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

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

v. — CASE NO. 1:06cv433-LTS-RHW

STATE FARM MUTUAL INSURANCE COMPANY — DEFENDANT/COUNTER-PLAINTIFF

and

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

DEFENDANT/COUNTER-PLAINTIFF
STATE FARM FIRE AND CASUALTY COMPANY'S
REBUTTAL IN SUPPORT OF ITS [91] MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION

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PRELIMINARY STATEMENT

The Rigsbys' opposition [223] only underscores that they have failed to meet their burden of establishing subject matter jurisdiction. Seeking to avoid this conclusion, their brief ignores controlling adverse case law, embraces inapposite case law, and generally urges the Court to assume facts contradicted by their admissions. The Rigsbys acknowledge that the False Claims Act ("FCA") divests this Court of subject matter jurisdiction if (i) there has been a pre-filing public disclosure of the allegations or transactions, (ii) their complaint is "based upon" a public disclosure, and (iii) they are not an "original source" with "direct and independent knowledge" of the requisite information, but fail to identify anything that meets their burden on each of these points. Instead, the Rigsbys endorse interpretations of the statute that have been rejected by the Supreme Court and the Fifth Circuit.

The Rigsbys also advance the legally untenable notion that, if they were the original source of only one claim of actual federal flood fraud, they would thereby qualify as relators who can pursue claims in gross that they speculate might exist. The FCA "does not permit such claim smuggling." *Rockwell Int'l Corp. v. United States*, ___ U.S. ___, 127 S. Ct. 1397, 1410 (2007). One claim is hardly evidence of a far reaching scheme and *qui tam* relators are not permitted to make broad, unsupported allegations as a "ticket to the discovery process that the statute itself does not contemplate." *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999). In any event, the Rigsbys have not shown even one example of an actual fraudulent flood claim.

Initially, the Rigsbys spend many pages arguing that the civil complaints and Congressional testimony cited by State Farm are not specific enough to trigger the public disclosure bar. But the public disclosure bar does not require a high level of specificity. Rather, it "is intended to be a quick trigger" and a predicate to "the more exacting original source analysis." *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992). Moreover, a simple comparison between the allegations in the *Cox/Comer* complaint and those subsequently made by the Rigsbys in this *qui tam* action reveals that they raise identical allegations of fraudulent transactions.[1]

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[1] *Compare, e.g.*, (Compl. [2] ¶ 33) (alleging that State Farm and other insurers "made a corporate decision to misdirect and misallocate claims from those of hurricane coverage (which a company would be required to pay from its reserves or reinsurance) to flood claims that could be submitted and paid directly from the United States Treasury")), *with* ([223] at 12 n.8) (quoting *Comer* Am. Compl. ¶ 12 (alleging that State Farm and other insurers improperly engaged in a *(cont'd)*

The Rigsbys further argue that their Complaint was not "based upon" public disclosure because they "never even knew of the public statements." ([223] at 4.) But their argument is based on a small minority view of the statute that is at odds with Fifth Circuit precedent. In this Circuit, and almost all others, whether the Rigsbys knew about the public disclosures is irrelevant. Moreover, even if the minority view did apply, then the Rigsbys' claims would still fail under the public disclosure bar as part of their allegations admittedly was based upon prior reports from the news media.

Unable to escape the fact that their pleadings are based upon public disclosures, the Rigsbys contend that the Court nevertheless has subject matter jurisdiction because they are "original sources" of State Farm's alleged fraud on the government. Yet to meet their burden, the Rigsbys must "produce 'potentially specific, direct evidence of fraudulent activity,' ... and show that [they are] the origin of some evidence showing that [defendant] has committed fraud." *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 274 F. Supp. 2d 824, 852 (S.D. Tex. 2003) (citation omitted), *aff'd*, 384 F.3d 168 (5th Cir. 2004). Likewise, as the Supreme Court has definitively held, "demonstration that the [relator's] original allegations were false will defeat jurisdiction." *Rockwell*, 127 S. Ct. at 1409. Here, the Rigsbys' original allegations are false and their failure to proffer competent summary judgment evidence to support their fraud allegations divests the Court of jurisdiction. *Id.*

The Rigsbys identify the McIntosh claim as their clearest instance of alleged federal flood fraud, but the record reveals that no fraud was committed by paying the McIntoshes the limits of their flood insurance policy. While the Rigsbys maintain that "whether the McIntoshes' property sustained $250,000 of flood damage" is an issue of material fact, ([223] at 30), it is decidedly not a ***genuine*** or disputed one. Kerri Rigsby's testimony establishes that the McIntoshes' waterfront property, which had a five and a half foot interior water mark, suffered extensive flood damage well in excess of the flood policy limits of $250,000 for the home. *See* ([91-7] at 137:7-13, 139:9-23, 142:7-13.) Engineer Brian Ford has likewise testified that there is no doubt there was five and a half feet of water damage caused

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"'transparent and bad faith attempt to avoid their contractual duties, shift repayment obligations to the Federal Flood Insurance Program, and maximize profits at policyholders' and taxpayers' expense'")).

by storm surge on the main floor of the McIntoshes' house. *See* (Ford Dep. in *McIntosh*[2] at 251:2-24, 270:22-271:14, 302:11-303:8, Ex. A to Reb.) The McIntoshes have similarly admitted that the majority of the damage to their home was caused by flooding, with flood damage of at least their full flood policy limits of $250,000 for the structure and $100,000 for its contents. *See* (*McIntosh* [1312] at ¶ 2, Ex. B to Reb.); *see also* (*McIntosh* [1315].) Under *Rockwell* and other authorities, the Rigsbys' failure to produce sufficient evidence that they have "direct and independent knowledge" of even a single actual fraudulent flood claim mandates dismissal of their *qui tam* claims for lack of subject matter jurisdiction.

REBUTTAL ARGUMENT

I. THE "QUICK TRIGGER" OF THE "PUBLIC DISCLOSURE" BAR WAS PULLED BEFORE THIS SUIT

The Rigsbys' contention that the allegations of fraud that were made in civil complaints and in Congressional hearings "did not trigger the jurisdictional bar of section 3730(e)(4)(A)," ([223] at 14), does not withstand scrutiny. The law provides that the "based upon the public disclosure" test of section 3730(e)(4)(A):

- "is intended to be a quick trigger," *Precision*, 971 F.2d at 552; *accord United States ex rel. Fed. Recovery Servs., Inc. v. Crescent City E.M.S., Inc.*, 1993 WL 345655, at *2 (E.D. La. Aug. 30, 1993), *aff'd*, 72 F.3d 447 (5th Cir. 1995);
- is not intended to be difficult to meet, *see United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 46 (D.D.C. 2007); and
- is intended to quickly lead, without extended factual inquiry, to "the more exacting original source analysis," *Precision*, 971 F.2d at 552; *Fed. Recovery Servs.*, 1993 WL 345655, at *2.

Moreover, "it has been held, repeatedly, that '[d]isclosures which reveal *either* the allegations of fraud *or* the elements of the underlying fraudulent transaction are sufficient to invoke the jurisdictional bar.'" *Reagan*, 274 F. Supp. 2d at 842 (alteration in original; citation omitted).

