**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**

**VS** **CIVIL ACTION NO. 1:06-cv-00433-LTS-RHW**

**STATE FARM MUTUAL INSURANCE COMPANY, NATIONWIDE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, USAA INSURANCE COMPANY, FORENSIC ANALYSIS ENGINEERING CORPORATION; EXPONENT FAILURE ANALYSIS, HAAG ENGINEERING CO., JADE ENGINEERING, RIMKUS CONSULTING GROUP INC., STRUCTURES GROUP, E. A. RENFROE, INC., JANA RENFROE, GENE RENFROE and ALEXIS KING** **DEFENDANTS**

**MEMORANDUM OF LAW OF DEFENDANTS E. A. RENFROE & COMPANY, INC., GENE RENFROE, AND JANA RENFROE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT UNDER 31 U.S.C. § 3730(e)(4)**

E. A. Renfroe & Company, Inc., Gene Renfroe, and Jana Renfroe (hereinafter collectively the "Renfroe Defendants"), were named as defendants for the first time in this action in the Relators' Amended Complaint. Although all three parties have moved to dismiss Counts I to IV under Rule 9(b) of the Federal Rules of Civil Procedure, it is eminently clear from the Amended Complaint and the undisputed facts that this Court lacks subject matter jurisdiction over the claims against both the corporate and individual Renfroe Defendants. For this reason, as well, the Renfroe Defendants move for summary judgment.

## I. SUMMARY OF ARGUMENT

A statutory provision in the False Claims Act eliminates jurisdiction over *qui tam* cases that are even partly based on publicly disclosed allegations unless the relator has direct and independent information regarding the allegations. As will be demonstrated below, this case is based on allegations that were publicly disclosed on at least four separate occasions -- beginning more than seven months before the Relators filed their original *qui tam* Complaint. The key allegations in this case were publicly disclosed in class action pleadings filed in this federal district court on September 20, 2005 and January 31, 2006. The key allegations in this case were also publicly disclosed by the former head of the National Flood Insurance Program in testimony before Congress on October 18, 2005 and again on February 2, 2006. The Relators did not file their original complaint in this action until April 26, 2006.

Moreover, the Relators in this case have not pleaded facts that demonstrate any direct and independent information regarding the key allegations in this case, and their desperate effort to support their claims by engaging in the notorious "data dump" simply bolsters this conclusion. Because the allegations in Counts I through IV of the First Amended Complaint ("FAC") were publicly disclosed and the Relators do not qualify as original sources, those claims are barred under 31 U.S.C. § 3730(e)(4). This Court therefore lacks jurisdiction over Counts I through IV, and those claims must be dismissed with prejudice.

## II. LEGAL BACKGROUND

### A. Federal Courts Lack Jurisdiction Over *Qui Tam* Claims Based Upon Publicly Disclosed Allegations

Private citizens, like the Relators in this case, have standing to sue for substantive violations of the False Claims Act only because Congress has granted a limited assignment of the government's own rights under the FCA. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). However, Congress has made it abundantly clear that it intended to confer this partial assignment of its rights – including a right to a generous share (up to 30%) of any recovery – only upon individuals who bring valuable information to the government. Congress therefore established jurisdictional limits in 31 U.S.C. § 3730(e)(4) that "accommodate the primary goals of the False Claims Act: (1) 'promoting private citizen involvement in exposing fraud against the government' and (2) 'preventing parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud.'" *United States ex rel. Reagan v. East Texas Med. Ctr.*, 384 F.3d 168, 174 (5th Cir. 2004) (citations omitted); *United States ex rel. Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994) (the public disclosure bar represents Congress's effort "to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior."). The Relators in this case, Cori and Kerri Rigsby, have filed exactly the kind of parasitic and opportunistic litigation that Congress intended to prevent.

### B. An Overview of The FCA's "Public Disclosure Bar"

The FCA's public disclosure bar allows defendants to seek dismissal of *qui tam* claims if the allegations or transactions of the fraud have already been disclosed to the public through sources enumerated in the statute, and the relator's claims are even partly based upon those

publicly disclosed allegations. *United States ex rel. Federal Recovery Services, Inc. v. Crescent City E.M.S.*, 72 F.3d 447, 451 (5th Cir. 1995). The sources of potential public disclosures include media reports, governmental audits and investigations, as well as civil, criminal, and administrative hearings. The relevant statutory provision states that:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office[1] report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> 31 U.S.C. § 3730(e)(4)(A).

