

**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 INDIVIDUAL DEFENDANTS GENE RENFROE
AND JANA RENFROE IN SUPPORT OF THEIR MOTION TO DISMISS
FOR FAILURE TO COMPLY WITH RULES 12(b)(6) AND 9(b)**

Individual defendants Gene Renfroe and Jana Renfroe respectfully move to dismiss all claims in Relators' First Amended Complaint for Damages Under the False Claims Act, 31 U.S.C. § 3729, *et seq.* (the "Amended Complaint"), under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. Counts I through IV of the Amended Complaint do not plead fraud against these individuals with the specificity required under Rule 9(b). Count V fails to state a claim upon which relief may be granted under Rule 12(b)(6) because Relators have not pled the elements of a whistleblower retaliation claim under 31 U.S.C. § 3730(h) and because neither Gene Renfroe nor Jana Renfroe was ever the "employer" of the plaintiffs and therefore cannot be held liable under Section 3730(h).

As was argued in the Defendant E. A. Renfroe & Company, Inc.'s Motion to Dismiss for Failure to Comply with Rules 12(b)(6) and 9(b) [Docket No. 115] and Memorandum of Law in Support of Motion to Dismiss for Failure to Comply with Rules 12(b)(6) and 9(b) [Docket No. 116] (hereinafter "Renfroe Inc. Memorandum"), filed on April 8, 2008, much of which will be incorporated by reference in this Memorandum, Gene and Jana Renfroe respectfully seek dismissal of this case prior to discovery.

Gene and Jana Renfroe are, respectively, the President/Managing Director and the Treasurer/Director of Administration of Defendant E. A. Renfroe & Company, Inc. ("Renfroe Inc." or the "Company"). Neither Gene Renfroe nor Jana Renfroe was a defendant in the Relators' original *qui tam* complaint. They, like Renfroe Inc., were named as defendants in this action only after Renfroe Inc. filed a successful lawsuit in federal court in Alabama seeking to enforce employment contracts signed by the Relators. The Amended Complaint provides no detail or guidance whatsoever on what "claims" submitted by other parties are allegedly "false," who submitted them, why any particular claims were "false," or – most importantly – how Gene or Jana Renfroe was individually responsible for causing the submission of false claims of those other parties. Consequently, compliance with Rule 9(b) is essential in this case to allow Gene and Jana Renfroe to defend themselves. Moreover, Count V of the Amended Complaint fails to state a claim under 31 U.S.C. § 3730(h), particularly because it does not plead that Gene and Jana Renfroe were, as individuals, the employers of the Relators.

FACTUAL BACKGROUND

Gene Renfroe is President and Managing Director of Renfroe Inc. Jana Renfroe is Treasurer and Director of Administration of the Company. Renfroe Inc. is a temporary personnel staffing company that specializes in providing insurance adjusters to adjust property

damage claims for insurance companies. Am. Comp. ¶ 24. In particular, Renfroe provides temporary personnel to supplement the resources of insurance companies when catastrophic events result in an urgent, increased demand for adjusters. *Id.* Renfroe was called upon by State Farm during the aftermath of Hurricane Katrina, and Renfroe did send independent adjusters to Mississippi to assist State Farm in providing adjusting services to its insureds. *Id.* Renfroe's headquarters and principal place of business is located in Birmingham, Alabama.

The respective roles of Renfroe Inc. and its insurance company customers and the other defendants in this case, as well as the background of the breach of contract litigation between Renfroe Inc. and the Relators, is summarized in the Renfroe Inc. Memorandum at 2-5 [Docket No. 116], which is incorporated herein by reference.

ARGUMENT

I. RELATORS' AMENDED COMPLAINT AGAINST GENE AND JANA RENFROE MUST BE DISMISSED BECAUSE IT DOES NOT SATISFY THE HEIGHTENED PLEADING REQUIREMENTS UNDER RULE 9(b)

The pleading requirements in the Federal Rules of Civil Procedure set forth the elements that must be included in a federal complaint to be allowed to proceed:

[A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-236 (3d ed. 2004) (hereinafter *Wright & Miller*) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), . . . (footnote omitted).

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-1965 (2007). Failure to satisfy that criteria requires dismissal. *Elam v. Pharmedium Healthcare Corporation*, 2008 WL 1818436 (N.D. Miss. April 18, 2008).

In addition, a complaint raising False Claims Act (“FCA”) allegations must also meet the stringent pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. *See United States ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 384 (5th Cir. 2003); *United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 328 (5th Cir. 2003); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997). Rule 9(b) provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Failure to comply with Rule 9(b) renders a complaint subject to dismissal under Rule 12(b)(6). *Russell*, 193 F.3d at 308 (“A dismissal for failure to comply with Rule 9(b) is a dismissal on the pleadings for failure to state a claim.”); *Dow Chem. Co.*, 343 F.3d at 328 (same).

A. The Amended Complaint Fails To Satisfy Rule 9(b) As To Gene And Jana Renfroe

In support of this Rule 9(b) motion, Gene and Jana Renfroe respectfully incorporate by reference the arguments made on behalf of Renfroe Inc. in the Renfroe Inc. Memorandum at 5 to 20. Among other deficiencies summarized therein, the Amended Complaint fails to distinguish between the actions of the various “defendants;” fails to set forth a factual basis for key “information and belief” allegations; does not identify which corporate employees took what actions; and fails to identify any specific false claims or false statements alleged. The Amended Complaint also fails to plead any facts supporting any agreement between the Defendants or the specific intent necessary to properly plead a conspiracy count. Because of these deficiencies alone, which need not be repeated in detail here, the Amended Complaint should be dismissed against Gene and Jana Renfroe individually.

In addition, however, when naming individuals in FCA cases, it is even more important to satisfy Rule 9(b)'s stringent pleading requirements. While individuals can have liability under the FCA, the normal defendant in civil FCA cases is a corporate defendant. The corporation may be vicariously liable for the acts of its agents and employees if those individuals acted within the scope of their corporate duties and intended to benefit the corporation. *See United States v. Ridglea State Bank*, 357 F.2d 495, 500 (5th Cir. 1966); *United States v. Entin*, 750 F. Supp. 512, 519 (S.D. Fla. 1990). Individuals, however, are liable under the FCA only for their own acts; otherwise, the imposition of vicarious liability eliminates the FCA intent requirement and transforms the law into a strict liability statute. In *United States v. Nazon*, No. 93 C 5456, 1993 U.S. Dist. LEXIS 15642 at *7 (N.D. Ill. Nov. 3, 1993), for example, the government sought to impose personal liability on a physician for claims that were submitted by others. The court denied the government's summary judgment motion, holding that cases allowing vicarious corporate liability are distinguishable, and that the use of agency principles against an individual would eviscerate the FCA's scienter requirement. *Id.* *See also United States ex rel. Piacentile v. Wolk*, 1995 U.S. Dist. LEXIS 580 at *12-14 (E.D. Pa. Jan. 13, 1995) (holding that a corporate officer's position did not support the government's FCA claim against him in his individual capacity because the government did not allege any misfeasance by that defendant). Individuals, even those who serve as officers or executives of a company or institution, are not liable under the False Claims Act for the acts of corporate employees – they may only be held liable for their own individual conduct.

Applying these liability principles to the pleading requirements of Rule 9(b), a plaintiff must plead, with specificity, the actions of the individual defendant that allegedly violated the FCA. In this case, the Amended Complaint (which does not even specify the actions of Renfroe

Inc. that allegedly violated the False Claims Act) does not address what particular actions Gene or Jana Renfroe took that “caused” some third party to submit a false claim in connection with the violations alleged in Counts I through IV of the Amended Complaint. Paragraphs 59, 109, 117, 124 and 130 (all quoted or summarized below) are the only paragraphs in Counts I through IV of the Amended Complaint that contain allegations regarding actions allegedly taken by Gene Renfroe and Jana Renfroe in their individual capacities:

¶ 59: On information and belief, defendant State Farm directed its employee adjusters and independent contractor adjusters (supplied by defendant E.A. Renfroe, Inc., and supervised by Renfroe employees including Jana and Gene Renfroe) to show flood damage whenever and wherever there was any amount of water damage, and to adjust the claim as flood insurance rather than hurricane insurance even though the primary mechanism for damage was wind, not flood waters.