A. "Public Disclosure" Occurred Long Before the Rigsbys Filed This Suit

The facts readily demonstrate that the "public disclosure" bar's quick trigger was pulled long before the Rigsbys filed this suit. For instance, the Rigsby opposition quotes from the *Comer* amended

[2] *McIntosh v. State Farm Fire & Cas. Co.*, No. 1:06cv1080-LTS-RHW (S.D. Miss. filed Oct. 23, 2006).

complaint, which was filed in this Court on January 31, 2006, and named seven insurance company defendants, including State Farm. *See* ([223] at 10, 12 n.8) (citing *Comer* Am. Compl. ¶¶ 9 & 12). That pleading alleged that State Farm and other insurers had improperly engaged in a "transparent and bad faith attempt to avoid their contractual duties, ***shift repayment obligations to the Federal Flood Insurance Program, and maximize profits at*** policyholders' and ***taxpayers' expense***." (*Id.* at 12 n.8) (quoting *Comer* Am. Compl. ¶ 12) (emphasis added). These allegations, which the Rigsbys later mirrored in their pleadings, *see, e.g.*, ([2] ¶¶ 28, 33 & [16] ¶¶ 51, 56), are more than sufficient to satisfy section 3730(e)(4)(A)'s quick trigger, which simply requires the public disclosure to give "notice to the possibility of fraud," *Dingle v. Bioport Corp.*, 388 F.3d 209, 214 (6th Cir. 2004), or "to raise the inference of fraud." *United States ex rel. Settlemire v. D.C.*, 198 F.3d 913, 919 (D.C. Cir. 1999) (quoting *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 687 (D.C. Cir. 1997)). "The words fraud or allegations need not appear in the disclosure for it to qualify." *Dingle*, 388 F.3d at 214.

For precisely the same reasons, the Rigsbys' statement that "Dr. Hunter's testimony ... raised the *possibility*" of fraud, ([223] at 22) (emphasis in original), cannot forestall the public disclosure bar. Indeed, it compels its application. Nor does the Rigsbys' argument that Dr. Hunter did not "explain *how* insurance companies may have been defrauding the government," (*id.*) (emphasis in original), pass legal muster or avert dismissal. "There is no requirement ... that the relevant public disclosures irrefutably prove a case of fraud." *Settlemire*, 198 F.3d at 919. Moreover, the October 18, 2005 testimony from Dr. Hunter, the former Federal Insurance Commissioner who ran the National Flood Insurance Program ("NFIP"), does explain how insurers may have been defrauding the government, *i.e.*, by misallocating damage from homeowners policies to federal flood policies.[3]

The public disclosures made in the *Cox/Comer* complaints, as well as in Dr. Hunter's Congressional testimony, were at the very least enough to raise "the possibility of fraud," *Dingle*, 388

[3] Dr. Hunter notified Congress that, in the wake of Katrina, when "insurers underpay wind when allocating damage between their homeowners' policy and the NFIP policy, taxpayers will suffer," ([91-5] at 6-8), and that Congress "must make sure that the Write Your Own [("WYO")] insurers do not hurt taxpayers by overstating flood damage in their claims adjustment, as oppose to wind." ([91-6] at 24.)

F.3d at 214, or its "inference," *Settlemire*, 198 F.3d at 919, and to put the government "on the trail of fraud." ([223] at 13) (quoting *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995)). Those public disclosures relate to the ***same*** allegation of fraudulent transactions made by the Rigsbys, *i.e.*, the shifting and misallocation of damage from homeowners claims to flood claims. While the Rigsbys make much ado about their purported ***evidence*** of the alleged fraud – such as the Haag Report, actions said to have been taken by State Farm personnel, and the presence of a "Shred-It" truck,[4] *see, e.g.*, ([223] at 5-8, 18-19, 22, 27) – as distinguished from the ***allegation*** of fraudulent transactions, their broad recitation of the purported evidence is legally inadequate to forestall the jurisdictional bar. The FCA "bars suits based on publicly disclosed 'allegations or transactions,' not information," *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992) (quoting § 3730(e)(4)(A)), and "[a]n allegation can be made public even if its proof remains hidden." *Id.* As the Fifth Circuit recently held in *United States ex rel. Fried v. West Independent School District*, 527 F.3d 439 (5th Cir. 2008), "Even if [the relator] 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 [the] *qui tam* suit is based on publicly disclosed information." *Id.* at 442; *see also, e.g.*, *Wang*, 975 F.2d at 1417 (same).

Moreover, the Rigsbys' fallback arguments that the allegations in the *Comer* amended complaint are inadequate to constitute public disclosure are wrong on multiple levels. First, that State Farm "cited only one case to support its position" that allegations made in civil litigation constituted public disclosures of fraud, ([223] at 16), does not matter one whit. The FCA requires nothing more. The public disclosure need only "be contained in one of the forms ... listed in section 3730(e)(4)(A)," *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1004 (10th Cir. 1996), "[r]egardless of the number of people [the] disclosure may have reached." *Id.* at 1006. As the Fifth Circuit has repeatedly

[4] The Rigsbys have judicially admitted that "[w]hether or not Shred-It was employed to shred particular documents is unknown to the relators ...." ([2] ¶ 54; [16] ¶ 78). Nor can the so-called "data dump" documents be used to satisfy the Rigsbys' burden on this motion. *Cf.* ([223] at 10). The "data dump" occurred in June 2006, after the Rigsbys commenced this action in April 2006. *See id.* The FCA expressly requires a relator to disclose all original source material to the government "***before*** filing an action under this section." 31 U.S.C. § 3730(e)(4)(B) (emphasis added); *see United States ex rel. Fried v. W. Indep. Sch. Dist*., 527 F.3d 439, 442 (5th Cir. 2008); *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1145-46 (D. Wyo. 2006); *see also* ([217] at 3-9).

held, "***[a]ny 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)." *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004) (emphasis added) (quoting *Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1995)).[5] Second, that two of the insurers were not WYO carriers, *see* ([223] at 17), merely narrowed the list of named defendants to five WYO carriers. And as the Rigsbys admit, federal law requires that when a WYO carrier also provides homeowners insurance, one adjuster must be used. *See, e.g.*, ([16] ¶¶ 54-55.) Among those named carriers who were allegedly using a single adjuster to "shift repayment obligations to the Federal Flood Insurance Program ... at ... taxpayers' expense," ([91-4] ¶ 12), there was complete symmetry between the WYO carriers named as defendants in *Cox/Comer* and this action. That is, the complaints and amended complaints in both *Cox/Comer* and this action actually named State Farm, Nationwide Insurance Company, Allstate Insurance Company, and USAA Insurance Company as defendants. *Compare* ([91-3] ¶ 1 & [91-4] ¶ 1) *with* ([2] ¶¶ 10-13 & [16] ¶¶ 13-16.)

Even where the public disclosure did not specifically name State Farm or other carriers, such as in Dr. Hunter's Congressional testimony, that does not prevent application of the public disclosure bar. When presented with allegations of industry-wide fraud, "the issue is not whether a public disclosure names names; instead, the issue is whether, once alerted by the public disclosure to the nature of the wrongdoing, the federal government can identify the wrongdoers through whatever means are at its disposal." *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1138 (D. Wyo. 2006); *see also United States ex rel. Fried v. Hudson Indep. Sch. Dist.*, 2007 WL 3217528, at *3 (E.D. Tex. Oct. 26, 2007). Unlike the innumerable Medicare secondary payers at issue in *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 566 (11th Cir. 1994), here there were only a limited number of NFIP carriers in Mississippi and Louisiana at the time of Hurricane Katrina, *see* ([92] at 7 n.6), and "these companies are readily identifiable by the government," *In re Natural Gas Royalties*, 467 F. Supp. 2d at 1139, with State Farm being the largest and most readily identifiable.

[5] The Rigsbys' reliance on Senator Grassley's *amicus* brief from *Rockwell*, 127 S. Ct. 1397, is misplaced. *See* ([223] at 13 n.7.) Senator Grassley supported the losing side in *Rockwell.*

B. The Rigsbys' Suit Is "Based Upon" Public Disclosure

The Rigsbys argue that the Court should reject the conclusion of the overwhelming majority of the federal Circuit Courts, including the Fifth Circuit, that "[t]o be based upon a public disclosure, an action need not actually be derived from the publicly disclosed allegations or transactions." *United States ex rel. Richardson v. E-Sys., Inc.*, 1999 WL 324666, at *3 (N.D. Tex. May 18, 1999) (citing *Findley*, 105 F.3d at 682). Instead, the Rigsbys urge the Court to adopt the minority view taken only by the Fourth and Seventh Circuits that the phrase "based upon" means "derived from" the public disclosure – *i.e.*, their allegations arose out of a public disclosure known to them. *See* ([223] at 19-21.) Notably, although the Rigsbys cite and quote the Seventh Circuit's decision in *United States ex rel. Fowler v. Caremark RX, LLC*, 496 F.3d 730, 738 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1246 (2008), *see* ([223] at 20-21), they fail to bring key language in the decision to this Court's attention. That is, in *Fowler*, the Seventh Circuit expressly recognized that the Fifth Circuit follows the majority approach.

Citing cases from eight other circuits, including the Fifth Circuit's decision in *Federal Recovery Services*, 72 F.3d 447, the Seventh Circuit acknowledged that "[t]he majority of circuits apply the standard 'that a qui tam action is "based upon" a public disclosure when the supporting allegations are "the same as those that have been publicly disclosed ... regardless of where the relator obtained his information."'" *Fowler*, 496 F.3d at 737 (citations omitted); *see also Wercinski v. Int'l Bus. Machs. Corp.*, 982 F. Supp. 449, 459 (S.D. Tex. 1997) ("it appears that [in *Federal Recovery Services*] the Fifth Circuit has, at least implicitly, adopted the [majority] interpretation of 'based upon'"). The majority holding is consistent with the structures and the policies of the FCA, and if the "based upon the public disclosure" requirement is read too narrowly, relators will be able to evade and render superfluous the stricter "original source" requirements. *See, e.g., United States ex rel. O'Keeffe v. Sverdup Corp.*, 131 F. Supp. 2d 87, 93 (D. Mass. 2001). Moreover, the Supreme Court's recent decision in *Rockwell*, 127 S. Ct. 1397, "strongly suggests that the [majority] view of what constitutes a disclosure is correct, as that view is more demanding of relators and construes federal jurisdiction more narrowly." *Hockett*, 498 F. Supp. 2d at 38 n.6.

The Rigsbys' assertion that "under either reading, [their] action is not 'based upon' any public disclosures," ([223] at 20), is plainly wrong. Under the majority position, which is followed in the Fifth Circuit, the jurisdictional bar of section 3730(e)(4)(A) applies. So, too, even if the minority view were followed in the Fifth Circuit (which it is not), the Rigsbys' argument would still fail. As State Farm previously noted, the Rigsbys are not an "original source" of their "two specific instances" of the alleged federal flood fraud, one of which is Mullins. *See* ([92] at 17-18.) As Renfroe has explained in its papers addressing the lack of subject mater jurisdiction, the Rigsbys are not an "original source" of the Mullins information and have admitted that they based their allegations on prior published reports from the news media, which are "public disclosures" under section 3730(e)(4)(A).

More particularly, Renfroe quoted directly from the Rigsbys' own court papers in *E.A. Renfroe & Co. v. Cori Rigsby Moran and Kerri Rigsby*, No. CV-106-WMA-1752-S (N.D. Ala. filed Sept. 1, 2006), to disclose Kerri Rigsby's admission they have no direct and independent knowledge of the Mullins claim, but rather based their allegations on published news reports. In Ms. Rigsby's own words:

> 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.

([182] at 15-16) (second emphasis added) (quoting ([181-6] at 2-3)); *see* Michael Kunzelman, *State Farm Accused in Suit; Couple: Damage Reports Conflict*, Sun Herald, Mar. 23, 2006, at A8 (discussing *Mullins*); *Suit accuses State Farm of fraud*, Clarion-Ledger, Mar. 23, 2006 at 2B (same) (Exs. C & D to Reb.). In short, at least part of the Rigsbys' allegations was actually "derived from" public disclosures.

The law is well settled that "'[a]n FCA qui tam action *even partly based upon* publicly disclosed allegations or transactions is nonetheless "based upon" such allegations or transactions.'" *Fed. Recovery Servs.*, 72 F.3d at 451 (emphasis in original) (quoting *Precision*, 971 F.2d at 552); *accord Reagan*, 384 F.3d at 176. The Rigsbys thus have the burden of demonstrating that they are an "original source" with "direct and independent knowledge" of fraudulent federal flood claims that was provided to the government in a timely manner. They have failed to do so.

II. THE RIGSBYS ARE NOT AN "ORIGINAL SOURCE" OF ANY FRAUDULENT FLOOD CLAIM

As the parties invoking federal jurisdiction, the Rigsbys have the burden of proving its existence, *see St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998), with any "doubts resolved against federal jurisdiction." *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984). They must "produce 'potentially specific, direct evidence of fraudulent activity,' by the defendant to establish standing to pursue an FCA claim. It follows that, to refute Defendants' motion to dismiss, [the relator] must show that she is the origin of some evidence showing that [defendant] has committed fraud." *Reagan*, 274 F. Supp. 2d at 852 (citations omitted). And the fraud must be the type actionable under the FCA, *i.e.*, the submission of a false claim. *See United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 225 (1st Cir. 2004). Because the Rigsbys cannot show that they produced "evidence of a meritorious fraud claim," they lack standing and are not an "original source." *Reagan*, 274 F. Supp. 2d at 853.

Refusing to acknowledge the fact that (i) they were not involved with the adjustment of the Mullins claim, (ii) they based their allegations about the Mullins claim on media reports, and (iii) *Mullins* did not even involve a federal flood claim, the Rigsbys stubbornly insist that having "included the details of the Mullins claims, they are original sources of that claim." ([223] at 28.) They are not. Nor do their other arguments fare any better. Since the Rigsbys have failed to meet their burden of demonstrating that they are an "original source" of even a single fraudulent federal flood claim, this Court lacks subject matter jurisdiction over this action and it must be dismissed.

A. The Facts Demonstrate That the Rigsbys' Original Allegations Were False

The Rigsbys do not and cannot dispute that in addressing the "original source" provisions in the context of determining subject matter jurisdiction, the Supreme Court recently indicated that courts must look behind a relator's mere allegations and examine the actual "state of things." *Rockwell*, 127 S. Ct. at 1409. As the Court held, "[t]he state of things and the originally alleged state of things are not synonymous; ***demonstration that the [relator's] original allegations were false will defeat jurisdiction***." *Id.* (emphasis added). Examining the actual "state of things" in *Rockwell*, the Court stated that the relator's allegation that he possessed "direct and independent knowledge" of a fraudulent

federal claim "assuredly does not [qualify] when its premise of cause and effect is wrong." *Id.* at 1410. So, too, here. The McIntosh property – the only other "specific instance" of an allegedly fraudulent flood claim identified by the Rigsbys – is close to the Gulf of Mexico and sustained an interior water mark of five and a half feet due to Hurricane Katrina, causing extensive damage to the main floor. *See* ([92] at 15; [91-7] at 137:7-13.) Kerri Rigsby admitted in sworn testimony that based on her inspection of the McIntosh property, the flood payments, which she approved, were wholly proper. *See* ([92] at 15-16; [91-7] at 131:12-20, 140:9-15, 133:1-6, 139:13-23.) The McIntoshes have likewise admitted that "(a) the McIntosh dwelling was damaged as a result of Hurricane Katrina; (b) the majority of the damage to the McIntosh dwelling was caused by flooding; (c) the McIntosh dwelling sustained flood damage of at least $250,000 to the structure and $100,000 to its contents; [and] (d) State Farm promptly and properly paid [them] the full policy limits of their flood insurance policy." (*McIntosh* [1312] at ¶ 2; *see also McIntosh* [1315].) Each of these facts demonstrates that the Rigsbys' original allegations that the McIntosh federal flood claim was fraudulent were false, thus defeating jurisdiction.