If a relator's allegations are at least partly based upon public disclosures, the relator may still proceed with a *qui tam* suit, but only if she can prove that she qualifies as an "original source" under the statute. To qualify as an original source, a relator must demonstrate that she has "direct and independent knowledge of the information on which the allegations are based" and that she "has voluntarily provided the information to the Government before filing" the *qui tam* action. *Id.*, § 3730(e)(4)(B).

In sum, resolving a jurisdictional challenge under Section 3730(e)(4) requires three principle inquiries: (1) Has there been a "public disclosure" of the allegations or transactions? (2) Is the *qui tam* action "based upon" the publicly disclosed allegations? (3) If so, is the relator the "original source" of the information? *Reagan*, 384 F.3d at 173-74; *Federal Recovery Services, Inc.*, 72 F.3d at 451; *United States ex rel. Church v. Mississippi Baptist Health Systems*,

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[1] So in the original, but is assumed to refer to the General Accounting Office, now known as the Government Accountability Office.

*Inc.*, No. 3:01 CV 113WS, 2005 WL 2375161, at *2 (S.D. Miss. Sept. 26, 2005). Each of these three principle inquiries involves terms of art -- "public disclosure," "based upon," and "original source" -- that have been the source of enormous amounts of litigation. These terms have therefore been parsed and interpreted many times in this Circuit, and that authority is discussed in greater detail below. However, when that precedent is applied to the facts of this case, it compels the conclusion that (1) the allegations in the Amended Complaint were publicly disclosed on numerous occasions, (2) the Relators' allegations were at least partly based upon those public disclosures, and (3) the Relators do not qualify as original sources because they do not have direct and independent information regarding the alleged fraud.

### C. The Public Disclosure Bar Is A Jurisdictional Provision

The Supreme Court recently confirmed that the FCA's public disclosure bar is a jurisdictional provision and as such, challenges asserted under Section 3730(e)(4) may be raised at any time.[2] In *Rockwell*, the Court held that the FCA "*eliminates federal-court jurisdiction* over actions under § 3730 of the Act that are based upon the public disclosure of allegations or transactions 'unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.'" *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1401 (U.S. 2007) (emphasis added). *See also United States ex rel. Fried v. West Independent School Distr.*, No. 07-50732, 2008 WL 1991787, at *2 (5th Cir. May 9, 2008) ("[t]o prevent 'parasitic suits' the Act prohibits a relator from pursuing an action – *and strips federal*

[2] In *Rockwell*, the Section 3730(e)(4) jurisdictional challenge was asserted in a post-verdict motion, and the Court held that it must be considered, even though it was raised after a verdict had been reached and despite the fact that the relator claimed that the defendant had previously conceded jurisdiction. *Rockwell* at 1405.

*courts of subject matter jurisdiction over the claim* – when the allegations of fraud are based on information that has been publicly disclosed" if the relator is not an original source.) (emphasis added).

A jurisdictional challenge raised under Section 3730(e)(4) is "necessarily intertwined with the merits" and is therefore treated as a motion for summary judgment. *Reagan,* 384 F.3d at 173. Nonetheless, this FCA jurisdictional issue is a threshold issue, and threshold jurisdictional issues must normally be decided before merits issues. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94-95 (1998); *United States ex rel. Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp*., 276 F.3d 1032, 1040 (8th Cir. 2002) (describing the public disclosure/subject matter jurisdiction issue as a "threshold" issue). A grant of summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Reagan*, 384 F. 3d at 173.

### D. A Public Disclosure Challenge Requires A Claim-By-Claim Evaluation Of The Amended Complaint

The public disclosure analysis is performed on a claim-by-claim basis, and when claims are found to have been publicly disclosed, the relator must prove original source status as to *each claim*. *Rockwell*, 127 S. Ct. at 1408-1410. Moreover, the public disclosure and original source analysis applies to the allegations in the Relators' original complaint as amended. *Id.* at 1409. "[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." *Id*. Performing this claim-by-claim analysis helps achieve Congress's objective of discouraging parasitic suits; otherwise, a relator could plead a "trivial theory of fraud for which he had some direct and independent

knowledge and later amend the complaint to include theories copied from the public domain or from materials in the Government's possession." *Id.* at 1408.