¶ 109: Defendants State Farm Mutual Insurance Company, E.A. Renfroe, Inc., Alexis King, Jana Renfroe, Gene Renfroe, and the various engineering defendants, acting through their employees, officers, agents and independent contractors knowingly presented or caused to be presented claims for payment of flood damage.

¶ 117: Defendants State Farm Mutual Insurance Company, E.A. Renfroe, Inc., Jana Renfroe, Gene Renfroe, Alexis King, and the Engineering Defendants, acting through their officers, employees, agents, adjusters, and independent contractors knowingly made, used, or caused to be made or caused to be used, false records in support of false claims.

¶ 124: Defendants State Farm Mutual Insurance Company, E.A. Renfroe, Inc., Jana Renfroe, Gene Renfroe, Alexis King, and the Engineering Defendants, acting through their officers, employees, agents, adjusters, and independent contractors conspired to defraud the Government by getting false or fraudulent claims allowed or paid.

Paragraph 130 of the Amended Complete simply makes the bald assertion that Jana Renfroe conspired with Gene Renfroe, State Farm, and Alexis King and that Gene Renfroe conspired with Jana Renfroe, State Farm, and Alexis King.

While the allegations regarding Renfroe Inc. are grossly deficient, the allegations regarding Gene and Jana Renfroe are even more obviously inadequate under the strict Rule 9(b) standards that apply to FCA cases. Counts I to IV of the Amended Complaint should therefore be dismissed as to Gene Renfroe and Jana Renfroe.

II. RELATORS FAIL TO STATE A CLAIM FOR RELIEF UNDER 31 U.S.C. § 3730(h)

The retaliation claims asserted in Count V do not satisfy fundamental pleading requirements, and therefore must be dismissed under Rule 12(b)(6). 31 U.S.C. Section 3730(h) states, in relevant part, that:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment *by his or her employer* because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. *Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.* (Emphasis added).

As explained more fully in the Renfroe Inc. Memorandum at 20 to 26 [Docket No. 116], the Amended Complaint fails to state a prima facie case under Section 3730(h). The Relators do not adequately allege that Relators were engaging in protected conduct, and they do not allege that Renfroe Inc. or Gene and Jana Renfroe had knowledge that Relators were engaged in alleged protected conduct. Sections of the Renfroe Inc. Memorandum detailing those deficiencies are incorporated herein by reference, and Count V of the Amended Complaint should be dismissed for those reasons alone.

Moreover, the allegations against Gene and Jana Renfroe under Section 3730(h) set forth in Count V should be dismissed for the additional reason that the Amended Complaint does not

(and could not) allege that either Gene Renfroe or Jana Renfroe, individually, was the “employer” of plaintiffs Cori and Kerri Rigsby.¹ Because Section 3730(h) liability applies only to employers, Section V of the Amended Complaint should be dismissed as to Gene and Jana Renfroe based upon the express allegations in the Amended Complaint.

The plain language of Section 3730(h) provides that an (h) claim may only be brought against an “employer.”² In a long line of cases, courts have routinely held that claims against supervisors or corporate officials sued in their individual capacities under Section 3730(h) must be dismissed. *See, e.g., United States ex rel. Golden v. Arkansas Game & Fish Comm’n*, 333 F.3d 867, 870-71 (8th Cir. 2003) (officials sued in their individual capacities were not plaintiff’s “employers” within the meaning of Section 3730(h)); *Overton v. Board Comm’rs of Rio Blanco County*, No. 05-cv-00186-WDM-PAC, 2006 WL 2844264, at *5 (D. Colo. Sept. 29, 2006) (dismissing retaliation allegations against board member in his personal capacity who was not an “employer” in the common law sense); *United States ex rel. Sarafoglou v. Weill Med. College of Cornell Univ.*, 451 F. Supp. 2d 613, 625 (S.D.N.Y. 2006) (dismissing retaliation allegations against individual defendants who were merely supervisors); *United States ex rel. Harris v. EPS, Inc.*, No. 2:05-CV-212, 2006 WL 1348173, at *8 (D. Vt. May 16, 2006) (individual supervisors were not employers under Section 3730(h)); *Elizondo v. Parks*, No. SA-04-CA-1025-XR, 2005 WL 329268, at *8 (W.D. Tex. Dec. 5, 2005) (defendant could not be liable as an “employer” in