B. <u>The Rigsbys Have Failed To Meet Their Burden on This Motion</u>

"[A] challenge under the FCA jurisdictional bar is necessarily intertwined with the merits and is, therefore, properly treated as a motion for summary judgment." *Reagan*, 384 F.3d at 173 (internal quotation marks and citation omitted). In order for the Rigsbys to prevail, they must come forward with sufficient evidence upon which a jury could reasonably return a verdict in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 252 (1986). They "may not rest upon the mere allegations … of [their] pleading" and evidence that "is merely colorable or is not significantly probative" will not suffice. *Id.* at 249-50 (citations omitted). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims," and "it should be interpreted in a way that allows it to accomplish this purpose." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

In terms of addressing the Mullins claim, the Rigsbys come forward with nothing. In terms of addressing the McIntosh claim, the most the Rigsbys proffer – in a desperate attempt to "create[] a clear issue of material fact: whether the McIntoshes' property sustained $250,000 of flood damage" ([223] at 30) – is a mischaracterized statement from one of Kerri Rigsby's depositions that "she should not have

approved the payment of the McIntosh flood claim." ([223] at 29.) This statement is not sufficient to satisfy the Rigsbys' burden, and there is no genuine issue of material fact on which a jury could reasonably return a verdict in their favor.

First, the entire premise of that statement is misleading because the statement it rests on – *i.e.*, "once the report came in and showed that it was wind and I still allowed Cody to pay it as water" (K. Rigsby *McIntosh* Dep. at 238:11-13) – refers solely to the conclusions of the original October 12, 2005, engineering report that Ms. Rigsby as well as Brian Ford (the author of that report) later admitted were erroneous.[6] Indeed, Ms. Rigsby admitted that the October 12, 2005 report, standing alone, would not have supported the flood insurance payment that she had previously authorized and believed was appropriate, and she further admitted that the subsequent October 20, 2005 report is consistent with her own conclusions based on her personal inspection of the McIntosh home.

> Q. Do you believe this [October 12, 2005] report – this report would support a $250,000 payment under the National Flood Insurance Program on the home?
>
> A. No.
>
> Q. And when you made the payment or agreed or authorized your subordinate, who was working – primarily working the claim, to request authority for $250,000, you thought there was at least that much flood damage to the home, didn't you?

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[6] Further, just questions later, Ms. Rigsby ***rejected*** the notion that water was not a cause of the McIntoshes' loss.

> Q. Okay. And are you telling us now that since then you've learned that water didn't have anything to do with this loss?
>
> A. ***No.*** Since then, I've learned that Haag is just an extension of State Farm and will write what State Farm wants them to write.
>
> Q. Who told you that?
>
> A. I learned that just by reading what happened in Oklahoma City.

(K. Rigsby *McIntosh* Dep. at 241:8-17.) As this testimony further makes clear, the Rigsbys' issues with the Haag Report on Hurricane Katrina are based on newspaper accounts of unrelated incidents involving tornadoes in Oklahoma. Moreover, while the Rigsbys attach as their Exhibit 1 a verdict from the *Watkins* case, relating to the tornadoes in Oklahoma, they fail to note that the *Watkins* court subsequently vacated the judgment in its entirety, ordered a new trial, and shortly thereafter dismissed the case with prejudice. *See* (Order Granting Defendant's Petition for a New Trial and Motion To Vacate the Judgment, *Watkins v. State Farm Fire & Casualty Co.*, No. CJ-2000-303 (Okla. Dist. Ct. Mar. 30, 2007); Dismissal with Prejudice, *Watkins*, No. CJ-2000-303 (Okla. Dist. Ct. Apr. 2, 2007), Exs. E & F to Reb.). State Farm objects to the admission of Exhibit 1 to the Rigsbys' Response. *See* Fed. R. Evid. 103, 401 & 403.

A. Was a lot of damage to that home.
….

A. It was a large home. It was insured for a lot of money, and I – yeah, I believe I thought there was $250,000 worth of flood damage to that home.
….

Q. The third bullet point [in the October 20, 2005 report], which states that the damage to the first floor walls and floors appears to be predominantly caused by rising water from storm surge and waves, was that consistent with what you saw when you went out to the McIntosh home?

A. Yes.

([91-7] at 139:9-23, 142:7-13.) Mr. Ford has likewise testified that there is "no doubt" there was "five and a half feet" of water damage caused by storm surge on the main floor of the McIntoshes' house, and he agrees with the conclusions of the October 20 report, including the conclusion that there was extensive water damage to the first floor. (Ford Dep. in *McIntosh* at 251:2-24, 270:22-271:14, 301:11-303:8, Ex. A to Reb.) The Rigsbys cannot change the clear meaning or the legal import of this testimony. Nor can they change the undisputed fact that the inside of the McIntoshes' waterfront home was inundated with five and a half feet of flood water, which caused massive damage to the structure and its contents that exhausted the flood policy limits.[7] The Rigsbys' attempt to advance a mischaracterized deposition answer, which itself was based on the admittedly erroneous conclusions of the October 12 report, is not sufficient to create a genuine issue of material fact.

Second, despite their vain attempt to create an irreconcilable discrepancy in Kerri Rigsby's deposition testimony where none exists, even if there was a discrepancy, it would not suffice to defeat this motion. The law is well settled that a nonmoving party is not permitted to create a genuine issue of material fact by submitting her own contradictory depositions or affidavits. *See, e.g.*, *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 386 (5th Cir. 2000); *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 993 (E.D. La. 2000), *aff'd*, 31 F. App'x 151 (5th Cir. 2001). To do so "would greatly diminish the

[7] The issue here is not whether the McIntoshes were underpaid for wind, but rather whether their flood claim was fraudulently submitted to the government. That this distinction is lost on the Rigsbys is apparent from their reliance on the Mullins claim, which did not even have a flood policy.

utility of summary judgment as a procedure for screening out sham issues of fact." *Doe*, 220 F.3d at 386; *accord Hyde*, 107 F. Supp. 2d at 993.

Though Kerri Rigsby was intimately involved with the adjustment and approval of the McIntosh flood claim, the Rigsbys have failed to come forward with any specific or probative evidence sufficient to show that the flood claim was false, let alone "knowingly" false. *Cf.* 31 U.S.C. § 3729; *Wang*, 975 F.2d at 1420. All of the evidence and the reasonable inferences demonstrate not that the McIntosh flood claim was false, but rather that the Rigsbys' original allegations were false.

C. The "Other False Claims" Are Legally Impermissible Speculation and Conjecture

In discussing other ostensible false claims, including the Vela claim, *see* ([223] at 31), the Rigsbys engage in rhetorical sleight of hand. Addressing claims apparently made under their homeowners policies, the Rigsbys state that "Vela's neighbors to her left, right, and across the street all had their claims denied ***under their policies' flood exclusions***." *Id.* (emphasis added). The Rigsbys have no proof that Ms. Vela or any of her neighbors had federal flood insurance through State Farm, or that any flood claim was submitted, let alone a false one. A relator's mere speculation and conjecture that a defendant might have submitted false claims does not satisfy the "original source" requirements. *See United States ex rel. Hafter, D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162-63 (10th Cir. 1999); *Reagan*, 274 F. Supp. 2d at 853-54. In fact, the Fifth Circuit recently confirmed that "a relator's suspicions cannot substitute for the requirement of direct and independent knowledge" under the "original source" standard. *United States ex rel. Lam v. Tenent Healthcare Corp.*, No. 07-51042, 2008 WL 2835215, at *5 (5th Cir. July 22, 2008) (citing *Rockwell*, 127 S. Ct. at 1410). Yet the Rigsbys offer nothing more.

D. Discovery Cannot Show the Rigsbys To Be "Original Sources"

No discovery is needed for the Rigsbys to support their assertion of jurisdiction. The public disclosures are a matter of public record. The "based upon" portion of the public disclosure bar is a legal issue for the Court. Whether the Rigsbys satisfy the "original source" standard is not something they need to take discovery on inasmuch as the issues raised by this motion rise or fall on their own knowledge, including their own prior sworn admissions which reveal that the McIntosh flood claim was

not fraudulent. The Rigsbys' stated need to take discovery in connection with the issues raised by this motion demonstrates they are not an "original source."

In order to be an "original source," the Rigsbys must have "'direct and independent knowledge of the information' which forms the basis of [their] claims." *Fried*, 527 F.3d at 442 (citation omitted). "In order to be 'direct,' the information must be ***firsthand*** knowledge. In order to be 'independent,' … the relator cannot depend or rely on the public disclosures." *Id.* at 442-43 (emphasis added; citation omitted). Indeed, the fact that the Rigsbys claim that discovery from State Farm will "further substantiate their role as original sources" ([223] at 32) (emphasis omitted), necessarily "conflicts with" their allegation that they are an "original source." *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 560 (8th Cir. 2006); *see generally* ([217]).

While the Rigsbys cite the Fifth Circuit's decision in *McAllister v. F.D.I.C.*, 87 F.3d 762, 766 (5th Cir. 1996), for the proposition that "when a court 'makes factual determinations decisive of a motion to dismiss for lack of jurisdiction, it must give plaintiffs an opportunity for discovery'" ([223] at 30), they omit the end of the sentence which qualifies the preceding language – *i.e.*, "that is appropriate to the nature of the motion to dismiss." *McAllister*, 87 F.3d at 766. Here, for the reasons previously discussed, no such discovery is needed. Moreover, the Fifth Circuit's affirmations of the district court orders in both *Fried* and *Lam* establish conclusively that the Rigsbys' suggestion that the Court "'must give [them] an opportunity for discovery and for a hearing'" is wrong. ([223] at 11) (citation omitted). In *United States ex rel. Fried v. West Independent School District*, No. 6:05-cv-00386-WSS (W.D. Tex. May 10, 2007), *aff'd*, 527 F.3d 439 (5th Cir. 2008), defendant moved to dismiss relators' claims for lack of subject matter jurisdiction under Rules 12(b)(1) and (b)(6). *See* (*Fried* [18].) The district court "construe[d] the motion as one for summary judgment" and dismissed the complaint based on the pleadings, affidavits of the relators, and judicially-noticed submissions. (*Fried* [18] at 2-4.) Similarly, in *Lam*, relators submitted two declarations in opposition to defendants' motion for summary judgment. The district court found the declarations insufficient to raise a triable issue of fact and dismissed the case on the papers. *United States ex rel. Lam v. Tenent Healthcare Corp.*, 3:02-cv-525-KC (W.D. Tex. July

20, 2007) (*Lam* [200] at 4-7), *aff'd*, No. 07-51042, 2008 WL 2835215, at *5 (5th Cir. July 22, 2008). The same result is mandated here.

CONCLUSION

For the foregoing reasons, State Farm's motion should be granted in its entirety, dismissing Counts I, II, III, and IV of the First Amended Complaint, together with an award against the Rigsbys of State Farm's reasonable attorneys' fees, costs, and expenses. State Farm further prays that this Court will allow its Counterclaim to continue to pend for final adjudication.

This the 16th day of September, 2008.

Respectfully submitted,

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

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THIS the 16th day of September, 2008.

s/ E. Barney Robinson III (MSB # 09432)
E. Barney Robinson III (MSB # 09432)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

THOMAS AND PAMELA MCINTOSH Plaintiffs -vs- STATE FARM FIRE & CASUALTY COMPANY, FORENSIC ANALYSIS & ENGINEERING CORPORATION, AND E.A. RENFROE & COMPANY, INC., AND DOES 1 THROUGH 10, Defendants.	CIVIL ACTION NO.: 1:06-CV-1080-LTS-RHW

DEPOSITION OF

A. BRIAN FORD

ATHENS, GEORGIA

WEDNESDAY, OCTOBER 10, 2007

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

THOMAS AND PAMELA MCINTOSH Plaintiffs -vs- STATE FARM FIRE & CASUALTY COMPANY, FORENSIC ANALYSIS & ENGINEERING CORPORATION, AND E.A. RENFROE & COMPANY, INC., AND DOES 1 THROUGH 10, Defendants.	CIVIL ACTION NO.: 1:06-CV-1080-LTS-RHW

Deposition of A. Brian Ford, taken on behalf of the Plaintiff, pursuant to the stipulations agreed to herein, before Linda K. Jackson, Certified Court Reporter, at the Hilton Garden Inn, Athens, Georgia, on the 10th day of October, 2007, commencing at the hour of 9:52 a.m.

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Also present by telephone: Jana Renfroe

Videographer: Mike Brown

I N D E X

WITNESS: A. BRIAN FORD

E X H I B I T S

a waterline visible of about five to five and a half feet in the house. Can you see that? Or where that would be on this photograph? Look at the top of Page 2.

A Yes, I see it.

Q The waterline mark in the house is approximately five and one half feet above the main floor -- interior floor.

A What room are we in B -- A?

Q I can't tell you which room that is without going back and looking at Ms. McIntosh's testimony. But my question to you is: Is that waterline apparent in that photograph? That five and a half foot waterline?

A Do you have a magnifying glass?

Q You can't see it without it? In fact I do if I need to get one. There is one over there in my bag.

A I can't see a stain level separating --

Q Okay.

A -- the waterline from your original wall finish.

Q Okay.

A Now, the five and a half is up around where the sheetrock is gone.

Q Isn't that, in fact, where the sheetrock is gone consistent with damage that would be caused by water being at that level in the house?

A Yes. Yes. And I have no doubt there was water in the house at that level.

Q Okay. Well, then to make a follow-up to that

point that you have just made, if -- do you have any idea whether there were any waves on top of that water or do you know?

A From the data provided by State Farm, by Forensic, there was no guidance whatsoever. From data I have seen from other sources, yes, there is standing water height and there is wave height on top of that.

Q Yes, sir.

A But that information was not available during this timeframe.

Q Okay.

A In this case.

Q You didn't have that information at the time you did your report, is that right?

A That's correct.

MR. WEBB: I believe -- I was just told that there were five minutes left on the tape. So let's take another break while we change tapes if that's all right.

THE VIDEOGRAPHER: This marks the end of video tape number four in the deposition of Brian Ford. Going off the record. The time is 5:11.

(Video off.)

(Tape change.)

the storm surge, was it?

A No. And the only -- the corner of this house was missing, the lower portion.

Q Yes, sir.

A That doesn't like -- it could be but it doesn't look like that.

Q Doesn't look like what?

A That it would be that corner of the house. But I don't know what room in the house this is anyway so no need to discuss that.

Q Go to 409. Look at the Photograph A on 409. You will see I believe -- and you can correct me if I'm wrong, but you can see in Photograph A that there is a portion of the sheetrock missing on both sides of an interior wall. That would be reflective of that same water damage we had talked about in those other rooms, correct?

A Uh-huh.

Q Do you see over here on the right side of that photograph where there appear to be some items of clothing up on about the third -- excuse me, the 4th shelf?

A Uh-huh.

Q But yet there are no items of clothing down below that?

A Right. Right. Or anything else.

Q That would also be consistent with the water damage doing that, correct? As a opposed to wind?

A Yeah, I would think so.
Q Because just as a simple --
A Clothes hanging in the closet.
Q Yes, sir. It is a simple matter if wind is doing this, you would not expect to see those lightweight items still lying folded in that closet area, would you?
A No. This looks like the five and a half

feet of water.
Q Yes, sir.
A Although I'm surprised those are still on the shelf. At that fourth shelf. In 409.
Q Okay. Do you think at this stage having first seen these pictures here today, do you think that those photographs do, in fact, confirm that there was water damage to the first floor of that house caused by storm surge, don't they?
A Five and a half feet of it.
Q Yes, sir. And as we sit here today, there is no doubt that there was water damage to the bottom floor of that house in your judgment, correct?
A Yes.
Q And so -- and there was also wind damage to that house?
A Whatever was remaining when the water got up that high was damaged. Yes.
Q There was wind damage and there was water damage?
A Yes.

Q And the wind -- is it true or do you know if it is true that wind normally damages from the top of a structure down and that water normally damages from the foundation up?

MR. WYATT: Object to the form of the question. Particularly the part about 'normally'.

BY MR. WEBB:

Q If you understand the question.

A Again, wind has many variables. If you are talking about a skyscraper, the winds are higher at the top of a skyscraper than they are at the ground.

Q Yes, sir.

A In this structure you are not going to have that kind of variation. The protection of the structure probably contributes more than the height of it in this situation. The amount of other houses and trees that protect it.

Q From?

A From wind.

Q From wind?

A Right.

Q It has a friction factor that slows the wind down as well as blocks it in some instances, completely?

A Correct.

Q And there were a fair amount of trees around this house, correct?

A There are some trees remaining, yes.

Q Do you have any reason to believe that Mr. Kelly did anything other than apply his -- his best engineering training to the facts that he knew of when he was doing that October 20th report?
A I have no reason to believe that. No.
Q Okay. And with respect to the October 20th report, you have that there as Exhibit Number 6. I believe you pointed out earlier that in the bullet points in the conclusions, the first one is identical, I

believe, you said. The second one is a description of wind damage to the house. In certain areas of the house, correct?
A Uh-huh.
Q That uh-huh was a yes?
A Yes.
Q I'm sorry. But on the transcript sometimes it is hard to distinguish between a uh-huh from a huh-uh.
And the third one in his says what?
A The damage to the first floor walls and floors appears to be predominately caused by rising water from the storm surge waves.
Q Have you read his report completely?
A No.
Q Okay. Do you know now as we sit here today whether the information that he refers to in his report justifies those conclusions?
A I haven't read it yet.
Q Okay. So you don't know as we sit here today

whether you agree or disagree with that particular conclusion based on the information in his report?

A I think I said earlier, five and a half feet of water causes floor and wall damage.

Q Yes, sir.

A I agree with that.

Q Okay. So you agree with the three conclusions as stated in the October 20th report as well?

A Yeah. He covers the first floor ceiling damage in his second --

Q Yes, sir.

A -- conclusion.

Q So you agree with those three? Sir?

A Yes.

MR. WEBB: Thank you. Let me go off the record for just a minute.

THE VIDEOGRAPHER: Going off the record. The time is 6:32.

(Video off.)

(Break taken.)

(Video on.)

THE VIDEOGRAPHER: Back on the record. The time is 6:39.

BY MR. WEBB:

Q One or two -- honestly -- questions. Have you been retained by any lawyers or law firms to consult related to any claims or lawsuits they have got going on related to Katrina?

A No.
Q Have you been -- have you had any discussions with any lawyers or law firms about that?

A Yes, several. Just -- you know, saying it is a possibility, but no...
Q With the Scruggs Group?
A That's one.
Q What's the status of that?
A No.
Q No? You said no? Is that a final no?
A We didn't agree to work together.
Q Okay. And you didn't agree to work together why?
A I took a full-time job.
Q Okay. Is that the only reason?
A I don't know what their reasons would be.
Q Okay. From your standpoint?
A Right.
BY MR. WEBB:
Q With that, and I have got copies of these for y'all. I have had my -- let's do this on the record before I tender it. In view of the fact that you brought information that you have records over there and to make the record very clear, I did not have a Subpoena for you. I am serving you with one related to those documents which will allow us to be in a position to ask the Court to see whether we can obtain those documents that you have declined to produce here as well as anything else

STATE OF GEORGIA)

COUNTY OF WALTON) CERTIFICATE

I, Linda K. Jackson, a Certified Shorthand Reporter in and for the State of Georgia, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth.

That said deposition was taken before me at the time and place set forth and was taken down by me in shorthand and thereafter reduced to computerized transcription under my direction and supervision, and I hereby certify the foregoing deposition is a full, true and correct transcript of my shorthand notes so taken.

I further certify that I am neither counsel for nor related to any party to said action nor in anyway interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 15th day of October, 2007.

_____
Linda K. Jackson
Certified Court Reporter B-995
Registered Professional Reporter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THOMAS C. and PAMELA McINTOSH,	:	
Plaintiffs,	:	CIVIL ACTION NO. 1:06-CV-1080-LTS-RHW
- against -	:	
STATE FARM FIRE & CASUALTY CO. and FORENSIC ANALYSIS & ENGINEERING CO., et al.,	:	
Defendants.	:	

MOTION FOR DISMISSAL WITH PREJUDICE OF
EXTRA-CONTRACTUAL AND PUNITIVE DAMAGES CLAIMS

COME NOW the Plaintiffs, Thomas C. and Pamela McIntosh, by and through their counsel of record, and pursuant to Federal Rule of Civil Procedure 41(a)(2), who hereby move this Honorable Court for an Order dismissing all claims for extra-contractual damages, including but not limited to punitive and emotional distress damages, with prejudice. As ground for this motion, Plaintiffs would show as follows:[1]

1. On October 23, 2006, Plaintiffs Thomas C. and Pamela McIntosh filed the instant action against State Farm Fire and Casualty Company ("State Farm") and Forensic Analysis & Engineering Corporation ("Forensic"). On May 31, 2007, Plaintiffs filed an Amended Complaint adding E. A. Renfroe & Company, Inc. ("Renfroe") as a defendant. The Amended Complaint alleges breach of Plaintiffs' homeowners insurance contract, negligence, bad faith,

[1] Plaintiffs respectfully request that this Court waive the requirement of filing a separate brief in conjunction with the instant motion, as all authorities and arguments are cited herein.

fraud,[2] intentional/negligent infliction of emotional distress, and concerted action to avoid paying insurance claim. [Dkt. 193.] The Amended Complaint seeks, *inter alia*: (i) "[c]ompensatory damages for economic and non-economic damages suffered by Plaintiffs as a proximate result of the denial of coverage"; (ii) "[e]xtra-contractual damages"; and (iii) "[p]unitive and exemplary damages." (Am. Compl. ¶ 111, D-F.). On August 26, 2008, the Court granted Plaintiffs' Motion [Dkt. 1251] and dismissed all claims against Forensic with prejudice. [Dkt. 1287.]

2. After engaging in extensive discovery, the Plaintiffs have determined the following:

(a) the McIntosh dwelling was damaged as a result of Hurricane Katrina;

(b) the majority of the damage to the McIntosh dwelling was caused by flooding;

(c) the McIntosh dwelling sustained flood damage of at least $250,000 to the structure and $100,000 to its contents;

(d) State Farm promptly and properly paid Plaintiffs the full policy limits of their flood insurance policy; and

(e) State Farm promptly tendered payment to Plaintiffs for wind damage covered under their homeowners insurance policy prior to the time that the dwelling was inspected by an engineer.

3. In light these facts, Plaintiffs have concluded that: (i) State Farm had a reasonable basis for taking the position it did regarding coverage under Plaintiffs' homeowners policy; (ii) there is no credible evidence that State Farm engaged in bad faith with respect to the

[2] By Order dated April 21, 2008, this Court granted State Farm's Motion for Partial Summary Judgment and dismissed Plaintiffs' fraud claim with prejudice. [Dkt. 1186.]

adjustment of Plaintiffs' claims under their homeowners policy; (iii) there is no credible evidence of any other conduct that can arguably give rise to punitive damages. Therefore, Plaintiffs have determined that any and all claims seeking extra-contractual damages, including but not limited to punitive and emotional distress damages, should be dismissed with prejudice.