## III. KEY ALLEGATIONS IN THE AMENDED COMPLAINT

The key allegations relevant for this claim-by-claim analysis are those that reflect Relators' attempt to establish the *sine qua non* of an FCA case: a false claim or overcharge to the government. Therefore, the key allegations made by Relators in their First Amended Complaint are as follows:

- ¶ 42: Hurricane force winds normally precede storm surge by six to seven hours. (Plead for the first time in the May 22, 2007 First Amended Complaint.)

- ¶¶ 43-44: State Farm adopted a report that opined "contrary to science and all normative models of hurricanes in the past 100 years" that storm surge preceded the hurricane force winds during Hurricane Katrina and therefore caused most of the property damage associated with Hurricane Katrina. (Plead for the first time in the May 22, 2007 First Amended Complaint).

- ¶ 51: WYO [Write Your Own] companies have an incentive to attribute damage to flood, rather than wind damage, thus shifting costs to the federal government that would otherwise be paid by the WYO company.

- ¶ 56: "*On information and belief*," the insurance company defendants decided to mischaracterize wind and rain damage (which they may have been required to cover under homeowners' policies written by the insurance company defendants) as flood damage.

- ¶ 57: State Farm obtained engineering reports on properties that had suffered significant damage to support these improper "wind vs. flood" determinations.

- ¶ 63: "*On information and belief*," insurance companies misallocated wind claims to the Flood Insurance Program when wind damage made a structure unsalvageable.

- ¶ 64: The misallocation of wind claims as flood claims caused damages to the United States.

*See* FAC (Docket No. 16).

## IV. THE KEY ALLEGATIONS WERE "PUBLICLY DISCLOSED" NUMEROUS TIMES IN NUMEROUS SOURCES

A public disclosure that triggers the application of Section 3730(e)(4) is a disclosure that contains enough information "to enable [the government] adequately to investigate the case and make a decision whether to prosecute." *United States ex rel. Johnson v. Shell Oil Co.*, 33 F. Supp. 2d 528, 540 (E.D. Tex. 1999). "The False Claims Act does not require that the fraudulent actions which are the subject of the public disclosure involve the specific Defendants and geographical area involved in the suit; rather, all that is necessary is enough information to 'set the government squarely on the trail of the alleged fraud without the assistance of relators.'" *United States ex rel. Fried v. Hudson Independent School Distr.*, No. 9:05-CV-245, 2007 WL 3217528, at *3 (E.D. Tex. Oct. 26, 2007), *quoting Johnson*, 33 F. Supp. 2d at 540.

State Farm identified a number of public disclosures of the key allegations that occurred before the Relators filed their original Complaint in its Motion to Dismiss For Lack of Subject Matter Jurisdiction (Docket No. 91). In particular, the following public disclosures of the key allegations preceded Relators' April 26, 2006 filing of the original Complaint:

- **September 20, 2005:** The *Cox/Comer* class action litigation filed in the U.S. District Court for the Southern District of Mississippi alleges that State Farm and other insurers were improperly passing on costs to the federal flood insurance program. Ex. 1 at ¶¶ 1(d), 6, 12.
- **October 18, 2005:** Hearings in Congress specifically address the possibility of fraud in the Write-Your-Own program, including the allegation that insurers were improperly allocating wind claims to the federal flood insurance program and that wind damage probably preceded storm surge damage in Hurricane Katrina. Ex. 2 at 6-8.
- **January 31, 2006:** Pleadings filed in the *Cox/Comer* class action litigation allege even more explicitly that taxpayers are harmed when insurers improperly characterize wind

damage as flood damage and shift costs to the Federal Flood Insurance Program. Ex. 3 at ¶¶ 1(d), 5, 12.

- **February 2, 2006:** More testimony is provided to the Senate Committee on Banking, Housing and Urban Affairs regarding the possibility that insurers might be unfairly allocating costs to the Flood Insurance Program. Ex. 4 at 6.

Thus, the key allegations in the Amended Complaint were publicly disclosed in at least four separate sources well before the Rigsbys filed their *qui tam* suit on April 26, 2006. Two of those disclosures occurred in pleadings filed in this very Court.