¹ In numerous allegations throughout the Amended Complaint, the plaintiffs allege that they were employees of E. A. Renfroe & Company, Inc.

¶ 34: “They were discharged from employment by E. A. Renfroe.”

¶ 147: “At all times relevant herein relators were the joint employees of State Farm Mutual Insurance Company and E. A. Renfroe, Inc.”

¶ 152: “. . . E. A. Renfroe ‘accepted their resignations’ ... and E. A. Renfroe ... discharged relators....”

² In addition to referring specifically to acts “by his or her employer,” Section 3730(h) provides for relief such as reinstatement which is only available from an employer.

his individual capacity); *United States ex rel. Lang v. Northwestern Univ.*, No. 04 C 3290, 2005 WL 670612, at *2 (N.D. Ill. Mar. 22, 2005) (dismissing retaliation claims against individual defendants because a supervisor could not be an “employer” for purposes of retaliation under the FCA); *Pollak v. Board of Trustees of Univ. of Ill.*, No. 99-C-710, 2004 WL 1470028, at *3 (N.D. Ill. June 30, 2004) (plaintiff’s supervisors, who were sued in their individual capacities, were not “employers” within the meaning of Section 3730(h)); *United States ex rel. McVey v. Board of Regents of Univ. of Cal.*, 165 F. Supp. 2d 1052, 1056 (N.D. Cal. 2001); *Palladino ex rel. United States v. VNA of S. N.J., Inc.*, 68 F. Supp. 2d 455, 464-65 (D.N.J. 1999); *Miller v. Bunce*, 60 F. Supp. 2d 620, 624 (S.D. Tex. 1999), *aff’d*, 220 F.3d 584 (5th Cir. 2000) (faculty members not “employers”); *United States ex rel. Lamar v. Burke*, 894 F. Supp. 1345, 1348 (E.D. Mo. 1995) (company president, who actually fired the employee, not personally liable as “employer” within meaning of Section 3730(h)).

Even owners of closely-held corporations must be dismissed. The Court of Appeals for the District of Columbia Circuit held that corporate control and ownership did not render the individual defendant an “employer” under Section 3730(h). *United States ex rel. Siewick v. Jamieson Sci. & Eng’g., Inc.*, 322 F.3d 738, 740 (D.C. Cir. 2003). In that case, Section 3730(h) claims against the president and owner of the defendant corporation were dismissed because the individual was not the “employer.”

The Amended Complaint does not, and could not, allege that the plaintiffs here were “employed” by Gene and Jana Renfroe in their individual capacities.³ For this reason, as well as

³ While not necessary for the disposition of the instant motion, the Renfroe Defendants note there was a passing reference to Renfroe Inc. in a prior Order: "When the Rigsby sisters told their Renfroe superiors what they had done, their employment with Renfroe was terminated." Docket No. 177 at 2. In fact, Renfroe Inc. accepted the Rigsbys' resignations after they appeared on television and gave statements to the media in August 2006, when Renfroe Inc. was notified that they had accepted employment by the Scruggs firm.

the others set forth in the Renfroe Inc. Memorandum previously filed, Count V should be dismissed.

CONCLUSION

For the foregoing reasons, all allegations in the Amended Complaint against Gene Renfroe and Jana Renfroe should be dismissed.

THIS the 27th day of May, 2008

Respectfully submitted,

**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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THIS, the 27th day of May, 2008.

s/ H. Hunter Twiford, III
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