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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

E.A. RENFROE & CO., INC.	§	
Plaintiff,	§	**No. 2:06-cv-1752-WMA**
v.	§	
CORI RIGSBY and KERRI RIGSBY,	§	
Defendants.	§	

DEFENDANTS' RESPONSE TO PLAINTIFF'S AMENDED BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING ITS CLAIM FOR BREACH OF CONTRACT

COME NOW defendants Cori Rigsby and Kerri Rigsby ("Rigsbys" or "Defendants"), by and through their undersigned counsel, and respond in opposition to Plaintiff E.A. Renfroe & Company, Inc.'s ("Renfroe" or "Plaintiff") Amended Brief in Support of its Motion for Partial Summary Judgment Regarding its Claim For Breach of Contract as follows:

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INTRODUCTION

On October 31, 2007, Renfroe filed its Motion for Partial Summary Judgment. On December 3, 2007, Defendants filed a brief in opposition to Renfroe's motion and in support of its Motion for Summary Judgment.

Renfroe filed a response to Defendants' Motion for Summary Judgment and Reply in Support on December 10, 2007. Defendants then filed a reply in support of their Motion for Summary Judgment on December 21, 2007.

Defendants hereby incorporate by reference the facts and arguments set forth in their earlier briefs. Based on the arguments in those filings, as well as those herein, Renfroe's Motion for Partial Summary Judgment should be Denied and Defendants' Motion for Summary Judgment is due to be Granted.

RESPONSE TO STATEMENT OF FACTS ASSERTED BY RENFROE IN ITS JUNE 23, 2008 AMENDED BRIEF

1. The Rigsbys dispute the statement that "the material facts of this case are undisputed," as the Rigsbys dispute many of the material facts related to Renfroe's Motion as set forth below.[1]

2. Admitted for purposes of summary judgment.

3. The Rigsbys did not sign an employment agreement at the time they started work on adjusting Katrina claims. (Affidavits of Cori and Kerri Rigsby

[1] To the extent the Rigsbys do not dispute the facts asserted by Renfroe and/or admit certain facts asserted by Renfroe, the Rigsbys do so only for purposes of summary judgment and reserve the right to dispute such facts if a trial takes place.

filed on October 5, 2006, Exhs. A ¶¶ 9, 11-12). Each of the Rigsbys signed the employment agreement and the Code of Conduct which Renfroe contends are applicable to this lawsuit. These documents are form agreements and were not negotiable. (See Gene Renfroe Depo., relevant excerpts of which are attached as Exh. B, at 138-39; Jana Renfroe Depo. II, relevant excerpts of which are attached as Exh. C. at 13-14, 94-95). The agreements speak for themselves and the Rigsbys dispute any interpretation of them by Renfroe otherwise.

4. Admitted that these sections of the agreements which Renfroe asserts are applicable are quoted correctly.

5. These averments are not facts but legal conclusions, which we dispute in argument.

6. The Renfroe employment agreement and Code of Conduct are designed to protect policyholders. (See Jana Renfroe Depo. I, relevant excerpts of which are attached as Exh. D, at 362:23-363:6). The Code of Conduct imposes on Renfroe employees "a duty of undivided loyalty to Renfroe, our clients, and their customers." (See Code of Conduct, attached as Exhibit E at 1). The employment agreement and Code of Conduct do not forbid employees of Renfroe from disclosing fraud to policyholders or to the public. (See Employment Agreement attached as Exhibit F & E) Renfroe employees are not to be complicit in fraud on policyholders. (See Jana Renfroe Depo. I, at 254:14-22 & 353:9-10). Renfroe

employees who observe fraud are permitted to report it to the authorities and to turn over documentary evidence without the consent of Renfroe. (See Letter from Gene Renfroe to Kerri Rigsby, dated September 1, 2006, Exhibit G) ("We understand that you have or may have provided documents or other information to law enforcement authorities. We support your behavior in that respect, and do not question its propriety or appropriateness.") (hereafter "Gene Renfroe letter")).

7. After starting work, the Rigsbys observed irregularities in State Farm's claims handling. (See K. Rigsby Depo. I, relevant excerpts of which are attached as Exh. H, at 37:5-42:4). In October 2005, the Rigsbys discovered documents appearing to reflect efforts by State Farm to falsify engineering reports. (See Cori Rigsby Decl., Exhibit I ¶ 7). Specifically, the Rigsbys found two engineering reports concerning the same property that reached different conclusions about the cause of property damage (hereafter "the McIntosh reports"). (See C. Rigsby Depo. I, relevant excerpts of which are attached as Exhibit J at 69:7-71:4; K. Rigsby Depo., at 42:5-45:7). The conflicting McIntosh reports led the Rigsbys to believe that State Farm was causing engineering reports to reflect falsely that damage to insureds' homes derived from flood, which was covered by federal flood insurance, rather than wind, which was covered under the State Farm homeowners policies. (See C. Rigsby Decl., at ¶ 7; K. Rigsby Depo. I, at 44:17-23). Kerri copied the McIntosh reports. (See K. Rigsby Depo. I, at

47:11-20). Kerri was shocked by her discovery of the McIntosh reports. (See K. Rigsby Depo. I at 44:24-45:2). Her mother, Patricia Lobrano, observed that Kerri "was horrified and she didn't know what to do." (See Lobrano Depo., relevant excerpts of which are attached as Exh. K, at 38:1-16. Lobrano advised her daughter to "document" what she saw. (See Lobrano Depo. at 38:24-39:4).

Following their mother's advice, the Rigsbys at different times copied documents and emails which evidenced State Farm's fraudulent activities so that the documents would not be lost or destroyed. (See C. Rigsby Decl., at ¶ 7).