### A. The Public Disclosure Of Allegations Or Transactions Satisfy Section 3730(e)(4)(A)

#### 1. Disclosures In Civil, Criminal Or Administrative Hearing

There can be no dispute that the public disclosure bar is triggered by disclosures in civil litigation. Numerous courts, including the Fifth Circuit Court of Appeals, have concluded that this is so. Section 3730(e)(4)(A) has been properly interpreted "to encompass the full range of proceedings in a civil lawsuit . . . ." *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1157 (3d Cir. 1991). "Any information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing for the purposes of section 3730(e)(4)(A)" and "[t]his includes civil complaints." *Federal Recovery Servs., Inc.*, 72 F.3d at 450 (citations omitted). Even materials filed in state court, which are sometimes less readily available than material filed with federal district courts, are public disclosures under the FCA. *See Reagan*, 384 F.3d at 174 (holding that allegations in a state court lawsuit were clearly publicly disclosed).

The public disclosures relevant to this case began occurring almost immediately after Hurricane Katrina hit coastal areas of Louisiana and Mississippi on August 29, 2005. Less than

a month later, the *Cox/Comer* complaint was filed in the Southern District of Mississippi, on September 20, 2005. Among other things, that complaint asserted that, "[i]n an effort to save money and pass on the costs of the loss to the federal flood insurance program, adjusters working on behalf of the Insurance Defendant Class have denied claims under the insurance policies at issue." *Cox v. Nationwide Mut. Ins. Co.,* No. 1:05-cv-436-LG-RHW (S.D. Miss.), Cmpl. (Docket No. 1) ¶ 12. A January 31, 2006 Second Amended Complaint in the same case alleged that State Farm and others had improperly sought to "shift repayment obligations to the Federal Flood Insurance Program" at taxpayers' expense. *Comer v. Nationwide Mut. Ins. Co.*, No. 1:05-cv-436-LTS-JMR (S.D. Miss.), Second Am. Cmpl. (Docket No. 53-1) ¶¶ 1(d), 5, 12. The disclosures in the *Cox/Comer* litigation therefore trigger the application of the FCA's public disclosure bar, and the Relators now have the burden of doing what they cannot do: proving original source status.

**2. Disclosures In A Congressional, Administrative, Or GAO Report, Hearing, Audit, Or Investigation**

The public disclosure bar is also triggered in this case because of disclosures that occurred in Congressional hearings well before the Relators filed their *qui tam* suit. As is noted above, the explicit allegation of possible fraud in the Write-Your-Own flood insurance program arose not once, but at least twice, in hearings before the Senate Committee on Banking, Housing and Urban Affairs. On October 18, 2005, J. Robert Hunter, the former head of the National Flood Insurance Program specifically addressed the issue at the heart of the Relators' key allegations, in testimony provided under the caption **"WYO Conflicts of Interest: Wind v. Water":**

> Since Hurricane Katrina devastated the Gulf Coast, there has been much public discussion about whether damage to homes was caused by wind and rain, or by flooding. Many policyholders have policies covering wind and rain damage (under homeowners' policies), but not flooding, which is a separate policy underwritten by the NFIP.
>
> Despite press releases and public pronouncements by the insurance industry that those without flood insurance should get nothing if their homes were eventually flooded, the situation is far from clear cut. Moreover, even though a property may have been washed away by the storm surge, it was likely first hit by heavy winds, so that by the time the water wiped out the property, some percentage of the property was already destroyed by wind and rain . . . . The importance of this legal dispute to the flood insurance program *is obvious*. *To the extent that insurers underpay wind when allocating damage between their homeowners' policy and the NFIP policy, taxpayers will suffer*.

*See* Written Test. of J. Robert Hunter, 2005 WLNR 16872930, at 6-7 (attached at Ex. 2) (emphasis added). This October 18, 2005 public disclosure of disputes with insurance companies over the timing of damage caused by storm surge – as opposed to wind damage – also occurred well before this allegation first appeared in Relators' Amended Complaint on May 22, 2007.

Mr. Hunter's concerns about fraud against the NFIP were reiterated in his February 2, 2006 testimony before the Senate Banking, Housing and Urban Affairs Committee. *See* Feb. 2, 2006 Written Test. of J. Robert Hunter, 2006 WLNR 1848600, at 6. On that date – more than two full months before the original Complaint was filed – Mr. Hunter again explored the issue of the **"**WYO Conflicts of Interest: Wind v. Water." The February 2006 testimony under this caption begins with information similar to that in the October statement, but then more fully develops the public disclosure of possible fraud against both the NFIP program and homeowners without flood insurance. Because these issues overlapped in Mr. Hunter's testimony, the WYO Conflicts of Interest testimony is provided in full below:

> Since Hurricane Katrina devastated the Gulf Coast, there has been much public discussion about whether damage to homes was caused by wind and rain, or by flooding. Many policy holders have policies covering wind and rain damage (under homeowners' policies), but not flooding, which is a separate policy underwritten by NFIP. Many court challenges to the industry's no coverage determinations have begun.
>
> The importance of this legal dispute to the flood insurance program is obvious. To the extent that insurers underpay wind when allocating damage between their homeowners' policy and the NFIP policy, taxpayers will suffer. It is also true that the more lax the federal government is in demanding that the allocation be fair to taxpayers, the more likely it is that persons without flood insurance will receive unfair or no compensation under their wind policies. Take the situation of two damaged homes next to each other, one with flood coverage and one without. If the federal government is vigilant regarding the home with flood coverage and the resulting allocation is 50/50 versus the insurer suggestion of 25 percent wind/75 percent flood, the insurer will be hard-pressed to assess the similarly damaged home next door at 25 percent wind damage.
>
> For the benefit of taxpayers and those with no flood insurance, it is essential that the government assure a fair and proper allocation of the wind/flood damage by the WYO insurance companies who have a serious conflict of interest. [The Consumer Federation of America] urges this Committee to insure that the GAO audits these allocations starting right now, so that any tendency of the insurers to diminish their wind losses for their own benefit is stopped quickly.

Ex. 4 at 5. This February 2, 2006 public disclosure of WYO conflicts of interest and the "tendency" to misallocate wind damage to the National Flood Insurance Program also occurred well before the Relators filed their *qui tam* suit on April 26, 2006.

## V. THE RELATORS' CLAIMS ARE "BASED UPON PUBLICLY DISCLOSED ALLEGATIONS

The law in the Fifth Circuit is clear and unequivocal: a *qui tam* relator must prove original source status if the allegations in her complaint are even partly based upon publicly disclosed allegations. "Congress chose not to insert the adverb 'solely' before 'based upon….'" If relators could avoid the application of the public disclosure bar by requiring proof that their allegations were based only on the public disclosures, such a requirement "would accomplish

exactly that result and alter the statute's plain meaning." *Federal Recovery Servs.*, 72 F.3d at 451. The Fifth Circuit's holding in *Federal Recovery Services* is especially instructive because it holds that relators cannot defeat a public disclosure challenge simply by pointing to "other claims" when such claims "are substantively identical to those previously disclosed." *Id*. Thus, the Relators' allegations regarding the Mullins and McIntosh claims (FAC (Docket No. 16) ¶¶ 65-77) do *not* serve to defeat the application of the public disclosure bar.

Moreover, a unanimous panel of the Fifth Circuit quite recently rejected a relator's attempt to characterize public disclosures about an allegedly fraudulent practice as merely "information" about possible misconduct, as opposed to specific "allegations or transactions" of a fraud by the parties specifically identified in that relator's suit. *Fried v. West Independent School Distr.*, 2008 WL 1991787, at *2. The Court of Appeals held that:

> To the contrary, the record shows that the very essence of the allegations made by Fried had been publicly disclosed on several occasions prior to Fried's suit in 2005. For example, the General Accounting Office received an inquiry through its FraudNET system in 2002 which questioned [the alleged exploitation of a regulatory loophole] by Texas school districts. As a result of this inquiry, that Office issued a report on the programs (including their "potential for abuse") in August 2002. . . . In addition, Congressional hearings were held in 2003 and 2004 in which the loophole was debated-and its use by Texas school districts was specifically noted.

*Id*. (citations omitted). The Fifth Circuit concluded that "much" of the relator's information "duplicates what was uncovered in government investigations," and that

> Even if Fried uncovered some nuggets of new, *i.e.*, non-public, information, his claims of fraud are based at least in part on allegations already publicly disclosed. Therefore, we hold that Fried's *qui tam* suit is based on publicly disclosed information. His claims thus are barred unless he can show that he is the original source of the information underlying his claim.

*Id*. This is precisely the situation before this Court. In both the *Cox/Comer* litigation and the Congressional hearings described above, "the very essence" of Relators' allegations was publicly disclosed. A few "nuggets" of non-public, speculative information, such as details (many incorrect or irrelevant, as it turns out) regarding particular claims, do not prevent the application of the public disclosure bar, and the Relators cannot proceed with their case if – as is true here – they do not qualify as original sources under Section 3730(e)(4)(B).