4. Plaintiffs have consulted with State Farm and Renfroe, who do not object to this motion. The parties have also agreed that all parties will bear their own costs and attorneys fees.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that the Court enter an Order dismissing all claims for extra-contractual damages, including but not limited to punitive and emotional distress damages, with prejudice.

DATED: September 7, 2008

THOMAS C. and PAMELA MCINTOSH, PLAINTIFFS

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STATE FARM ACCUSED IN SUIT / COUPLE: DAMAGE REPORTS CONFLICT

MICHAEL KUNZELMAN, THE ASSOCIATED PRESS

BAY ST. LOUIS - A couple that got conflicting reports from an engineering firm regarding how one of their homes was destroyed during Hurricane Katrina filed a lawsuit Wednesday accusing State Farm Insurance Co. of manipulating those reports to deny their claim.

The lawsuit, which comes as Mississippi's attorney general says he's investigating insurance companies for "fraudulent" handling of post-Katrina claims, is one of many spawned by a fierce debate over whether homes were destroyed by the hurricane's wind or water.

In this latest case, Terri and William Mullins have two conflicting reports done by the same engineering firm.

The first report, dated Oct. 23, found the couple's two-story home in Kiln was destroyed by hurricane-force wind, which their policy covered. On Jan. 3, however, the firm issued a second report that blamed the damage on the storm's floodwaters.

State Farm used the second report to deny the Mullins' claim. Insurance companies say their homeowners' policies do not cover damage from rising water, including wind-driven water, but policyholders argue that storm surge should not be considered flooding.

"State Farm's actions show that it believes that it should be able to pick and choose which proof it relies upon in evaluating the validity of a claim," the Mullins' lawsuit states. "State Farm will only accept reports from engineering firms that support a denial of coverage."

Terri Mullins said she obtained a copy of the first engineering report from her insurance agent's office in December. A month later, when employees of a State Farm office in Biloxi showed her the second report, she brandished a copy of the first and demanded an explanation. "They flat out told me, 'You were not supposed to get that (first) report,'" she said. Mullins and her husband are seeking unspecified damages from State Farm and Forensic Analysis & Engineering, the Raleigh, N.C., firm that prepared both reports.

rown Hunger vent Monday

annual Taste of Mississippi: Hunger Relief is scheduled .m. Monday at Highland Vil- ceeds from the event will pot Community Services. ır's event includes sam- 35 area restaurants, live ctions and artwork by Mis- sts.

f the event is $50 in advance, door. Tickets can be pur- e-Bop Record Shops, the urmet, select BancorpSouth h La La or by calling Stew- 353-2759. Tickets also can d online at www.stewpot.

equipment ition kicks off

competition used to enhance heavy equipment operators ssippi Department of Trans- s off today.

strict Seven competition will he southbound I-55 truck Osyka. The event will begin and the public can attend.

Equipment Operators n also stresses the impor- fety on the job. Each of districts competes against t employees, with the indi- winners qualifying for the npetition.

information, call MDOT irs Division at (601) 359-

R

ntral CC holds are expo

ral Community College is th annual Business, Educa- h Care Expo on April 6. is also invited to the free 11:30 a.m. in the Brackeen- al Education Building.

endors are expected, said airman Chris Harris, who llege's Work-Based Learn- or.

l about 500 students and campus visitors attended o, and he expects a larger ar.

nformation, write or call expo committee chairman, Community College, Box MS 39327; (601) 635- oll free, 1-877-462-3222, mail at charris@eccc.edu.

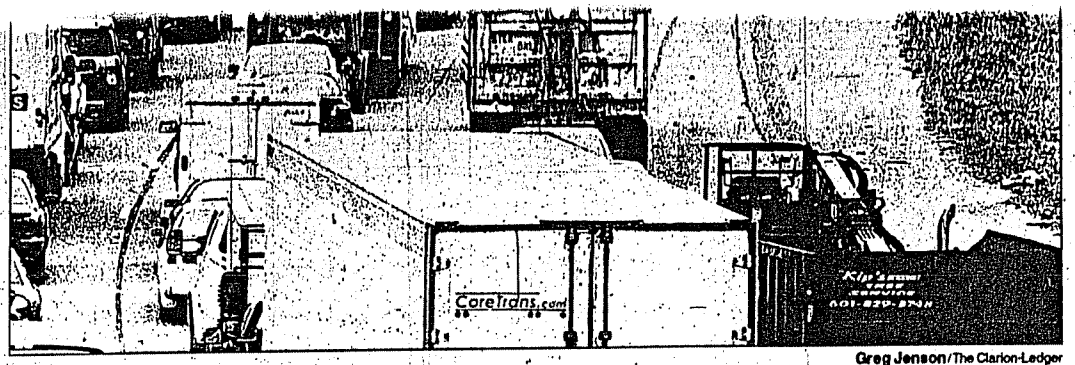
LLE

sts Air Force engineer

ecurity engineer for the Air stealth fighter project will y at Mississippi State Uni-

who works for the Science nternational Corp. in Wash- will be the first speaker in tinguished Lecture Series the university's Center for urity Research.

iscuss computer security he F-22 project. His public vill begin at 2 p.m. in 100 vhich is home to MSU's f computer science and eating is limited.



Greg Jenson/The Clarion-Ledger

Northbound traffic on I-55 near the Fortification Street exit backs up Tuesday morning while Jackson police officers reconstruct an accident scene. The interstate closure near the waterworks curve delayed motorists for about an hour.

Suit accuses State Farm of fraud

■ Coast couple sues after insurance company denies claim

The Associated Press

BAY ST. LOUIS — A couple that got conflicting reports from an engineering firm regarding how one of their homes was destroyed during Hurricane Katrina filed a lawsuit Wednesday accusing State Farm Insurance Co. of manipulating those reports to deny their claim.

Katrina: The Recovery

The lawsuit, which comes as Mississippi's attorney general says he's investigating insurance companies for "fraudulent" handling of post-Katrina claims, is one of many spawned by a fierce debate over whether homes were destroyed by the Aug. 29 hurricane's wind or water.

In this latest case, Terri and William Mullins have two conflicting reports done by the same engineering firm.

The first report, dated Oct. 23, found the couple's two-story home in Kiln, a rural community near the Mississippi-Louisiana border, was destroyed by hurricane-force wind, damage their policy covered. On Jan. 3, however, the firm issued a second report that blamed the damage on the storm's flood waters.

State Farm used the second report as the basis for denying the Mullins' claim. Insurance companies say their homeowners' policies do not cover damage from rising water, including wind-driven water, but policyholders argue that storm surge should not be considered flooding.

"State Farm's actions show that it believes that it should be able to pick and choose which proof it relies upon in evaluating the validity of a claim," the Mullins' lawsuit states. "State Farm will only accept reports from engineering firms that support a denial of coverage."

Terri Mullins said she obtained a copy of the first engineering report from her local insurance agent's office in December. A month later, when employees of a State Farm office in Biloxi showed her the second report, she brandished a copy of the first and demanded an explanation.

"They flat out told me, 'You were not supposed to get that (first) report,'" she recalled in an interview at the family business in Bay St. Louis.

Mullins and her husband are seeking unspecified damages from State Farm and Forensic Analysis & Engineering, the Raleigh, N.C.-based firm that prepared both reports.

Such disputes with insurance companies over the wind-vs.-water debate have been commonplace for many homeowners in the path of Katrina's destruction, particularly those without federal flood insurance.

The Mullins' case may be part of Mississippi Attorney General Jim Hood's fraud investigation.