Additional events caused the Rigsbys to suspect that State Farm was engaged in fraud on policyholders. Cori observed Lecky King, who was a State Farm storm coordinator, hurl an engineering report at another employee and order the employee to tell the engineering company that, "if they don't change this report, we're not paying the invoice." (See C. Rigsby Depo. I, at 71:12-24). Lecky King has invoked her Fifth Amendment right against self-incrimination in this case, and this Court granted her motion for protective order on an invocation by her attorney of the Fifth Amendment privilege as to all questions relating to this case. (See Order, entered April 13, 2007, attached as Exh L).

8. The Rigsbys did not "steal" the documents. The employment agreement and Code of Conduct do not forbid employees of Renfroe from disclosing fraud to policyholders or to the public. (See Exh E & F) Renfroe

employees who observe fraud are permitted to report it to the authorities and to turn over documentary evidence without the consent of Renfroe. (See Gene Renfroe letter dated September 1, 2006).

9. The Rigsbys were privileged to disclose documents to government authorities, including in connection with the *qui tam* litigation. Renfroe has conceded that those disclosures did not violate the nondisclosure clause of the employment agreement. (See Transcript Hearing 11/14/06, Statement of Barbara Stanley, Exhibit M at 40:23-41:11) ("Renfroe stipulates that the giving of information and documents to a governmental investigator conducting any kind of investigation is not a violation of their contract"); (See Gene Renfroe Letter, Exhibit).

The Rigbys gave a copy of the State Farm documents to Richard Scruggs to prosecute the *qui tam* matter on their behalf, which he did. (See C. Rigsby Decl., at ¶ 12; C. Rigsby Depo. I, at 112:9-14). On April 26, 2006, with Scruggs as counsel, the Rigsbys filed a lawsuit as relators on behalf of the United States against State Farm and others under the FCA in federal court in Mississippi. (See Exhibit N (docket in *United States ex rel. Rigsby*, 1:06-cv-00433-LTS-RHW (S.D. Miss.); Exhibit O (Complaint); Exhibit P (First Amended Complaint)). As required by the FCA, the complaint was filed *in camera* and under seal to afford the United States time to decide whether to intervene in the case. (See 31 U.S.C. §

3730(b)(2)). The case remained under seal until August 1, 2007. (See Exhibit N at 6 (docket entry #25)).

In addition to filing the *qui tam* action, on or about April 24, 2006, as required by the FCA, *see* 31 U.S.C. § 3729(b), the Rigsbys, through counsel, filed with DOJ, an evidentiary disclosure consisting of a legal analysis of the facts and law in the *qui tam* case, followed by documents selected to support the *qui tam* allegations. (See Exhibit Q, Letter from Rigsbys' counsel, Michael Smith, to counsel for State Farm, John Banahan, dated October 17, 2007)).

10. The *qui tam* lawsuit was filed April 24, 2006. (See Exhibit CC). By May 2006, a newspaper article had reported that there was a "mole" inside of State Farm. The Rigsbys feared that their ability to help victims of State Farm's fraud would end. They then obtained other documents that they believed proved fraud and believed that State Farm might destroy. (See K. Rigsby Depo. I at 86:22-87:12; C. Rigsby Contempt Hrg. Testimony, Exhibit R at 106:8:13). The Rigsbys did not consult with anyone, including Scruggs, before undertaking the "data dump." (C. Rigsby Depo. I, at 90:21-91:2; 114:18-19). During the weekend of June 2-4, 2006, the Rigsbys and three friends downloaded and copied the claims-related documents. (See C. Rigsby Decl., at¶ 11). The Rigsbys gave one set of records to the FBI and the other set to the Mississippi Attorney General's Office. (See id. at ¶ 12). The Rigsbys retained the third set to be used in

the False Claims Act lawsuit, and later gave it to their *qui tam* lawyer. (See id.; C. Rigsby Depo., at 93:5-94:21).[2] The Rigsbys also gave documents to Scruggs to expose the fraud to policyholders. (See K. Rigsby Depo. I, at 94:12-23; See also Carron Rocko Depo., relevant excerpts of which are attached as Exhibit S at 43:5-17; Michelle Lee Depo., relevant excerpts of which are attached as Exhibit T at 20:16-24).[3]

11. The employment agreement and Code of Conduct do not forbid employees of Renfroe from disclosing fraud to policyholders or to the public. (See Exh E & F). Renfroe employees who observe fraud are permitted to report it to the authorities and to turn over documentary evidence without the consent of Renfroe. (See Gene Renfroe letter dated September 1, 2006). See also response to factual allegation number 10 above.

12. The Rigsbys did not "steal" the documents. The employment agreement and Code of Conduct do not forbid employees of Renfroe from disclosing fraud to policyholders or to the public. (See Exh E & F). Renfroe employees who observe fraud are permitted to report it to the authorities and to

[2] During her earlier deposition, Cori could only allude to the existence of the *qui tam* action, because it still was under seal. Her limited answers show that the Rigsbys kept the third set of "data dump" documents for the *qui tam* litigation. (See C. Rigsby Depo. I, at 95:24-25, 97:11-6, 155:12-22).

[3] Rocko and Lee confirmed that, based on what they observed and heard that weekend, neither Scruggs nor anyone from the Scruggs Law Firm was involved in the data dump weekend. (See Rocko Depo., at 15:3-12; 22:18-24:4, 28:12-30:16, 40:7-15; Lee Depo., at 21:12-21, 25:21-26:10, 35-36).

turn over documentary evidence without the consent of Renfroe. (See Gene Renfroe letter dated September 1, 2006, Exhibit). See also response to factual allegation number 10 above.

13. Renfroe fails to cite any support for its factual allegation in the second sentence; therefore, under the Court's Uniform Initial Order, it should not be considered by the Court as evidence. See also response to factual allegation number 10 above.

