anything of value . . . because of the testimony under oath or affirmation given or to be given . . . as a witness upon any such trial"). Having accepted dozens of sham payments, the Rigsbys cannot now escape the consequences of their own willful conduct by blaming it on their former counsel. *See Hunt v. Howes*, 74 F. 657, 662 (5th Cir. 1896) (affirming the doctrine of *"ignorantia juris non excusat;"* that is, every person is charged with knowledge of the law).

## CONCLUSION

For the foregoing reasons, State Farm requests that this Court dismiss the Rigsbys' FAC with prejudice. State Farm also requests such further alternative or supplemental relief as may be appropriate in the premises.

This the 1st day of October, 2008.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

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