## VI. THE RELATORS CANNOT ESTABLISH "ORIGINAL SOURCE STATUS"

Cori and Kerri Rigsby do not qualify as original sources and cannot establish original source status. "An 'original source' is someone with 'direct and independent knowledge of the information' which forms the basis of his claims, who provides the information to the Government before filing suit." 31 U.S.C. § 3730(4)(B); *Fried*, 2008 WL 1991787, at *3; *Reagan*, 384 F.3d at 177.[3] "In order to be 'direct,' the information must be *firsthand* knowledge. In order to be 'independent,' the information known by the relator *cannot* depend or *rely on the public disclosures*." *Fried*, 2008 WL 1991787, at *3 (emphasis added), quoting *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997). To establish original source status a relator must "allege specific facts – as opposed to mere conclusions – *showing exactly how and when he or she obtained direct and independent knowledge* of the fraudulent acts alleged in the complaint and support those allegations with

[3] The Relators state that they made their first submission to the United States Attorney before filing the original Complaint. They report in their Amended Complaint that they made another submission to the United States on December 8, 2006. Am. Comp. ¶ 3. Notably, this second admission occurred on the same date on which Judge Acker issued a preliminary injunction in the Northern District of Alabama enjoining the Rigsbys and their agents from sharing specified documents "unless to law enforcement officials *at their request*." Ex. 6 at 14 (emphasis added).

*competent proof*." *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999) (emphasis added).

Kerri and Cori Rigsby fail to establish original source status in their Amended Complaint because they rely almost exclusively on conclusory assertions claiming, for example, that they "witnessed from time to time the events" alleged in the First Amended Complaint. FAC (Docket No. 16) ¶¶ 11, 12. Numerous allegations are made "on information and belief," but contain none of the specific facts that would constitute "competent proof" of original source status. *See, e.g.*, FAC (Docket No. 16) ¶¶ 18, 19, 20, 21, 22, 59, 63, 97, 110. In paragraph 27 the Relators make another conclusory assertion that they have "full and independent knowledge of the facts and circumstances surrounding the allegations made in this Complaint, and learned this information in their capacity as employees, and through no other source."

Nowhere in paragraph 27 or elsewhere in the First Amended Complaint do the Relators acknowledge, as Kerri Rigsby admitted in pleadings filed in the United States District Court for the Northern District of Alabama, that her knowledge of the allegations in this case is – when it suits her purposes – based on publicly disclosed sources. Criminal contempt proceedings were initiated against Kerri Rigsby in that court, and in pleadings submitted in opposition to those proceedings, Ms. Rigsby conceded that the Relators obtained public information relating to this case. Ms. Rigsby's own submission admits that:

> The simple truth is that the Rigsbys are **not** the only sources supporting allegations that engineering reports were changed after Hurricane Katrina. . . . [D]ozens of lawsuits have been filed and numerous news articles have been published (whose sources have been individuals other than the Rigsbys), which described engineering reports that were later changed or altered. Ms. Rigsby gained information regarding one of these cases, the Mullins case, from reading

> media reports such as the article regarding certain emails and changed engineering reports in the Clarion-Ledger.

Ex. 5 at 2.

Moreover, any attempt the Relators might make to claim original source status through the use of misappropriated State Farm documents, such as those gathered during the now notorious June 2006 "data dump," would simply reinforce the conclusion that the Relators lacked direct and independent information to support their claims. If they had possessed such knowledge, the data dump would have been entirely unnecessary. The Rigsby sisters could have built their case as true whistleblowers do: on the basis of factual, credible testimony, bolstered by documentary evidence obtained through proper discovery methods.

## VII. CONCLUSION

For the reasons set forth above, this Court lacks subject matter jurisdiction over the substantive FCA allegations in Counts I through IV of the Relators' First Amended Complaint, and those Counts therefore must be dismissed with prejudice.

THIS the 27th day of May, 2008

Respectfully submitted,

**E. A. RENFROE & COMPANY, INC., GENE RENFROE and JANA RENFROE, individually Defendants**

BY: s/ H. Hunter Twiford, III
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**CERTIFICATE OF SERVICE**

I, the undersigned H. Hunter Twiford, III, McGlinchey Stafford PLLC, hereby certify that on this day, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants:

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THIS, the 27th day of May, 2008.

s/ H. Hunter Twiford, III
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