14. The employment agreement and Code of Conduct do not forbid employees of Renfroe from disclosing fraud to policyholders or to the public. (See Exh E & F). Renfroe employees who observe fraud are permitted to report it to the authorities and to turn over documentary evidence without the consent of Renfroe. (See Gene Renfroe letter dated September 1, 2006, Exhibit).

15. The Rigsbys admit for purposes of summary judgment that the Data Dump Documents and the Boot Box Documents are claims files. They dispute that these documents are protected by the contractual confidentiality agreements as the citations provided by Renfroe do not support this assertion.

16. Admitted for purposes of summary judgment.

17. Admitted for purposes of summary judgment.

18. The Rigsbys dispute the characterization in paragraph 18. The Rigsbys do not have the Boot Box Documents nor do they know where they are.

19. Admitted for purposes of summary judgment.

20. The Renfroe employment agreement at issue as it relates to Cori Rigsby and Kerri Rigsby states that "[e]mployee will be employed by RENFROE from the time he is checked in at the assignment location until the time he is checked out at the assignment location." (See, e.g., Exh. 2 to Cantrell Depo., Cori Moran's employment agreement with Renfroe dated November 18, 2004, attached hereto as Exh. U).[4] The Renfroe check-in form provides that "Employment does not begin until this form is completed and returned to the Home Office." (See, e.g., Exh. 3 to Cantrell Depo., Cori Moran's check-in form for Katrina disaster, attached hereto as Exh. V)

Renfroe employees who have signed an employment agreement with Renfroe can work for other companies when not on an assignment for Renfroe. (See Jana Renfroe Depo. II, at 161:15 – 162:9). In fact, Renfroe employees do not receive benefits unless they have "checked in" to work on an assignment, and Renfroe is aware that Renfroe employees not working on an assignment seek unemployment benefits. (Jana Renfroe Depo. II at 159:4-159:20; Gene Renfroe Depo. at 144:5 – 146:13).

Cori Rigsby's check out form related to the Katrina disaster states that she checked out on June 20, 2006. (See Exhibit 5 to Mr. Cantrell's Depo. attached

[4] The Rigsbys maintain, and do not waive, their contention that the employment agreements they signed in 2004 apply to their employment with Renfroe as adjusters on the Katrina disaster.

hereto as Exh. W; see also Exh. 12 to Mr. Cantrell's Depo., attached hereto as Exh. X). Kerri Rigsby's check out form related to the Katrina disaster states that she checked out on June 27, 2006. (See Exh. 6 to Mr. Cantrell's Depo., attached hereto as Exh. Y). Gene Renfroe acknowledged that on June 23, 2006 both Cori and Kerri Rigsby had resigned from the Katrina project. (Gene Renfroe Depo. at 189:5 – 190:9). Neither Cori nor Kerri Rigsby performed any additional services as Renfroe employees after June 23, 2006. (See Gene Renfroe Depo. at 190:6 – 190:9)

In July 2006, Scruggs hired the Rigsbys to work as consultants for the Scruggs Katrina Group, after the Rigsbys had stopped working State Farm claims. (See C. Rigsby Decl., at ¶ 9). The employment was not in exchange for their earlier disclosure of documents. (See id. at ¶¶ 9, 15).

21. The Rigsbys did not "steal" the documents. The employment agreement and Code of Conduct do not forbid employees of Renfroe from disclosing fraud to policyholders or to the public. (See Exh E & F). Renfroe employees who observe fraud are permitted to report it to the authorities and to turn over documentary evidence without the consent of Renfroe. (See Gene Renfroe letter dated September 1, 2006, Exhibit).

22. See Response to factual allegation number 21 above.

23. Renfroe is not seeking economic damages for its claim for breach of contract. (Dkt. #302 at 5; see also First Supplement to Plaintiff's Initial Disclosure, Dkt. #302-3).

24. Renfroe's reputation has been enhanced, not injured, by the Rigsbys' disclosures and prevention of fraud. (See Jana Renfroe Depo. I, at 353:1-3). Renfroe is not seeking economic damages for its claim for breach of contract. (Dkt. #302 at 5; see also First Supplement to Plaintiff's Initial Disclosure, Dkt. #302-3). The employment agreement and Code of Conduct do not forbid employees of Renfroe from disclosing fraud to policyholders or to the public. (See Exh E & F). Further, the contents of claims files are generally known. (See Depo. of Michael Quinn, attached as Exhibit Z, at 260:1-12). Renfroe employees who observe fraud are permitted to report it to the authorities and to turn over documentary evidence without the consent of Renfroe. (See Gene Renfroe letter, dated September 1, 2006).

25. Renfroe has abandoned any request for economic damages related to harm, and Jana Renfroe has testified she is unaware of any harm. (See Plaintiff's First Supp. to Initial Disclosures, Exhibit AA at 2; Jana Renfroe Prelim. Hrg. Testimony, Exhibit BB at 158:11-161:2; Jana Renfroe Depo. I, at 365:10-20).

26. See Response to factual allegation number 21 above. Further, Renfroe provides no support for their allegation that Renfroe materials provided to

the Rigsbys were not returned; therefore, under the Court's Uniform Initial Order, it should not be considered as evidence. Additionally, the employment agreement at issue states that confidentiality must only be maintained for two years after termination. (See Employment Agreement at 2, ¶ 6(a)) The Rigsbys were terminated in June, 2006. See also response to ¶ 20 above.

27. Renfroe has abandoned any request for economic damages related to harm, and Jana Renfroe has testified she is unaware of any harm. (See Plaintiff's First Supp. to Initial Disclosures, at 2; Jana Renfroe Prelim. Hrg. Testimony, at 158:11-161:2; Jana Renfroe Depo. I, at 365:10-20).

28. The Rigsbys did not "steal" the documents. The employment agreement and Code of Conduct do not forbid employees of Renfroe from disclosing fraud to policyholders or to the public. (See Exh E & F). Renfroe employees who observe fraud are permitted to report it to the authorities and to turn over documentary evidence without the consent of Renfroe. (See Gene Renfroe letter dated September 1, 2006, Exhibit). Further, in July 2006, Scruggs hired the Rigsbys to work as consultants for the Scruggs Katrina Group, after the Rigsbys had stopped working State Farm claims. (See C. Rigsby Decl., at ¶ 9). The employment was not in exchange for their earlier disclosure of documents. (See id. at ¶¶ 9, 15).

29. As the Court is aware, some of the Rigsbys' legal fees have been paid by Scruggs and/or Scruggs Katrina Group. The Rigsbys' counsel objects to this evidence because it is irrelevant and responding to this factual allegation any further may implicate counsel's duties under Rule 1.6 of the Alabama Rules of Professional Conduct.

ADDITIONAL UNDISPUTED FACTS

1. The Renfroe employment agreement excludes from the definition of "confidential information" documents that are "public" or "in the public domain." *See* Employment Agreement at 3, ¶ 6(a).

2. By February 2006, the Rigsbys still did not know what to do about the evidence of fraud that they had observed. Keeping secret what they knew took its toll mentally and physically. (See C. Rigsby Depo. I, at 113:17-114:4; K. Rigsby Depo., at 69:15-70:13).

3. Their mother, not the Rigsbys, sought the assistance of Richard Scruggs. Without notifying her daughters, Lobrano contacted Scruggs and arranged a meeting with them. See Lobrano Depo., at 50:3-53:11, 56:20-58:4).

4. Despite receiving little notice of Scruggs' visit, (See K. Rigsby Depo. I, at 70:14-71:15), the Rigsbys agreed to consult with him for advice because they "needed help," (See C. Rigsby Depo. I, at 113:19-114:4, and "wanted guidance," see K. Rigsby Depo. I, at 71:16-22).

5. After meeting with Scruggs, the Rigsbys agreed that he would serve as their lawyer. (See C. Rigsby Depo. I, at 109:20-110:1; K. Rigsby Depo. I, at 69:15-70:5, 71:16-25).

6. At their initial meeting, the Rigsbys gave Scruggs State Farm documents in their possession that they believed evidenced fraud by State Farm. (See C. Rigsby Depo. I, at 112:9-14). Those documents, which totaled about 20 pages, included the conflicting McIntosh reports. (See C. Rigsby Contempt Hrg. Testimony, March 19, 2007, at 34:20-35:14).

7. After the first meeting with Scruggs, with his assistance, the Rigsbys began cooperating with federal and state law enforcement officials. (See K. Rigsby Depo. I, at 90:10-91:19).

ARGUMENT[5]

I. The Rigsbys Did Not Breach The Contract By Disclosing Fraud To A Lawyer Who Represented State Farm Policyholders.

A. State Farm does not prohibit adjusters from disclosing evidence of wrongdoing in claims handling to a policyholder's lawyer.

The core of Renfroe's argument - - that the Rigsbys breached the nondisclosure agreement by disclosing documents to a policyholder's lawyer - - is

[5] Renfroe makes many of the same arguments as it did in its initial briefs. To the extent these arguments are not addressed herein, the Rigsbys incorporate by reference the arguments and evidentiary support they have submitted to the Court relating to Renfroe's Motion for Summary Judgment on its breach of contract claim.

eviscerated by the undisputed fact that State Farm has no policy that prohibits an adjustor from going to a policyholder's lawyer with information that the policyholder's claim has been mishandled or handled fraudulently.[6] (See Defendants' Supplement, filed on December 3, 2007). Therefore, the Rigsbys' giving of documents to Richard Scruggs, who represented hundreds of policyholders whose claims were mishandled by State Farm, did not violate any State Farm policy. Renfroe's contract cannot confer greater protection to State Farm's documents than does State Farm itself. The Rigsbys' disclosures to Scruggs, therefore, did not breach the Renfroe contract.

B. Public policy makes no distinction between disclosing documents of fraud to the victim and to the victim's attorney.

Renfroe does not challenge cases like *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850 (10th Cir. 1972), which hold that public policy renders unenforceable a non-disclosure clause against an employee who discloses his employer's wrongdoing to the victim. Renfroe nevertheless argues that *Lachman* is distinguishable because the disclosure there was made to the victims, whereas here it was made to the victims' lawyer. See Renfroe's Amended Opposition, filed June 23, 2008 (hereafter "Amd. Opp. Br.") at 25. That distinction is irrelevant, for the lawyer is the representative of the victim in such matters.

[6] Renfroe procedurally has not disputed this fact and, therefore, has admitted it. See Rule D(2)(A), Appendix II of the ALND Uniform Initial Order, at 17.

In *Lachman* the court observed that the law was reluctant "to enforce contracts which have the effect of injuring third parties, whether such a possibility is anticipated or not. It is apparent that it is the silence contracted for . . . that creates a condition not contemplated by the parties and, had it been, the agreement for silence would be unenforceable." Id. at 852. There is no reason why public policy would allow an employee to reveal fraud to a victim directly, but not through the victim's lawyer. The law and the canons of legal ethics impose a duty on lawyers to notify clients about favorable evidence. It is reasonable to believe that a victim's attorney will share information of wrongdoing with the victim and will take appropriate action to remedy the harm done. "It is [the] injury that the law has an interest in correcting." Id. at 853. Enforcing a non-disclosure agreement to prevent disclosure of wrongdoing to a victim's lawyer runs counter to the law's remedial interest.

Absurd consequences would result under Renfroe's narrow interpretation of public policy. According to Renfroe, instead of giving documents to a lawyer who represented policyholders, the Rigsbys should have sought out and delivered the evidence of fraud individually to the hundreds of policyholders victimized by State Farm. The Rigsbys then should have left it to individual policyholders to figure out how they were wronged, how the documents could be used, and how to file and prosecute a lawsuit to seek compensation, so that no "local plaintiff's attorney,"

Amd. Opp. Br. at 25, would earn fees. Such a result would undermine the "public policy . . . everywhere to encourage the disclosure of criminal activity," 457 F.2d at 853, and would effectively deprive victims of information they have a right to receive.[7]

C. The Rigsbys disclosed documents to help policyholders.

Renfroe's breach of contract theory also fails because the undisputed facts show that the Rigsbys gave documents to Scruggs, not to benefit Scruggs or themselves, but to obtain advice, to help policyholders, and to prosecute the *qui tam* case.[8]

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[7] While Renfroe agrees that the Rigsbys could have gone directly to policyholders, it draws an arbitrary line at disclosures made through the media, *see* Amd. Opp. Br. at 21, even though the Rigsbys' appearance on television was the most direct way of notifying the greatest number of victims what State Farm had done. In any event, Renfroe does not contest that the Rigsbys had a First Amendment right to speak to the media about a matter of public importance. *See Bartnicki v. Vopper*, 532 U.S. 514, 539 (2001) (Breyer, J., concurring) ("Where publication of private information constitutes a wrongful act, the law recognizes a privilege allowing the reports of threats to public safety.").

[8] We have not argued, as Renfroe contends, *see* Amd. Opp. Br. at 22-24, that filing the *qui tam* suit immunizes the Rigsbys from liability. Rather, we have argued, and Renfroe agrees, *see id.* at 18-22, that it was not a breach for the Rigsbys to collect documents and disclose them to the government to prosecute the *qui tam* case and that there were no other, independent disclosures because the *qui tam* disclosures would, and have, become public and available to everyone. Moreover, this case is not independent of the *qui tam*. The breach of contract claim is tantamount to the types of counterclaims against *qui tam* relators that courts have dismissed because such causes of action are contrary to the objectives of the *qui tam* statute. *See* Defendants' Reply Memo. at 16-21. Furthermore, the provision of the FCA that extinguishes a relator's award if the relator is convicted has no application here, *see* 31 U.S.C. 3730(d)(3), *see* Amd. Opp. Br. at 22-23, as that provision addresses the circumstance in which the relator is convicted of a crime arising from the fraudulent conduct that he reported, not from its disclosure. Renfroe cites *United States ex rel Doe v. X Corp.*, 862 F. Supp. 1502 (E.D. Va. 1994), for the proposition that relators can be held accountable under state law and asserts that the Rigsbys' disclosure violated Ala. Code § 13A-8-102(a). A taking of property violates that statute only if done "without authorization or without reasonable grounds to believe" that authorization exists.

There is no dispute that the Rigsbys did not know Scruggs when they discovered the conflicting McIntosh engineering reports and that their mother initiated contact with him. (See Lobrano Dep., at 50:3-53:11, 56:20-58:4). The Rigsbys agreed to meet with Scruggs because they wanted advice and guidance. (See C. Rigsby Depo. I, at 113:19-114:4; K. Rigsby Dep., at 109:20-110:1). It is undisputed that soon after meeting the Rigsbys Scruggs arranged for them to cooperate with federal and state authorities, (See K. Rigsby Dep., at 90:10-91:19), and then in April 2006 the Rigsbys made disclosures to the Department of Justice detailing fraud on the government and filed the *qui tam* complaint, (See Exhibits CC – EE).

The one, and only, litigation that Renfroe cites to support its contention that State Farm documents have been used for non-*qui tam* litigation is the *McIntosh* case. (See Amd. Opp. Br. at 21). That litigation was filed on October 23, 2006, eight months after the Rigsbys gave Scruggs the conflicting McIntosh reports, which also were the basis of the *qui tam* complaint filed six months earlier. See Excerpts of *McIntosh* docket, Exhibit FF, attached hereto; *compare* Exhibits CC and CC (*qui tam* complaints) *with* Exhibit GG (*McIntosh* complaint), attached hereto. Renfroe's failure to identify any lawsuit that relies on documents that the Rigsbys gave to Scruggs other than the McIntosh reports demonstrates the

Renfroe concedes that the Rigsbys were authorized to take documents and disclose them to government authorities and to file the *qui tam*, so there was no violation of state law.

emptiness of Renfroe's assertions that the Rigsbys' motive was to benefit Scruggs and that Scruggs recruited "thousands" of clients as a result of the Rigsbys' disclosures, (see Amd. Opp. Br. at 25).[9]

There is likewise no basis for Renfroe's claim that the Rigsbys' disclosed documents to benefit themselves. It is undisputed that there is no agreement or expectation that the Rigsbys will receive proceeds from any policyholder lawsuit. (See K. Rigsby Dep., at 139:21-140:3). It is further undisputed that Scruggs did not pay the Rigsbys for any documents and that their consulting arrangement with the Scruggs Katrina Group (SKG) came about only after they stopped working on State Farm claims. (See C. Rigsby Decl., at ¶ 9). The employment was not in exchange for their earlier disclosure of documents. (See id. at ¶¶ 9, 15).

II. The Code of Conduct Authorized The Rigsbys' Disclosures.

Renfroe argues that the Code of Conduct, which imposes on adjusters a "duty of undivided loyalty to Renfroe, our clients, and their customers," did not

[9] The record citations on which Renfroe relies do not support its argument. For example, Renfroe contends that Scruggs' contempt hearing testimony shows that he "retained documents at his Moss Point office for use in non-*qui tam* litigation." See Amd. Opp. Br. at 18-19. That is not true. Scruggs never testified to using the "data dump" documents for any litigation, and in fact testified that the "data dump" documents remained under a folding table in his office "virtually the whole time." See Contempt Hr'g. at 218:11-25. Scruggs' testimony is corroborated by Cori Rigsby's deposition testimony that she was not aware that any "data dump" document was used in any lawsuit. See C. Rigsby Dep., at 157:8-11. Renfroe similarly misrepresents Kerri Rigsby's testimony to assert that the Rigsbys' purpose in disclosing documents was to help Scruggs. See Amd. Opp. Br. at 21. Kerri Rigsby testified that she had collected and copied documents, not to help Scruggs, but to "benefit the policyholders." "I didn't care whose clients they were. . . . I wanted the people helped. They had been wronged, and it was time that they had a chance to know the truth." See K. Rigsby Dep., at 94:8-17.

authorize the Rigsbys to disclose documents. (Amd. Opp. Br. at 25). Renfroe's argument is wrong for three reasons. First, it is premised on the false distinction that Renfroe and State Farm had legitimate interests that differed from the interests of policyholders. Renfroe and State Farm cannot validly claim to have an interest in concealing evidence of fraud on policyholders and taxpayers. Their only legitimate interest is in rendering a fair and honest evaluation of a policyholder's claim. The Rigsbys' disclosures were consistent with that objective. Second, the contract's use of the term "undivided loyalty" clearly meant that the Rigsbys' duty to policyholders was entire and undiluted and could not be diminished by the interests of Renfroe and State Farm. It is unreasonable and impermissible to revise the contract to say that employees have a duty to clients' customers, unless it conflicts with Renfroe's interests, in which case the rights of the those customers should be ignored. Third, Renfroe does not dispute that the Code of Conduct was intended to protect policyholders and that it would not want its adjusters to participate in fraud and would want it disclosed. (See Jana Renfroe Dep., Exhibit B at 362:23-363:6, 254:14-22).[10]

III. The Documents Are Public In The *Qui Tam* Case.

[10] As *qui tam* relators, the Rigsbys were not required, as Renfroe contends, to seek the advice of Gene and Jana Renfroe before collecting documents of fraud and filing the *qui tam* complaint. *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 779 F. Supp. 1252, 1254 (N.D. Cal. 1991) (dismissing *qui tam* defendant's counterclaim for breach of contract and a breach of duty of loyalty, which alleged that the employee had failed "to first raise its concerns with the alleged wrongdoer").

The documents are not "confidential information," as that term is defined in the employment agreement, because, at a minimum, the *qui tam* litigation has placed the documents "in the public domain." (See Renfroe SJ Brief, Exhibit A at 3, ¶ 6(a)).[11] The documents at issue are described in detail in the now-public *qui tam* complaint. It is also clear that all documents will eventually become "public."[12] Moreover, the inevitable disclosure of the documents once the *qui tam* case was filed deprives all other disclosures of independent significance. Certainly no injunction, the only relief Renfroe seeks, can preserve the confidentiality of documents and information on full display in the *qui tam* action. Renfroe also contends, without relying on any specific evidence, that the Rigsbys orally disclosed "confidential information" to Scruggs. (See Amd. Opp. Br. at 10). To assert generally, as Renfroe does, that the Rigsbys applied what they learned as Renfroe adjusters as consultants for SKG is not proof that they passed "confidential information." As Renfroe adjusters, the Rigsbys, among other things, learned how to adjust claims, how to prepare a claims file, and how to read policies. Those general skills are not protected "confidential information" that the

[11] To the extent that there is ambiguity in the terms "confidential information," "public" or "public domain" as used in the employment contract, the meaning of those terms must be construed against the Renfroe, the drafter of the agreement, and in favor of the Rigsbys. *See SouthTrust Bank v. Copeland One, L.L.C.*, 886 So. 2d 38, 43 (Ala. 2003) ("It is a well-established rule of contract construction that any ambiguity in a contract must be construed against the drafter of the contract.")

[12] Recently, the federal court in *McIntosh* granted State Farm's motion for access to most relevant documents in the *qui tam* case. *See* Exhibit V, attached hereto.

Rigsbys can be prohibited from using, because such a broad interpretation would restrict their right to work in violation of Alabama law.[13]

IV. There Is No Remedy For The Breach That Renfroe Claims.

Renfroe concedes that "[n]othing in this litigation interferes with the Rigsbys' continued prosecution of their *qui tam* action." *Id.* at 6. Renfroe also cannot prevent the Rigsbys from testifying in any case in which they are called as a witness. *See Hamad v. Graphic Arts Ctr., Inc.*, No. Civ. 96-216-FR, 1997 WL 12955 (D. Or. Jan. 3, 1997) (holding that a confidentiality provision could not be used to prevent deposition testimony). Nor can Renfroe impede any policyholder or their counsel from using the documents in any private action against State Farm, and it has not tried to do so. For instance, neither Renfroe nor State Farm has sought to prevent Mr. McIntosh or his counsel from using the conflicting engineering reports in his case. And every policyholder in Mississippi can serve on State Farm a request for all the documents that the Rigsbys believed evidenced fraud and took to preserve as proof. Renfroe has offered no concrete suggestion for how the Court could fashion a permanent injunction when the documents and information can be used by the Rigsbys in the *qui tam* and by policyholders in their

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[12]*See* Ala. Code § 8-1-1 (1975) (generally prohibiting restraints on trade); *Hughes Assoc. v. Printed Circuit Corp.*, 631 F. Supp. 851, 856 (N.D. Ala. 1986) (stating the rule in Alabama that complete restraints on trade with regard to independent contractors are void on their face).

own lawsuits. Moreover, any injury to Renfroe came about from its own the fraud that was disclosed and therefore the Rigsbys cannot be held liable.[14]

V. Renfroe Cannot Establish Any Damage for its Breach of Contract Claim.

A. Plaintiff's Claim for Injunctive Relief Should be Dismissed Because The Employment Agreement at Issue Provides that Any Confidentiality that May Attach to the Claims-Related Documents Expires Two Years from the Date of Termination of The Rigsbys Employment.