Katrina mediation program expands

The Associated Press

Insurance Commissioner George Dale has expanded the Hurricane Katrina mediation program for homeowners.

Dale said Wednesday that the administrators of the program, the American Arbitration Association, will increase the number of mediation conferences held daily and the number of days those meetings are held.

Dale said at the end of this past week, about 1,500 policyholders had requested mediation conferences. Of the 165 conferences scheduled since mid-February, Dale said 103 were settled before the conference was held, 42 were settled at the meeting and 20 reached impasses.

Disputes can involve the amount owed, but because of Katrina's unprecedented storm surge, many disputes are over the cause of damage, officials have said. Many homeowners were under the impression their policies covered all hurricane damage, but private insurers maintain their policies exclude damage from "wind-driven water."

her body ... Caribbean islan

The witness ... ic information that prompte investigators t organize ... search in sanc dunes along th northern tip o the island, Ger ald Dompig Aruba's deputy said in an inter television's *48 ...* program, which tial transcript o on Wednesday.

Dompig said will use cadaver near a lighthou that someone to fully hide Hollo perhaps burying CBS interview for broadcast on show will be see WJTV-12.

The witness more about the Natalee," Dom information th gave was too spe story that was j someone."

Aruban auth to comment Wednesday.

Holloway's Twitty of Mount said she's aware "I'm just waiting day night," Twitt

Holloway, 18, leaving a bar with al Joran van der namese brother Satish Kalpoe.

No one has b her disappear investigation h number of false l

In January, Ar tors searched sar northwest coast with more than 5

Holloway att high school in Her father now l an.

LAW ENFORCEMENT BRIEFS

JACKSON

Police ask for assistance in finding shooting suspect

Police are asking for the public's help in catching a man who is accused of shooting a pawn shop owner.

LaDarian Brackens, 20, is wanted for allegedly shooting Larry Simmons Jan. 18, Police Chief Shirlene Anderson said. Brackens is described as being 5-foot-9 and weighing 200 pounds.

Simmons is the owner of McDowell Road Pawn Brokers, police said. He was shot once in the abdomen.

Anyone with information on Brackens' whereabouts is asked to call the Jackson Police Department at (601) 960-1234.

HATTIESBURG

Information sought in Oak Grove school bus vandalism

Metro Crime Stoppers is offering up to $1,000 cash for information leading to an arrest in connection with the recent vandalism of an Oak Grove High School bus.

Officials with the Lamar County School Police Department say bus Number 42 was vandalized Saturday night while it was parked next to the baseball field at Oak Grove High School in Lamar County.

The vandals spray painted the bus with blue and black paint, slashed the seats and broke raw eggs inside, resulting in more than $5,000 in damages.

Tips can be reported at 601-582-STOP(7867).

JACKSON

U.S. marshals arrest s on Texas murder warr

The U.S. marshals' Jackson-area fugi on Tuesday arrested a man who was wa der warrant from Texas, said Jackson Pc Cedric Myles, a member of the task forc

Samuel Robinson, 24, also faces assault charges in Amite County and Ja said. Myles said the Jackson warrant w 15 shooting in the Nova Park Apartmen mond Road. The victim has since recove

Robinson was apprehended at 471 where he was staying, Myles said.

Standards: Fire safety important issue in code debate, lawmake

From 1B

Adrain Lumpkin, Pearl River County administrator, said his county was on the way to passing the international code before Katrina hit. The county was approved for a $300,000 grant to hire inspectors and start a building code office. "Katrina will help us get there faster," he said.

County, Picayune and Poplarville officials will meet March 28 to make sure all codes affect more than the Coast.

Updated requirements improve fire safety and are needed statewide, he said. By knowing the code, firefighters can tell how long material will burn.

"We're focusing on the storm aspect," said Hewes, a negotiator. "What we're not taking into account is the issue of fire safety."

Aside from whether to require codes in other counties, another sticking point is

Chaney, a negotiator, said structures used for farming, hunting and socializing at the Neshoba County Fairgrounds will be exempt.

Not all counties want the same code statewide.

Lowndes County, which uses the older Southern Building Code, is considering zoning, said Supervisor Leroy Brooks, who represents the western section.

"I don't think the state Legislature

with houses built to fare b canes on the Coast and eart north. Tornado-resistant would help across Mississi

The codes would increas costs from 1 percent to 4 pe

That will be on top of the als during the rebuilding said.

"The requirements stronger buildings," he said

IN THE DISTRICT COURT OF GRADY COUNTY

STATE OF OKLAHOMA

DONALD L. WATKINS, JR. & BRIDGET WATKINS, individually as representatives of a class of similarly situated individuals,	)	
Plaintiffs,	)	
vs.	)	Case No. CJ-2000-303
STATE FARM FIRE & CASUALTY COMPANY and DANNY WALKER, and other similarly situated agents of STATE FARM FIRE & CASUALTY COMPANY,	)	
Defendants.	)	

ORDER GRANTING DEFENDANT'S PETITION FOR A NEW TRIAL AND MOTION TO VACATE THE JUDGMENT

The Court having reviewed Defendant State Farm Fire & Casualty Company's ("State Farm") Petition for a New Trial ("Petition") and Motion to Vacate the Judgment entered by this Court on July 17, 2006 ("Motion") filed on March 22, 2007 and made pursuant to Rule 17 of the Rules of the District Courts of Oklahoma, T. 12, Ch. 2, App., Rule 17, and 12 Okl. St. Ann. §§ 651-655, 1031; the United States Supreme Court's decision, dated February 20, 2007, in *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); and this Court's Journal Entry of Judgment on the Watkins Verdicts dated July 17, 2006, finds that State Farm's Petition and Motion should be Granted.

THE COURT HEREBY ORDERS, ADJUDGES AND DECREES that State Farm's Petition for a New Trial and Motion to Vacate the Judgment entered by this Court on July 17, 2006 filed on March 22, 2007 are Granted.

IT IS SO ORDERED.

Dated this 30 day of March, 2007.

Richard G. Van Dyck
Judge of the District Court

I, LOIS FOSTER, Court Clerk for Grady County, OK, hereby certify that the foregoing is a true, correct, and complete copy of the instrument herewith set out as appears of record in the Court Clerk's Office of Grady County, Okla.
This 30 day of March 20 07
LOIS FOSTER, Court Clerk
By Marlene Hutchison Deputy

IN THE DISTRICT COURT OF GRADY COUNTY
STATE OF OKLAHOMA

DONALD L. WATKINS, JR. and BRIDGET WATKINS,	)	
Plaintiffs,	)	
versus	)	Case No. CJ-2000-303
STATE FARM FIRE & CASUALTY COMPANY,	)	
Defendant.	)	

DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, Donald L. Watkins, Jr. and Bridget Watkins, and dismiss this case with prejudice to the re-filing thereof.

Respectfully submitted,

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Telephone: (405) 236-8000
Facsimile: (405) 236-8025

- and -

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3100 Oklahoma Tower
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Oklahoma City, Oklahoma 73102
Telephone: (405) 232-1211
Facsimile: (405) 235-7025
Attorneys for Plaintiffs

CERTIFICATE OF MAILING

This is to certify that on the 2 day of April, 2007, a true and correct copy of the above and foregoing Dismissal With Prejudice was mailed, postage prepaid, to the following attorneys of record:

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David V. Jones
Jones, Andrews & Ortiz
21 E. Main Street, Suite 101
Oklahoma City, OK 73104
Attorneys for Defendants

JEFF D. MARR

I, LOIS FOSTER, Court Clerk for Grady County, OK, hereby certify that the foregoing is a true, correct, and complete copy of the instrument herewith set out as appears of record in the Court Clerk's Office of Grady County, Okla.
This 2 day of April 2007
LOIS FOSTER, Court Clerk
By [illegible] Deputy