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

UNITED STATES OF AMERICA ex rel.
CORI RIGSBY AND KERRI RIGSBY, RELATORS,

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

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

DEFENDANT E. A. RENFROE & COMPANY, INC.'S REBUTTAL TO "RELATOR'S OPPOSITION [235] TO DEFENDANTS E. A. RENFROE & COMPANY INC., GENE RENFROE AND JANA RENFROE'S MOTION FOR SUMMARY JUDGMENT UNDER 31 U.S.C. § 3730(E)(4) [181]"

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DEFENDANT E. A. RENFROE & COMPANY, INC.'S REBUTTAL TO [235] "RELATOR'S OPPOSITION TO DEFENDANTS E. A. RENFROE & COMPANY INC., GENE RENFROE AND JANA RENFROE'S MOTION FOR SUMMARY JUDGMENT UNDER 31 U.S.C. § 3730(E)(4)"

COMES NOW the Defendant, E. A. RENFROE & COMPANY, INC. ("Renfroe") (and files its *Rebuttal to Relators' