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 MEMORANDUM OF AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6) AND RULE 9(b)

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STATUTES

Defendant/Counter-Plaintiff State Farm Fire and Casualty Company, improperly denominated in the First Amended Complaint as "State Farm Mutual Insurance Company," ("State Farm" or "Defendant")[1] respectfully submits this memorandum of authorities in support of its Motion to Dismiss for failure to state a cognizable claim under Federal Rule of Civil Procedure 12(b)(6), and for failure to comply with the pleading standards of Federal Rule of Civil Procedure 9(b).

INTRODUCTION

A. Summary of Argument

On August 29, 2005, Hurricane Katrina struck the Gulf Coast, causing unprecedented storm surge and widespread damage to coastal Mississippi. The Federal Insurance Administrator described Hurricane Katrina as a "monumental flooding event" that was "unprecedented in the history of the [National Flood Insurance Program ("NFIP")]."[2] As one of the largest participants in the NFIP's Write Your Own ("WYO") program in Mississippi, State Farm received and adjusted approximately 4,000 flood insurance policies on residential properties. State Farm also received and adjusted approximately 85,000 Mississippi homeowner-type claims (including 31,000 in Mississippi's three coastal counties).

Undeterred by these or any other objective facts, Relators Cori and Kerri Rigsby (the "Rigsbys") are attempting to assert claims on behalf of the United States under the *qui tam* provision of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33. After reviewing the

[1] Plaintiffs have sued State Farm Mutual Insurance Company, an entity that does not exist. State Farm Fire and Casualty Company participated as a Write-Your-Own ("WYO") carrier in the NFIP. It was, therefore, State Farm Fire and Casualty Company that issued Standard Flood Insurance Policies pursuant to the NFIP and adjusted claims made under such policies. Accordingly, this motion is made on behalf of State Farm Fire and Casualty Company.

[2] Oct. 20, 2005 Statement of David I. Maurstad, 2005 WLNR 16997746, at 2 (Ex. 1 to Mtn.).

complaint and the Rigsbys' evidentiary disclosure for nine months, and conducting its own investigation, the United States declined to intervene in this action on January 31, 2008. (Dkt. 56) The gravamen of the Rigsbys' First Amended Complaint ("FAC") is that State Farm and other WYO carriers bilked the federal government out of "hundreds of millions of dollars in flood insurance claims" by improperly characterizing damage caused by wind as damage caused by flooding. (FAC ¶ 134) The Rigsbys further contend that the WYO program itself is fundamentally flawed because it gives State Farm and other WYO carriers "an incentive to charge off all damage to the government as flood damages" (*id.* ¶ 51), and that State Farm used engineering reports that were scientifically unsound to "len[d] enough credibility to the adjusters to assign wind claims to water damage." (*Id.* ¶ 45)

The Rigsbys' *qui tam* Complaint must be dismissed as a matter of law for failing to plead FCA violations with particularity, as required by Federal Rule of Civil Procedure 9(b). *See United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 328 (5th Cir. 2003). The Fifth Circuit has made clear that strict compliance with Rule 9(b) is required in *qui tam* actions, to protect the interests of both the government and defendants. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999).

The FCA is intended to redress false claims knowingly submitted to the government. However, the Rigsbys have not alleged (and cannot allege) any facts supporting a violation in this case. Indeed, they barely even try. Instead, the Rigsbys attempt to support their assertion that "hundreds of millions of dollars in flood insurance claims" have allegedly been misallocated by extrapolation from what they contend are "two specific instances where Defendant State Farm has engaged in reallocation of claims from wind damage to flood damage." (FAC ¶ 65) But these "two specific instances," which concern two State Farm policyholders – McIntosh and

Mullins, who, like the Rigsbys, are former clients of Richard F. Scruggs ("Scruggs") – do not support the Rigsbys' blanket fraud assertions as a matter of law. Significantly, in neither instance do the Rigsbys allege that a false claim was submitted to the government.

The Rigsbys' inability to identify with particularity even one fraudulent federal flood claim is not surprising. The Department of Homeland Security's Office of Inspector General has investigated the issue of possible attribution of wind damage to flood policies by WYO carriers, and found no evidence that federal flood insurance has been used to subsidize wind claims, that wind damage has been attributed to flooding, or that flood insurance has paid for wind damage.[3] Similarly, David Maurstad, Mitigation Division Director of the Federal Emergency Management Agency ("FEMA"), testified before Congress that the WYO insurance companies and their claims adjusters and agents have "more than fulfilled their responsibility to help NFIP policyholders begin to rebuild their lives."[4]

In addition to their total failure to identify a single false claim that State Farm allegedly submitted to the government, the Rigsbys' Complaint must also be dismissed because the Rigsbys have failed to comply with the FCA's strict requirements for bringing a *qui tam* action. First, the Rigsbys and their counsel repeatedly violated the FCA's mandatory seal requirement by publicly disclosing the existence and content of their *qui tam* lawsuit. Second, by hiring the Rigsbys as "litigation consultants" and paying each of them lavish consulting fees of $150,000 per year while prosecuting this *qui tam* action, counsel have violated 31 U.S.C. § 3730(d)(2), which plainly provides that relators may not receive any compensation until the litigation is

[3] Dep't of Homeland Security, *Interim Report Hurricane Katrina: A Review of Wind Versus Flood Issues* at 1 (July 2007) (Ex. 2 to Mtn.).

successfully concluded in their favor and caps the amount that relators can receive at 30 percent (in cases such as this where the government declines to intervene). Having failed to comply with the FCA's stringent requirements, the Rigsbys have forfeited any right they may have had to bring this lawsuit. Finally, because the Risbsys' allegations are predicated on matters inherently involving issues of judgment, they cannot support an FCA violation.

B. Standard for Dismissal Under Rule 12(b)(6)

Under Rule 12(b)(6), "plaintiff's allegations are taken as true and are considered in the light most favorable to the plaintiff." *Workman v. Calogero*, 174 F. App'x 824, 826 (5th Cir. 2006). But "conclusional allegations and legal conclusions masquerading as facts will not prevent dismissal or judgment on the pleadings." *Id.* To avoid dismissal, "[t]he plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)). Where (as here) it is clear that the plaintiff "'can prove no set of facts that would entitle him to relief,'" the defendant is entitled to dismissal of the Complaint. *Bolen v. Dengel*, 340 F.3d 300, 312 (5th Cir. 2003) (citation omitted). Moreover, "[a]lthough dismissal under Rule 12(b)(6) is ordinarily determined by whether the facts alleged in the complaint, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings." *Clark v. Amoco Prod. Co.,* 794 F.2d 967, 970 (5th Cir. 1986).

Importantly, under Fifth Circuit authority, a dismissal for failure to plead fraud with particularity as required by Rule 9(b) warrants dismissal for failure to state a claim upon which

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[4] Feb. 28, 2007 Testimony of David I. Maurstad, Dir. and Fed. Admin., Mitigation Div., FEMA, Dep't of Homeland Security before H.R. Committee on Fin. Srvc. Subcommittee on Oversight and *(cont'd)*

relief may be granted. *See Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996); *see also Doe*, 343 F.3d at 328 ("[A] dismissal for failure to meet the requirements of Rule 9(b) is a dismissal for failure to state a claim . . . .").

In addition to the facts alleged in the Complaint, the Court may also consider facts that are properly the subject of judicial notice. *See Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record."); *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (judicial notice of information on government agency's website); *Terrebonne v. Blackburn*, 646 F.2d 997, 1000 n.4 (5th Cir. 1981) ("Courts have not hesitated to take judicial notice of agency records and reports.").[5] Furthermore, the Court may consider documents that are specifically mentioned in or attached to the Complaint. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d

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Investigations, *available at* 2007 WLNR 3868622 (Ex. 3 to Mtn.).

[5] *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007) ("[W]hen ruling on Rule 12(b)(6) motions to dismiss, in particular, [courts consider] documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *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 False Claims Act case] the court may consider documents attached to or incorporated in the complaint and matters of which judicial notice may be taken."); *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996) ("When deciding a motion to dismiss a claim for securities fraud on the pleadings, a court may consider the contents of relevant public disclosure documents. . . ."); *In re Katrina Canal Breaches Consol. Litig.*, 533 F. Supp. 2d 615, 632 (E.D. La. 2008) (District court's consideration of background information as to action against government relating to Hurricane Katrina floodwater damage, including facts from amended complaint and government publication which provided timeline and facts surrounding certain relevant legislation, did not require conversion of government's motion to dismiss into motion for summary judgment); Fed. R. Evid. 201 (authorizing judicial notice of adjudicative facts); 5B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 (3d ed. 2004 & Supp. 2007) ("In determining whether to grant a Federal Rule 12(b)(6) motion, district courts primarily consider the allegations in the complaint. The court is not limited to the four corners of the complaint, however. Numerous cases . . . have allowed consideration of matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment.").

496, 498-99 (5th Cir. 2000).

ARGUMENT

I. THE RIGSBYS HAVE FAILED TO PLEAD FCA VIOLATIONS WITH PARTICULARITY

A. *Qui Tam* Complaints Must Comply with Rule 9(b)

A *qui tam* plaintiff must plead False Claims Act ("FCA") violations with particularity, as required by Federal Rule of Civil Procedure 9(b). *See United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 328 (5th Cir. 2003); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997). In order to meet the Rule 9(b) standard, the Complaint must allege, at a minimum, the "'who, what, when, where, and how' of the alleged fraud." *Id.* (citation omitted).

Accordingly, "[t]he 'time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby' must be stated in a complaint alleging violation of the FCA in order to satisfy Rule 9(b)." *Doe*, 343 F.3d at 329 (citation omitted, second alteration in original); *see also United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 384 (5th Cir. 2003) ("Rule 9(b) requires that the plaintiff allege 'the particulars of time, place, and contents of the false representations. . . .'") (citation omitted). "The purpose of this requirement is to give notice to defendants of the plaintiffs' claim, to protect defendants whose reputation may be harmed by meritless claims of fraud, to discourage strike suits, and to prevent the filing of suits that simply hope to uncover relevant information during discovery." *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 226 (1st Cir. 2004) (citation and internal quotation marks omitted); *see also Melder v. Morris*, 27 F.3d 1097, 1100 (5th Cir. 1994) ("[T]he complaint

here fails to put the defendants on notice, places defendants' reputations at risk, and burdens the courts with a potential strike suit.").

Significantly, the Rule 9(b) standard is not relaxed in the *qui tam* context. *See Doe*, 343 F.3d at 330; *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 308 (5th Cir. 1999); *see also United States ex rel. Clausen v. Lab. Corp. of Am.,* 290 F.3d 1301, 1314 (11th Cir. 2002) ("[N]either the Federal Rules nor the [False Claims] Act offer any special leniency" as to Rule 9(b)'s requirements.). To the contrary, strict compliance with Rule 9(b) in *qui tam* actions protects the interests of both the government and defendants. Allowing *qui tam* plaintiffs to initially allege violations of the FCA generally and/or on information and belief would be contrary to the purpose of the FCA, which provides "a right of action to private citizens only if they have independently obtained knowledge of fraud." *Russell*, 193 F.3d at 309.[6] Such a complaint would also fail to provide the government with sufficient information to determine whether to intervene. Thus, "allowing a relator to plead generally at the outset and amend to the complaint at the 12(b)(6) stage after discovery would be at odds with the FCA's procedures for filing a qui tam action and its protections for the government (which is, of course, the real party in interest in a qui tam action)." *Karvelas*, 360 F.3d at 231.

Further, the policy behind Rule 9(b) of protecting defendants from the reputational harm caused by groundless accusations of fraud is heightened in a *qui tam* action. The FCA provides significant monetary recovery to persons who have not been injured and, therefore, the potential for strike suits is high. As a consequence, Rule 9(b) must be strictly enforced:

[6] As set forth in State Farm's Motion to Dismiss for Lack of Subject Matter Jurisdiction and supporting Memorandum, the Rigsbys in this case lack such independent knowledge.

> When a plaintiff [sic] does not specifically plead the minimum elements of their allegation, it enables them to learn the complaint's bare essentials through discovery and may needlessly harm a defendants' [sic] goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinnings, and, at worst, are [sic] baseless allegations used to extract settlements. This is especially so in cases involving the False Claims Act, which provides a windfall for the first person to file and permits recovery on behalf of the real victim, the Government.

Clausen, 290 F.3d at 1313 n.24. Rule 9(b) is, therefore, intended to prevent fishing expeditions at a defendant's expense.

> The reluctance of courts to permit qui tam relators to use discovery to meet the requirements of Rule 9(b) reflects, in part, a concern that a qui tam plaintiff, who has suffered no injury in fact, may be particularly likely to file suit as "a pretext to uncover unknown wrongs." In light of the prevailing precedent and the procedures for filing and serving a qui tam complaint . . . we hold that a qui tam relator may not present general allegations in lieu of the details of actual false claims in the hope that such details will emerge through subsequent discovery.

Karvelas, 360 F.3d at 231 (citation omitted). In short, as the Fifth Circuit has explained, relaxing the requirements of Rule 9(b) would be a "ticket to the discovery process that the statute itself does not contemplate." *Russell*, 193 F.3d at 309.

B. The Rigsbys Have Failed to Plead, with Particularity, That a False or Fraudulent Claim Was Submitted to the Government

1. The Rigsbys Must Identify with Particularity Facts Supporting Their Allegations that False Claims Were Submitted to the Government

In Counts I and II of the Complaint, the Rigsbys allege violations of 31 U.S.C. § 3729(a)(1) & (2). To plead a Section (a)(1) violation, the complaint must allege facts showing that: (1) the defendant presented, or caused another person to present, a "claim for payment or approval" to the United States; (2) the claim was "false or fraudulent"; and (3) the person acted knowing that the claim is false. 31 U.S.C. § 3729(a)(1). Section 3729(a)(2) of the FCA imposes liability on one who makes or uses a false record or statement "to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). To state a § 3729(a)(2) claim,

the relator "must identify both a false claim and a false record or statement made or used to get that false claim paid." *Willard*, 336 F.3d at 380. Thus, to plead a claim under Section (a)(2), the relator must also allege with particularity the three elements of Section (a)(1).

The "*sine qua non* of a False Claims Act violation" is a false or fraudulent claim for payment submitted to the government. *Karvelas*, 360 F.3d at 225; *accord Clausen*, 290 F.3d at 1311. The FCA defines a "claim" as "any request or demand . . . for money or property" from the Government. 31 U.S.C. § 3729(c). Alleged fraudulent activity, violations of government regulations or improper internal policies do not give rise to liability under the FCA. Rather, the FCA attaches liability to the claim for payment. *See Willard*, 336 F.3d at 381; *Karvelas*, 360 F.3d at 232. Thus, the key issue is "'whether the defendant ever presented a "false or fraudulent claim" to the government.'" *Willard*, 336 F.3d at 381. (citations omitted).

> Underlying schemes and other wrongful activities that result in the submission of fraudulent claims are included in the "circumstances constituting fraud or mistake" that must be pled with particularity pursuant to Rule 9(b). However, such pleadings invariably are inadequate unless they are linked to allegations, stated with particularity, of the actual false claims submitted to the government that constitute the essential element of an FCA qui tam action.

Karvelas, 360 F.3d at 232. As a result, to comply with Rule 9(b), *qui tam* relators must identify the specific false claims that were submitted to the government for payment. *See id.* Such information should include, for example, the dates of the claims, the content of the forms or bills submitted, the amount of money charged to the government, and the items for which the government was charged. *See id.* at 233.

In this case, the Rigsbys have failed to identify with particularity any allegedly false claim that was submitted by State Farm to the government for payment, let alone the who, what, when, where, and how of each such transaction. An examination of the FAC makes patent its deficiencies under Rule 9(b). Paragraphs 1 through 26 contain introductory remarks,

jurisdictional allegations and a description of the parties. Paragraphs 27 through 39 contain allegations that purport to support the Rigsbys' claim in Count V that they supposedly suffered a retaliatory discharge, but include no facts supporting Counts I and II and do not identify any allegedly false claims submitted to the government.

In paragraphs 40 through 91, the Rigsbys attempt to describe a scheme pursuant to which wind claims might have been improperly allocated to flood claims. Such allegations include a description of storm surge (FAC ¶¶ 40-45), a description of how insurance sold pursuant to the National Flood Insurance Program ("NFIP") works (*id.* ¶¶ 46-55), and wholly conclusory and speculative allegations that State Farm directed adjusters and engineers to characterize wind losses as flood. (*Id.* ¶¶ 56-64)

2. Allegations Pled on Information and Belief Do Not Satisfy Rule 9(b)

Initially, such allegations are deficient under Rule 9(b) because they are made on information and belief. (FAC ¶¶ 56, 59, 63) In limited circumstances, the Rule 9(b) pleading requirement is relaxed to allow pleading on information and belief, but only "when the facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge." *Russell,* 193 F.3d at 308. These circumstances are not present here. To the contrary, the Rigsbys allege that they accessed State Farm's files in an effort to find documents in support of their allegations. (FAC ¶ 31)[7] Under such circumstances, relators may not rely upon information and belief. *See United States ex rel. Walsh v. Eastman Kodak Co.*, 98 F. Supp. 2d 141, 148 (D. Mass. 2000).

Indeed, because FCA actions brought by private persons are intended to be based upon the relator's independent knowledge, courts have rarely allowed the relaxed "information and

[7] For the reasons set forth in its Counterclaim, State Farm contends that the Rigsbys' actions were illegal; however, that issue need not be decided for this motion.

belief" standard in *qui tam* actions. *See Karvelas*, 360 F.3d at 228. For example, in *Russell*, the relator argued that she was prevented by a confidentiality agreement from copying relevant documents while she worked for the defendant. *See Russell,* 193 F.3d at 308. *Russell*, therefore, stands in marked contrast to the instant case where the Rigsbys admit that they took documents from State Farm. Nonetheless, even on the facts presented in *Russell*, the Fifth Circuit held that the relators were not entitled to plead based on information and belief, finding that the relevant information was possessed by other entities, including the Healthcare Financing Administration. *See id.*

Further, the Fifth Circuit has warned that even in cases where the relevant facts are exclusively within the defendant's possession, "this exception 'must not be mistaken for license to base claims of fraud on speculation and conclusory allegations.'" *Thompson*, 125 F.3d at 903 (citation omitted); *accord Willard*, 336 F.3d at 385. Even in the limited cases where the 9(b) pleading standard is relaxed, the plaintiff must nonetheless supply the underlying facts that form the information and belief. *See Willard*, 336 F.3d at 385; *Thompson*, 125 F.3d at 903. Here, the FAC is devoid of any such allegations.

3. Allegations of an Alleged Scheme to Defraud the Government Are Insufficient to Satisfy Rule 9(b)

Rather than pleading their claims with particularity, the Rigsbys base their entire FCA claim on a vague, factually unsubstantiated assertion that State Farm engaged in a broad scheme to shift wind damage to flood coverage. In doing so, the Rigsbys merely describe a general methodology or scheme by which a false NFIP claim *could* be submitted to the government. However, courts have repeatedly held that describing a scheme without the particular details of a specific false claim submitted for payment is insufficient. *See Thompson,* 125 F.3d at 903 (allegations of FCA violations based on statistical studies failed to comply with Rule 9(b)

because plaintiff "did not identify any specific physicians who referred patients for medically unnecessary services or any specific claims for medically unnecessary services that were submitted by defendants"); *Karvelas*, 360 F.3d at 235 (although relator described alleged procedures by which fraudulent claims were submitted, the "existence of such procedures does not permit [the court] to speculate that false claims were in fact submitted"); *Walsh*, 98 F. Supp. 2d at 147 (dismissing FCA complaint that set out "a methodology by which [defendants] might have produced false invoices," but failed to cite "a single false claim arising from an allegedly false invoice").

For example, in *Clausen*, the relator attempted to set out at length how the alleged scheme to defraud the government was accomplished. Nonetheless, "no copies of a single actual bill or claim or payment were provided. . . . Basically, [the relator] did not add any billing information to support his allegation that actual false claims were submitted for payment, such as the amount of any charges." 290 F.3d at 1306. Accordingly, such allegations were insufficient to satisfy Rule 9(b). As the court explained:

> Rule 9(b)'s directive that "the circumstances constituting fraud or mistake shall be stated with particularity" does not permit a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government. . . . [A]s with every other facet of a necessary False Claims Act allegation, if Rule 9(b) is to be adhered to, some indicia of reliability must be given in the complaint to support the allegation of *an actual false claim* for payment being made to the Government.

Id. at 1311 (emphasis in original).

Similarly, in *United States ex rel. Butler v. Magellan Health Services, Inc.*, 101 F. Supp. 2d 1365 (M.D. Fla. 2000), the relator alleged that the defendants submitted false claims to Medicare. *See id.* at 1367. The relator's allegations included an example where a doctor was

pressured to rescind a discharge order. The relator also asserted that other doctors were encouraged to lengthen patient stays. The court held that such allegations failed to satisfy Rule 9(b). *See id.* at 1369. As the court stated: "While these allegations are illustrative of the type of fraud Plaintiff alleges, none of these facts address any false claim or any document bearing a false claim on the part of the Defendants. . . ." *Id.* Dismissing the complaint with prejudice, the court further explained: "Plaintiff does plead a fraudulent scheme of conduct which may well be prohibited by law. However, Plaintiff pleads no specific occurrences of a false claim." *Id.* So, too, in this case, the Rigsbys' conclusory allegations that State Farm encouraged adjusters and engineers to find flood damage are completely insufficient under Rule 9(b).

In a vain attempt to provide the missing specificity, the Rigsbys allege that they "are aware of two specific instances where Defendant State Farm has engaged in reallocation of claims from wind damage to flood damage." (FAC ¶ 65) With respect to the first, the McIntosh claim, the Rigsbys allege that two engineering reports were obtained by State Farm, one which identified some damage to the property resulting from wind, and a second that identified, in addition to wind damage, damage caused by rising water from storm surge and waves. (*Id.* ¶¶ 66-70) However, nowhere is it alleged that a false claim for payment under the NFIP was submitted to the government.[8]

[8] The Rigsbys' allegations regarding the McIntosh claim are deficient on their face. For the reasons discussed in State Farm's Memorandum in Support of Its Motion to Dismiss for Lack of Subject Matter Jurisdiction at 15-17, the Rigsbys will not be able to allege that a false claim was submitted to the government as to the McIntosh property because it is undisputed that the McIntosh property sustained substantial flood damage, entitling the insureds to receive the limits of their flood policy. As a result, no false claim was submitted for payment.

The second example given is the Mullins claim. Again, the Rigsbys allege that two engineering reports were obtained on the property. (*Id.* ¶¶ 71-77) However, there are no facts alleged indicating that a false claim was made to the government. Indeed, Plaintiffs do not even allege that Mr. Mullins had an NFIP policy or made an NFIP claim.[9]

There is only one other specific claim described in the Complaint: the Anna Vela claim. (*Id.* ¶¶ 86-91) The Rigsbys do not describe any false claim that was submitted for Ms. Vela's property. Instead, they allege only that the policy limits of the homeowners policy were paid for wind damage. (*Id.* ¶ 90) In the case of Vela, as with Mullins, the Rigsbys do not allege that she had an NFIP policy or that she made an NFIP claim to the government. The inclusion of this example is, therefore, wholly irrelevant to the FCA.

4. The Rigsbys Fail to Provide the Particulars of Any Relevant Transactions

Even if the Rigsbys had identified specific claims that State Farm submitted to the government for payment, they would, in addition, have to identify the who, what, when, where, and how of each such transaction. *See Thompson*, 125 F.3d at 903. In short, they would have to identify the persons involved in the transactions, the dates of the transactions and sufficient facts to show both falsity and scienter. For example, in *United States ex rel. Williams v. Bell Helicopter Textron Inc.,* 417 F.3d 450 (5th Cir. 2005), the Fifth Circuit affirmed dismissal of an FCA complaint that failed to identify the employees allegedly involved in the fraud, as well as provide "particular facts showing that [defendant] was aware of the actions of its employees, that [defendant] had intentionally filed these false claims with the government, that [defendant] had

[9] The Rigsbys cannot make such an allegation because Mr. Mullins did not, in fact, have NFIP coverage for the property at issue.

purposefully withheld information about [the fraudulent] charges, or that [defendant] intentionally failed to repay the government for the overcharges." *Id.* at 454; *see also Doe*, 343 F.3d at 329 (affirming dismissal of FCA claim that listed only "the approximate time and place" of the alleged violations, but failed to "explicitly state [when] alleged false representations were made," what those false representations were, or who made them); *Walsh*, 98 F. Supp. 2d at 149 (observing that relator "never alleges with the requisite particularity that Kodak knowingly presented, caused the presentation of, or conspired to present any false cost report to the government").

Thus, it is not enough to provide examples of claims that might have been false. For example, in *United States ex rel. Cox v. Iowa Health System*, 29 F. Supp. 2d 1022 (S.D. Iowa 1998), the relator attempted to identify some examples of false claims in support of the alleged scheme. *See id.* at 1025. Nonetheless, the court held that the complaint failed to comply with Rule 9(b). *See id.* at 1025-26. Significantly, the complaint did not identify any persons who submitted any particular false claims, the dates they were submitted, or the manner in which the claims were fraudulent. Further, the relator never alleged that the claims were actually submitted to the government. *See id.* at 1025.

Likewise, in *United States ex rel. Lissack v. Sakura Global Capital Markets, Inc.*, No. 95 Civ. 1363(BSJ), 2003 WL 21998968 (S.D.N.Y. Aug. 21, 2003), *aff'd* 377 F.3d 145 (2d Cir. 2004), the relator attached a partial, non-exclusive list of affected transactions to his complaint. The court held that such a list failed to satisfy Rule 9(b), because the relator provided no additional detail about the transactions. *See id.* at *13.

It is equally clear that length does not equate with particularity. For example, in *Karvelas*, the relator filed a 93-page complaint that "describe[ed] at considerable length the defendants'

sixteen schemes to defraud the government." *Karvelas*, 360 F.3d at 233. The relator alleged that the defendant submitted false and fraudulent Medicare and Medicaid claims to the government, but "the complaint never specifie[d] the dates or content of any particular false or fraudulent claim." *Id.* It did not identify the individuals allegedly involved with the fraudulent submissions, nor did it provide the factual basis for the complaint's conclusory allegations. *See id.* For example, the relator alleged that the defendant billed Medicare and Medicaid for a large percentage of 21,000 tests performed between June, 1994 and April, 1997, even though such tests did not comply with applicable standards.

The court held that such allegation was insufficient to meet the relator's obligation under Rule 9(b):

> [Relator] does not specify which of the 21,000 tests were billed to the government, supply any details about the particular bills and certifications submitted, or provide a factual basis for his allegation that the defendants falsely certified compliance with federal standards in order to secure Medicare or Medicaid benefits. This lack of particularity characterizes all of [relator's] allegations concerning the submission of false claims to the federal government.

Id. at 234.

Likewise, facts supporting allegations of scienter must be pled with particularity. As the Fifth Circuit has held: "[C]ase law amply demonstrates that pleading scienter requires more than a simple allegation that a defendant had fraudulent intent. To plead scienter adequately, a plaintiff must set forth *specific facts* that support an inference of fraud." *Am. Realty Trust, Inc. v. Hamilton Lane Advisors, Inc.*, 115 F. App'x 662, 667 (5th Cir. 2004) (internal quotation marks and citation omitted). A plaintiff may not conclusorily plead that "the defendants knowingly did this or recklessly did that." *Melder*, 27 F.3d at 1103. Moreover, the Fifth Circuit has held at least twice that motive of profit – without anything else – is insufficient to show scienter. *See id.* at 1102; *Tuchman v. DCS Commc'ns Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994).

The Rigsbys should not be allowed to pursue serious charges of government fraud against State Farm based upon the scant and conclusory allegations of the Complaint. As one court has explained:

> If [a] plaintiff does not presently possess the relevant, indispensable facts to state a fraud claim with particularity, the precepts upon which Rules 9(b) and 11 are founded[,] . . . he has no business charging a party with fraud on the slim hope that he may use the various and expensive tools of discovery available under the Federal Rules to put meat on the bare bones of his fraud claim. Fraud is too serious a charge, and litigation is too expensive, to allow such tactics.

Beck v. Cantor, Fitzgerald & Co., 621 F. Supp. 1547, 1552-53 (N.D. Ill. 1985). In this case, the Rigsbys have failed to identify with particularity any of the elements of their claims under Counts I and II of the Complaint. Accordingly, such claims should be dismissed.

5. The Rigsbys' Remaining Allegations Fail to Plead with Particularity an FCA Violation

The Complaint includes several additional allegations which, like the rest of the FAC, lack the specificity required by Rule 9(b). For example, the Rigsbys' allegations about backdating of claims (FAC ¶¶ 97-100), fail to satisfy Rule 9(b) because such allegations are made on information and belief. *See supra* at 8-9. Second, the Rigsbys provide absolutely no details as to how, when and where this alleged backdating occurred, or that it was done with State Farm's knowledge. Lastly, and most importantly, the Rigsbys provide no link between these vague and baseless allegations and the submission of a false claim for payment to the government.

For these same reasons, the Rigsbys' allegations of grant fraud (Am. Cmpl. ¶¶ 92-96), and shifting adjusting expenses must also fail. (*Id.* ¶¶ 101-07) The Complaint provides no factual basis whatsoever for any of these allegations, fails to identify any particular false claims

submitted to the government, and fails to allege any facts to support that State Farm had knowledge of these alleged activities.

The Rigsbys' tangential and irrelevant spoliation allegations (FAC ¶¶ 78-85) also fail to allege with particularity any FCA violations. Instead, such allegations are made in a misguided attempt to justify the Rigsbys' own illegal activities. (*See* FAC ¶ 85.) Not only do they fail to allege any facts supporting an FCA violation, the Rigsbys' baseless and conclusory allegations rely on rank speculation. *See* FAC ¶ 78 (admitting that the Rigsbys have no knowledge of any actual spoliation).

C. The Rigsbys Fail to Allege the Elements of a Conspiracy Claim with Particularity

In Count III, the Rigsbys allege a violation of 31 U.S.C. § 3729(a)(3). (FAC ¶¶ 123-134) Section (a)(3) imposes liability on "[a]ny person who . . . conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3). A conspiracy claim necessarily includes a showing of a false or fraudulent claim. Thus, where a conspiracy to defraud is alleged, the allegations must comply with Rule 9(b). As this Court has observed: "Plaintiffs' allegations attempt to paint a complex civil conspiracy, but there are no specific allegations of actionable misconduct by State Farm General Insurance Company or State Farm Mutual Automobile Insurance Company. The fraud claims are so general and conclusory that they do not satisfy the requirements of Fed. R. Civ. P. 9(b)." *Perkins v. State Farm Gen. Ins. Co.*, No. 1:07cv116-LTS-RHW, 2007 WL 4375208, at *2 (S.D. Miss. Dec. 12, 2007).

Initially, if the conspiracy allegations do not plead with particularity that a false claim was submitted to the government, they cannot satisfy Rule 9(b). In support of the conspiracy claim, the Complaint broadly alleges, *on information and belief*, that defendants conspired with each other, but does not identify a single false claim submitted to the government, or provide the

who, what, when, where, and how of the transactions. (FAC ¶¶ 123-34) Without a false claim, no conspiracy to submit a false claim can exist.[10]

In addition, the Rigsbys fail to allege with particularity any facts supporting their conspiracy allegations. A conspiracy claim requires (1) that defendants knowingly agreed to defraud the government, (2) that at least one act was performed in furtherance of that conspiracy, (3) that the government suffered damages as a result of the acts alleged. *United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 274 F. Supp. 2d 824, 856 (S.D. Tex. 2003), *aff'd*, 384 F.3d 168 (5th Cir. 2004); *accord United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487, 509 (S.D. Tex. 2003), *aff'd*, 111 F. App'x 296 (5th Cir. 2004); *see also United States ex rel. Farmer v. City of Houston*, No. 06-20740, 2008 WL 771710, at *8 (5th Cir. Mar. 25, 2008) (citing with approval *Graves* and *Reagan* for the elements of an FCA conspiracy claim). There must be a meeting of minds between the conspirators and, "[i]n the context of an FCA conspiracy, the evidence must show that the alleged conspirators shared a 'specific intent to defraud the government.'" *Reagan*, 274 F. Supp. 2d at 857; *accord Farmer*, 2008 WL 771710, at *8.

In addition, "[g]eneral civil conspiracy principles apply to conspiracy claims under the False Claims Act." *Graves*, 284 F. Supp. 2d at 509. Thus, as one court has explained:

> A proper allegation of a conspiracy to commit fraud in a civil complaint must set forth with certainty facts showing particularly: (1) what a defendant or defendants did to carry the conspiracy into effect; (2) whether such acts fit within the framework of the conspiracy alleged; and (3) whether such acts, in the

[10] *See, e.g.*, *People's Choice Home Loan, Inc. v. Mora,* No. 3:06-CV-1709-G, 2007 WL 708872, at *5 (N.D. Tex. Mar. 7, 2007) ("[B]ecause PCHL failed to plead its fraud claim against MortgageSmith with particularity, PCHL's claim of conspiracy to commit fraud alleged against MortgageSmith must likewise be dismissed."); *Norwood v. Raytheon Co.*, No. EP-04-CA-127-PRM, 2006 WL 2833803, at *3 (W.D. Tex. Sept. 19, 2006) ("Because the Court has found that Plaintiffs fail to state the underlying allegations of fraud with the required specificity, the Court concludes that Plaintiffs' civil conspiracy claims must also be dismissed.").

> ordinary course of events, would proximately cause injury to the plaintiff. In short, the complaint must allege some factual basis for a finding of a conscious agreement among the defendants.

Sw. La. Healthcare Sys. v. MBIA Ins. Corp., No. 05-1299, 2006 WL 2548183, at *4 (W.D. La. Aug. 31, 2006) (quoting *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 298-99 (S.D.N.Y. 2000)).

Here, the Rigsbys broadly allege that State Farm conspired with Renfroe and the Engineering Defendants (Am. Cmpl. ¶ 130), yet they provide no factual basis for this allegation. Because they have failed to allege with particularity facts supporting the existence of a conspiracy, Count III of the Complaint must be dismissed. *See Whitney Nat'l Bank v. Med. Plaza Surgical Ctr. LLP*, No. H-06-1492, 2007 WL 400094, at *5 (S.D. Tex. Feb. 1, 2007) ("The underlying tort in this case is fraud. Neither the fraud claim nor the conspiracy claim is pleaded adequately under Rule 9(b) . . . .").

For example, in *Southwest Louisiana Healthcare System*, the Plaintiffs alleged that PricewaterhouseCoopers ("PwC"), acting in "'concert and conspiracy'" with other defendants, issued a "'false and misleading report'" to support a merger. *Sw. La. Healthcare Sys.*, 2006 WL 2548183 at *3. In support of this allegation, the plaintiffs noted that PwC had revised an earlier opinion and that "PwC had never changed a Preliminary Report in the past, thus, one must assume that it was at the behest of [other defendants]." *Id*. The court found that the plaintiffs failed to plead the conspiracy to defraud with the particularity required under Rule 9(b):

> A plaintiff has an obligation to explain what is untrue about each of the challenged statements and cannot merely quote a statement and assert that it is untrue. Plaintiffs may not proffer the different financial statements and rest. [They] must plead some fact suggesting that the difference is attributable to fraud.

Id. (internal quotation marks and footnotes omitted; alteration in original).

Likewise in *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097 (9th Cir. 2003), the Ninth Circuit affirmed dismissal of conspiracy claims for failure to plead with particularity as required by Rule 9(b):

> Vess alleges a fraudulent conspiracy between the APA and the other defendants, but he does not provide the particulars of when, where, or how the alleged conspiracy occurred. He alleges that the APA received financial contributions from Novartis, but he offers scant specifics as to when or between whom the money changed hands. He further alleges that the APA fraudulently included ADD in the DSM even though ADD failed to meet the manual's own diagnostic criteria, but he fails to indicate which criteria it failed to satisfy and how it failed to satisfy them. He charges that the APA sought to conceal its fraud by improperly clustering testing data for ADD with testing data for other conditions, but the allegation is unsupported by details, such as the names of those conditions. Vess also fails to point to the specific scientific literature that the APA failed to "fully address or actually obscured." Finally, he alleges that the APA misrepresented its connection to Novartis, but he does not identify any specific misrepresentations or specify when and where they occurred. These allegations are not particular enough to satisfy Rule 9(b).

Id. at 1106-07; *see Beck*, 621 F. Supp. at 1552 ("[P]laintiff has failed to support his general charge of civil conspiracy to commit securities fraud, to which the specific pleading requirements of Rule 9(b) apply, with any factual allegations of the specific parties engaged in the alleged conspiracy, its time and place, and the substance of the conspiracy."). The Rigsbys' FAC suffers the same defects that mandated dismissal of conspiracy allegations in the cases above.

D. The Rigsbys Fail to Allege with Particularity Facts Supporting a "Reverse False Claim" Action

The Rigsbys also purport to allege a claim under the reverse false claims provision, 31 U.S.C. § 3729(a)(7). Section (a)(7) prohibits the knowing use of a false record or statement to decrease or avoid an obligation to pay money to the government. *See* 31 U.S.C. § 3729(a)(7). The predicate of a reverse false claim is "an economic relationship between the government and the defendant (such as a lease or a contract or the like) under which the government provides

some benefit to the defendant wholly or partially *in exchange* for an agreed or expected payment or transfer of property by (or on behalf of) the defendant to (or for the economic benefit of) the government." *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, 657 (5th Cir. 2004) (emphasis in original).

First, and dispositively, no such economic relationship is alleged here. State Farm is under no obligation to pay the government money. The Rigsbys do not identify a basis for such an obligation, and their mere *allegation* of FCA liability does not create such a duty or obligation. *See Graves*, 284 F. Supp. 2d at 508 (holding that "a defendant must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgement of indebtedness" and that such obligation "cannot be merely a potential liability").

The Rigsbys try to twist their Count I and Count II claims into a Reverse False Claims violation, but do no more than merely restate their allegation that State Farm mischaracterized wind damage as flood loss in order to allocate losses to the NFIP. Because the Rigsbys have failed to allege particular facts showing a non-contingent obligation on the part of State Farm to pay money to the government, such claims fail. Further, because such claims are inherently dependent on Count I and Count II, which fail to satisfy Rule 9(b), dismissal of Count IV is likewise required.

Accordingly, for all the reasons set forth above, Plaintiffs have failed to allege with particularity facts supporting any violation of the FCA and Counts I, II, III and IV of the Complaint should be dismissed. This Court's recent order in *McIntosh v. State Farm Fire and Casualty Co., et al.*, No. 1:06CV1080 LTS-RHW, precludes the Rigsbys from using "any documents supplied by the Rigsby sisters to the Scruggs Katrina Group or the Katrina Litigation

Group or its associates" unless they "can show that the documents were obtained through ordinary methods of discovery." (*McIntosh* Dkt. 1173 at 1.) As there has been no discovery in this action, the Rigsbys will be unable to re-plead without resort to such illegally obtained and excluded documents and, therefore, dismissal of this action should be with prejudice.

II. THE RIGSBYS' AND THEIR COUNSEL'S REPEATED VIOLATIONS OF THE FCA'S SEAL PROVISION WARRANT DISMISSAL

The Rigsbys' claims also must be dismissed as a matter of law because they repeatedly violated the FCA's mandatory seal requirement by publicly disclosing the existence and content of their *qui tam* lawsuit. Specifically, the FCA provides that the complaint "*shall* be filed in camera, *shall* remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2) (emphasis added). "These procedures reflect Congress' desire to permit the government to investigate the allegations without 'tipping off' the alleged wrongdoers, while also 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). The seal provision protects a defendant's reputation when a "meritless *qui tam* action is filed, because the public will know that the government had an opportunity to review the claims but elected not to pursue them." *United States ex rel. Pilon v. Martin Marietta Corp*., 60 F.3d 995, 999 (2d Cir. 1995).

A relator who violates the seal provision forfeits her right to bring a claim under the FCA. *See Pilon*, 60 F.3d at 998-99; *United States ex rel. Fellhoelter v. Valley Milk Prods., L.L.C*., No. 3:05-CV-343, 2008 WL 217116, at *4 (E.D. Tenn. Jan. 24, 2008) ("By violating the mandatory statutory requirements, [relator] lost his right to bring this statutory cause of action. Therefore, on this basis, the case will be dismissed.").

A relator who discloses the contents or existence of the sealed *qui tam* complaint to a third party violates the seal. For instance, the Ninth Circuit held that disclosure to the media unequivocally violates the seal provision:

> [Relator] clearly violated the seal provision of 31 U.S.C. § 3730(b)(2) by making statements to the *Los Angeles Times* about the existence and nature of her *qui tam* suit. Any suggestion that her disclosure to a major newspaper is not a violation of the seal provision cannot be taken seriously.

United States ex rel. Lujan v. Hughes Aircraft Co., 67 F.3d 242, 244 (9th Cir. 1995) (footnote omitted). Similarly, in *Windsor*, the court held that disclosure of the *qui tam* suit to employees of the defendant company would violate the seal and warrant dismissal of the *qui tam* suit. *See Windsor*, 895 F. Supp. at 848 (stating rule, but declining to grant summary judgment because of factual dispute regarding whether such disclosure took place).

In this case, the Rigsbys and their attorneys violated the seal provision on multiple occasions. Here, the Complaint – which was filed on April 26, 2006 and amended on May 22, 2007 – remained under seal until August 1, 2007, when this Court ordered that it be unsealed. (Dkt. 25) Yet written Congressional testimony given by United States Representative Gene Taylor on February 28, 2007 – five months *before* the seal was lifted – plainly shows that the Rigsbys or their counsel told him that they had brought this *qui tam* action against State Farm and other insurers.

Indeed, Representative Taylor's testimony essentially paraphrases the allegations in the *qui tam* complaint:

> I urge the subcommittee to seek the testimony of Cori and Kerri Rigsby. The Rigsby sisters were claims adjusters working for E.A. Renfroe and Company. Renfroe worked exclusively for State Farm. The sisters were disturbed by the fraud being committed by State Farm and Renfroe officials, so they copied incriminating documents and gave them to federal and state law enforcement officials. *The Scruggs Law Firm represents the sisters in a False Claims Act filing against State Farm and Renfroe. The federal fraud case is still active*.

Insurance Claims Payment Processes on the Gulf Coast: Hearing Before the H. Fin. Serv. Comm. Subcomm. on Oversight and Investigation at 6 (Feb. 28, 2007) (statement of U.S. Rep. Gene Taylor) (emphasis added) (Ex. 4 to Mtn.).[11]

Notably, Rep. Taylor's testimony establishes conclusively that the source of this information regarding the *qui tam* suit was the Rigsbys or their counsel. This is so because in February 2007, when Rep. Taylor gave testimony, the Rigsbys had not yet amended their Complaint to add Renfroe as a defendant. At that time, only the Rigsbys and their counsel knew that they were "filing [a qui tam lawsuit] against State Farm *and Renfroe*."

The Rigsbys further violated the seal on numerous occasions by making detailed statements to the media revealing the substance of their *qui tam* suit. For instance, the Rigsbys turned over several of the documents at the heart of this case – including the October 12, 2005 engineering report conducted on the McIntosh property – to ABC News for a feature story on the nationally broadcast *20/20* on August 26, 2006.[12] The Rigsbys were also featured in the broadcast, where they repeated allegations against State Farm substantively identical to those raised in their *qui tam* complaint.[13] After the *20/20* broadcast, the Rigsbys repeated these allegations in several other media stories.[14]

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[11] Available at www.house.gov/apps/list/hearing/financialsvcs_dem/hr022807.shtml.

[12] *See* Tr. of *20/20* at 8 (Ex. 5 to Mtn.).

[13] *Compare* Tr. of *20/20* at 4 (describing Rigsbys' allegations that "damage reports be buried, replaced or changed so that insurance claims would not have to be paid), *with* Am. Compl. ¶¶ 79-85; *compare* Tr. of *20/20* at 4 (describing post-it on the McIntosh report), *with* Am. Compl. ¶ 69; *compare* Tr. of *20/20* at 4 (describing allegation that there was a "special shredding truck" and the sisters' belief the shredding was done to destroy key documents), *with* Am. Compl. ¶ 78; *compare* Tr. of *20/20* at 5 ("The sisters say they saw a senior State Farm coordinator go to great lengths to pressure outside engineers to prepare reports concluding that damage was caused by water, not wind."), *with* Am. Compl. ¶ 89; *compare* Tr. of *20/20* at 5 (where the Rigsbys describe a stack of engineering reports on a State Farm coordinator's desk and claim that she told them they all had to be changed), *with* Am. Compl. ¶ 80; *(cont'd)*

In short, a central purpose behind the FCA's strict seal provision is "protecting the defendants from damaging reputational injuries associated with possibly baseless public accusations." *Windsor*, 895 F. Supp. at 847. Here, the Rigsbys and their attorneys purposely engaged in an elaborate media campaign specifically designed to *cause* reputational injuries to State Farm. In doing so, the Rigsbys and their counsel violated the letter and spirit of 31 U.S.C. § 3730(b)(2). As a result, the Rigsbys have forfeited any right they may have had to bring this *qui tam* action.

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

The Rigsbys are not strangers to this Court. To the contrary, this Court has previously noted the multiple relationships between the Rigsbys and their former counsel Richard F. Scruggs ("Scruggs"), and the problematic situation that these multiple relationships create for the Court:

> [The Rigsbys] were E.A. Renfroe employees assigned to work State Farm *Katrina* claims in Mississippi immediately after the hurricane. At least by February 2006, the Rigsbys began copying and/or taking State Farm documents and giving them to Richard Scruggs. While still employed by Renfroe/State Farm, the Rigsbys continued to secretly provide State Farm documents to Scruggs. This conduct continued until June 2006, culminating in what has become known as the "data dump" weekend in early June when the Rigsbys and some of their friends copied thousands of confidential State Farm documents which they also turned over to Scruggs. Shortly after the "data dump" weekend, the Rigsbys, who have been characterized by Plaintiffs' counsel as key witnesses in the McIntosh case, were hired by the Scruggs Firm as "consultants" in the *Katrina* litigation, at annual salaries of $150,000.00 each. To further complicate matters, the Rigsbys are also

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compare Tr. of *20/20* at 4 (where Kerry Rigsby claims she was suspended by State Farm when she told them that they had given prosecutors thousands of company documents), *with* (FAC ¶¶ 32-34).

[14] *See, e.g.*, Michael Kunzelman, *Sisters Blew Whistle on Katrina Claims*, Assoc. Press, Aug. 27, 2006 (Ex. 6 to Mtn.); Anita Lee, *Sisters copied State Farm files; Insurer underpaid on purpose, they believe*, Biloxi Sun Herald, Aug. 26, 2006 (Ex. 7 to Mtn.).

> plaintiffs in a *qui tam* action filed under seal by Scruggs on their behalf on April 26, 2006. That case remained sealed until August 1, 2007, when the Court ordered the seal lifted. Thus, the Rigsbys are not only material witnesses in this [*McIntosh*] case, they are both employees and clients of the Scruggses. The multiple relationships involved have repeatedly resulted in situations where it became difficult to determine just whose interests the Scruggses were purportedly representing.

(*McIntosh* Dkt. 911 at 2.) More recently, this Court has ruled that "[t]he Rigsby Sisters will be disqualified as witnesses in any actions now pending on this Court's docket against State Farm or Renfroe in which the [Scruggs Katrina Group ("SKG")] or the [Katrina Litigation Group ("KLG")] has represented the plaintiffs, and any documents supplied by the Rigsby sisters to the SKG or the KLG or its associates shall also be excluded from evidence unless the plaintiffs can show that the documents were obtained through ordinary methods of discovery." (*McIntosh* Dkt. 1172 at 3.)

This Court has recognized that the SKG's payment of $150,000 a year to each of the Rigsbys was improper and unethical. As the Court explained:

> I have determined that disqualification is required because Scruggs, acting in furtherance of the SKG, paid the Rigsby Sisters a substantial sum of money (a consulting fee of $150,000 per year) despite Scruggs's knowledge that the Rigsby Sisters were material witnesses in connection with many hurricane damage claims that were likely to become the subject of litigation. . . . While the other ethical misconduct alleged by State Farm and Renfroe are substantial, the payments to the Rigsby sisters are, in and of themselves, sufficient to warrant disqualification.
>
> It is apparent to me, from my review of the deposition testimony of the Rigsby sisters, that there was no legitimate reason for these payments and that the "consulting" work that ostensibly justified these payments was a sham. . . . These payments were clearly improper.

(*Id.* at 2.) Notably, the multiple conflicts and ethical violations caused by these payments are further exacerbated in this *qui tam* action. Where, as here, the government declines to intervene, the FCA narrowly restricts a relator's compensation for bringing a successful lawsuit to "not less

than 25 percent and not more than 30 percent of the proceeds of the action or settlement." 31 U.S.C. 3730(d)(2). Moreover, the FCA clearly contemplates that the relator is *not* to be paid *anything* until the end of the lawsuit, and then *only* if she prevails. *Id.*

As discussed in Section I above, the significant monetary relief available to successful *qui tam* relators creates a very real risk of strike suits. As a result, it is important that the fee limitations in the FCA be strictly enforced. These specific fee limitations serve as an important check on frivolous *qui tam* actions (like this one) because they insure that a relator will not get a penny in compensation before the merits of the lawsuit are subject to judicial scrutiny. In this case, the Rigsbys' counsel displaced this Congressionally-mandated compensation scheme by paying the Rigsbys lavish "consulting fees" while the *qui tam* action was pending. But the *qui tam* statute will not tolerate counsel's "pay-as-you-go" scheme; the Rigsbys' lawsuit should be dismissed.

IV. THE RIGSBYS' CLAIMS FAIL BECAUSE THEY ARE PREDICATED UPON DIFFERENCES IN PROFESSIONAL JUDGMENT, WHICH CANNOT SUPPORT AN FCA CLAIM

The Rigsbys' claims under 31 U.S.C. § 3729 are further deficient as a matter of law because they are predicated on engineering site reports, which are distillations of professional opinions. But the cornerstone of section 3729(a)(1)-(3) is the existence of "a false or fraudulent claim" *knowingly* made by Defendants for the purpose of defrauding the government**.** In this case, the Rigsbys attempt to predicate liability on engineering reports assessing causation in the aftermath of Hurricane Katrina. Engineering reports, however, cannot support liability under the FCA because they are – by definition – assertions of professional judgment. Claims under the FCA "must be predicated on an objectively verifiable fact," not on judgment calls. *United States ex rel. Morton v. A Plus Benefits, Inc.*, 139 F. App'x 980, 983 (10th Cir. 2005); *see also United*

States ex rel. DRC, Inc. v. Custer Battles, LLC, 472 F. Supp. 2d 787, 797 (E.D. Va. 2007) ("It is well-established that the FCA requires proof of an objective falsehood.").

In this case, the heart of the Rigsbys' FAC is: (i) "inconsistent engineering assessments" of flood damage and (ii) allegedly altered engineering reports. (FAC ¶¶ 86-91, 68-72) In particular, the Rigsbys criticize State Farm's use of an engineering report prepared by Haag Engineering, claiming that the conclusion reached in the Haag report "was contrary to science and normative models of hurricanes in the past 100 years." (*Id.* ¶¶ 43-45) According to the Rigsbys, the incorrect scientific model used in "the Haag Report lent enough credibility to the adjusters to assign wind claims to water damage." (*Id.* ¶ 45) These engineering assessments, however, cannot form the basis of a "false" claim or record under the FCA. As the court explained in *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795 (D. Utah 1988), an "engineering judgment . . . is clearly not a statement of fact that can be said to be either true or false, and thus cannot form the basis of an FCA claim." *Id.* at 810.

Similarly, the act of adjusting a claim, which requires distinguishing between possible causes of damage well after the fact, is an exercise of professional judgment and is beyond the scope of the FCA. *See Tyger Constr. Co. v. United States*, 28 Fed. Cl. 35, 56 (1993) ("'The principle is fundamental that fraud cannot be predicated upon the mere expression of an opinion.'") (citation omitted). Such "[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false" and thus do not implicate the FCA. *United States ex rel. Roby v. Boeing, Inc.*, 100 F. Supp. 2d 619, 625 (S.D. Ohio 2000), *aff'd*, 302 F.3d 637 (6th Cir. 2002); *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp. 2d 1034, 1047 (N.D. Ill. 1998) ("Disagreements over scientific methodology do not give rise to False Claims Act liability."), *aff'd*, 183 F.3d 730 (7th Cir. 1999). Tellingly, even if

the Rigsbys could show that any one determination or judgment is wrong, "the common failings of engineers and other scientists are not culpable under the Act" and would not suffice to state a claim. *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992).

In *Morton*, the Tenth Circuit applied this line of precedent in an insurance coverage case, finding that an insurer's decision to deny coverage – which hinged first on a medical determination and then on a contractual interpretation, and where "neither the scientific nor contract determinations . . . [were] susceptible to proof of truth or falsity" – was not the appropriate target of an action under 31 U.S.C. § 3729. *Morton*, 139 F. App'x at 983. There, as here, the insurance company was required to examine a particular set of facts and render a professional judgment, and then apply that judgment to the formal requirements of an insurance contract. The *Morton* court concluded that the "[e]xpression of a legal opinion . . . depending [on] two sets of inherently ambiguous determinations by defendants, cannot form the basis for an FCA claim." *Id.* at 984.

Finally, the Rigsbys fail to identify a single statement made by State Farm that is objectively false. Instead, they allege that State Farm "characterize[d]" "damage due to wind and flying debris . . . as 'flood damage,'" and submitted claims for flood damage "for property that were [sic] outside the area designated as flood damaged by FEMA." (FAC ¶ 112 (a-b)) The Rigsbys' sole "evidence" of this "fraud," then, centers on the professional judgments of independent contractors, engaged to analyze conditions in the Gulf Coast in the aftermath of Hurricane Katrina. These analyses, which require the recreation of events for which there were often no witnesses, and which were dependent on individual judgment and expertise, cannot constitute fraud as a matter of law. *See, e.g.*, *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 792 (4th Cir. 1999) ("Expressions of opinion are not actionable as fraud."); *Luckey*, 2

F. Supp. 2d at 1047 ("Courts have consistently declined to find that a contractor's exercise of scientific or professional judgment as to an applicable standard of care falls within the scope of the FCA."). What the Rigsbys' Complaint contemplates, then, is – *at best* – nothing more than a "battle of experts." "[T]he legal process," however, and particularly the FCA, "is not suited to resolving scientific disputes or identifying scientific misconduct." *Luckey*, 2 F. Supp. 2d at 1047.

CONCLUSION

The Rigsbys, based on naked speculation and conclusory allegations, have failed to allege a single violation of the FCA with particularity. Accordingly, the FCA allegations in Counts I through IV of the First Amended Complaint must be dismissed pursuant to Rules 9(b) and 12(b)(6). Dismissal of these counts is required for several additional reasons as well. First, the Rigsbys have failed to comply with the seal mandated by the FCA. Second, their attorneys further violated the FCA when they put the Rigsbys on their payroll. Finally, the Rigsbys' allegations all involve matters dependent on the exercise of professional judgment and cannot give rise to an FCA violation. For all the foregoing reasons, State Farm requests that Counts I, II, III and IV of the First Amended Complaint be dismissed with prejudice.

This the 8th day of April, 2008.

Respectfully submitted,

STATE FARM FIRE AND CASUALTY COMPANY

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CERTIFICATE OF SERVICE

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

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