Plaintiff contends that the Rigsbys breached a provision in their employment agreements that provide that they must maintain the confidentiality of certain information for a period of two years after employment. (See Exh. "__" at 2, ¶ 6(a)) The employment agreement unambiguously states that "employees will be employed by RENFROE . . . until the time he is checked out at the assignment location." (Id. at 2(a)) Assuming for the sake of argument that the employment agreements are enforceable, Cori Rigsby's employment ended on June 20, 2006 when she checked out of the Katrina assignment. (See Exhs. "___" and "__") Kerri Rigsby's employment ended on June 27, 2006 when she checked out of the

[13]Renfroe's papers erroneously assume that Renfroe is entitled to an injunction simply because it proves a violation of a contractual confidentiality provision. In fact, Renfroe's unclean hands (it is itself a defendant on the fraud alleged in the *qui tam* case), the equities and public policy that favor broad disclosure of the kind of serious fraud on the public that occurred in the wake of Katrina, and the broad and permissible disclosure of documents and information in the *qui tam* case all mean that Renfroe is not entitled to final injunctive relief, the only relief it seeks, even if it proves a technical confidentiality violation in some respect. *See eBay, Inc. v. MercExchange, LLC*, 126 S.Ct. 1837, 1840-41 (2006) (final injunction governed by court's equitable discretion and not automatic even upon proof of defendant's liability; among other things, consideration of public interest and of balance of harms as between the parties is required).

Katrina assignment. (See Exhs. "__" and "__") Thus, any injunctive relief sought under this provision expired on June 20, 2006 against Kerri Rigsby and will expire on June 27, 2006, against Cori Rigsby.[15] Consequently, Renfroe's claim for injunctive relief should be dismissed.

B. Plaintiff Cannot Recover "Restitution" Damages for Breach of Contract Because It Would Place Renfroe In a Better Position Than It Would Have Been If A Breach Had Not Occurred.

Renfroe admits it is not seeking breach of contract damages based on any economic damages caused by the alleged breach of contract by Defendants. (Dkt. #302 at page 5; see also First Supplement to Plaintiff's Initial Disclosures, Dkt. #302-3). Renfroe argues that it can recover "restitution" damages under its claim for breach of contract. As an initial matter, Renfroe's supplemented initial disclosure attached as an exhibit to Renfroe's response brief appears to indicate that Renfroe is seeking restitution related to its trade secrets claim, but not its breach of contract claim. (See Dkt. #302-3 at ¶3(a)).

Even assuming Renfroe has made a claim for restitution damages for breach of contract, there is no legal support in Alabama that such damages in the form sought by Renfroe are recoverable for breach of contract. Defendants addressed

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[15] To the extent that Renfroe contends that the Rigsbys' took documents which contain trade secrets, such documents are not trade secrets as discussed in the Rigsbys' Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment, and Supplemental Brief in Support of Motion for Summary Judgment. Thus, any such documents are subject to the two-year limitation found in the employment agreement in ¶ 6(a).

this issue recently in their *Response to Renfroe's Motion to Compel Discovery Responses.* (Dkt. #309). As argued by Defendants in that response, under Alabama law, for a claim of breach of contract, the

> damages should return the injured party to the position he would have been in had the contract been fully performed. . . . However, the injured party is not to be put in a better position by a recovery of damages for the breach than he would have been in if there had been performance.

Garrett v. Sun Plaza Devel. Co., 580 So. 2d 1317, 1320 (Ala. 1991) (emphasis added); see also, Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564, 567 (Ala. 1992). Further, the Eleventh Circuit has recognized that "disgorgement of profits earned is not a remedy for breach of contract." Burger King Corp. v. Mason, 710 F. 2d 1480, 1494 (11th Cir. 1983). In particular, allowing Renfroe to recover restitution damages would put Renfroe in a better position than had Defendants not breached the contract in the first place, a result contrary to Alabama law.

In its response to Defendants' Motion for Summary Judgment for Lack of Subject Matter Jurisdiction, Renfroe cited *one* Alabama *trial court case* as support for its argument that restitution benefits *may be* available under Alabama law for breach of contract. (Dkt. # 302 at page 5, citing Snow v. Compass Bancshares, Inc., 2000 WL 33598653 (*rev'd* 823 So. 2d 667 (Ala. 2001)). Snow was a class-action brought by bank customers of Compass Bank who incurred certain charges regarding insufficient funds in their bank accounts. Snow, 2000 WL 33598653 at

*1. However, the portion of Snow discussing whether the defendant in that case should be required to disgorge benefits it obtained involved a discussion of the "common questions of law and fact" that were common to the class. Id. at *3. The trial court noted that one of the six common questions of law and fact was: "whether, as a result of Defendant's conduct, Defendant should be required to disgorge the benefits it obtained." Id. at *3. The trial court did not discuss the issue of disgorgement (or restitution), nor did the trial court discuss whether the "disgorgement" of the benefits related to the claims for breach of contract, fraudulent suppression, or conversion. Id. at *3. Moreover, the trial court cited no law from Alabama or any other jurisdiction concerning the issue of restitution being an available recoverable damage for breach of contract. Id. Thus, Renfroe's reliance on Snow for support that it can seek restitution damages for its breach of contract claim is misplaced.

Renfroe also contended in that response brief that a Texas decision, Quigley v. Bennett, 227 S.W.3d 51, 56 (Tex. 2007), supports its position that restitution damages are available for a breach of contract claim. Putting aside that the case was decided under Texas law, not Alabama law, Quigley did not even involve a breach of contract claim. Rather, it involved claims for fraud, unjust enrichment and conversion. 227 S.W.2d at 53. Further, the portion of Quigley cited by

Renfroe was not the majority holding but rather a concurring (in part)/dissenting (in part) opinion. Id. at 55-56.[16]

Finally, in that response, Renfroe relied on a Connecticut decision, David M. Somers & Assoc., P.C. v. Busch, 927 A.2d 832 (Conn. 2007), for its argument that restitution damages are available for a breach of contract action. (Dkt. # 302 at page 5). However, the Court in Somers specifically held that restitution-based damages in that case were not available for breach of contract, but rather were a damage available under a quasi-contract/unjust enrichment/quantum meruit theory. 927 A.2d at 841. Thus Somers stands for the proposition that restitution based damages are available under a quasi-contract theory to a breaching party, but in no way supports Renfroe's position that restitution damages are available for under a traditional breach of a written contract, which is the situation in our case.

In Renfroe's Reply to Defendants' Response to Motion to Compel Discovery Responses (Dkt. # 331), Renfroe cited three additional cases from Alabama which they contend support its argument that it could somehow claim as recoverable damages in this case the consulting fees paid to Defendants by Mr. Scruggs and the attorneys' fees paid to counsel for Defendants. (Dkt. #331 at pp.

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[16] While the concurring/dissenting opinion generally discussed that "American law has traditionally recognized three damage measures for breach of contract" (citing Restatement (Second) of Contracts §344), it cited another Texas *quantum meruit* case for support that restitution damages are available for *quantum meruit* (as opposed to breach of contract) actions. 227 S.W.2d at 56, citing Murray v. Crest Constr., Inc., 900 S.W.2d 342, 345 (Tex. 1995) (nothing that quantum meruit recovery provides "amount of benefits conferred" on defendant)).

6-7). However, the cases cited by Renfroe do not support its claim in this case because each of those cases merely refunded money paid by the Plaintiff as opposed to placing the plaintiff in a better position that the plaintiff would have been had the defendant not breached the contract.

Campbell v. Campbell, 371 So. 2d 55 (Ala. Ct. App. 1979) was a divorce case. The parties had previously been married and divorced, attempted to reconcile and were remarried, and then sought a second divorce. 371 So. 2d at 57. Upon remarriage the husband deeded to the wife a one-half interest in his home. Id. He requested that the court set aside this conveyance alleging the wife had fraudulently induced him to agree to deed a one-half interest to her. Id. The court essentially ordered that the husband and wife return to the same position they were in as a result of their first divorce agreement. Id. Campbell does not support Renfroe's claim that is should somehow be allowed to be placed in a better position than in it were in prior to the alleged breach of contract by Defendants, which is exactly what would happen if Defendants are allowed to recover the damages apparently sought by Renfroe here, i.e., the consulting fees paid to Defendants or the attorneys' fees paid to counsel for Defendants on Defendants' behalf. In fact, the Campbell court specifically notes that "this divestiture left the parties in essentially the same position regarding their property and finances as

they stood after their first divorce, a position which they reached by agreement." 371 So. 2d. at 59.

Further, Henry v. Homeside Lending, Inc., 1996 W.L. 943939 (N.D. Ala. 1996) (not cited in the Federal Reporter) and Pipes v. American Security Ins. Co., 1996 WL 928197 (N.D. Ala. 1996) (not cited in the Federal Reporter) are each cases wherein the Plaintiff's recoverable damages were "fees it unlawfully charged" to the plaintiff. Thus the plaintiffs were merely given back money they had paid.

In Henry, plaintiff sued a lender for unauthorized and hidden residential mortgage related charges. The court analyzed the plaintiff's unjust enrichment claim and noted that it was founded on the principle that "no one should be permitted to retain money that rightfully belongs to another." Id. at *3. The court then stated "the measure of any restitution that might be ordered is the amount by which the defendant has been unjustly enriched with fees it unlawfully charged the individual members of the putative class." Id. The court then found that "the measure for restitution [under the unjust enrichment claim] and the measure of damages under the breach of contract claim will be identical." Id. Thus, Henry does not stand for the proposition sought by Renfroe in this case, that a party may recover damages for breach of contract that puts the now breaching party in a better position than it would have been if there had been no breach. Instead, in

Henry, the damages sought would merely refund the payments made by the plaintiff that were in violation of the contract.

In Pipes, plaintiff sought to recover excess premiums plaintiff paid on credit property insurance from a credit insurance company. Pipes did not involve a claim for breach of contract, but rather the court simply noted that the plaintiff's damages sought on its claim for violation of the Alabama mini-code (refund of excess premiums paid) were "similar to restitution in a breach of contract claim." 1996 W.L. 928197 at *2. Again, similar to Henry, the damages sought by the plaintiff were premiums plaintiff had paid and sought to recover. Thus, plaintiff would not be placed in a better position that plaintiff would have been had the contract not been breached.

In sum, none of these cases support Renfroe's argument that it can somehow be placed in a better position than it would have been had the alleged breach of contract not occurred. In fact, Alabama law is to the contrary. As such, Renfroe cannot recover any damages for its breach of contract claim in this matter.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the Rigsbys respectfully request that the Court deny Renfroe's Motion for Partial Summary Judgment regarding its claim for Breach of Contract.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2008 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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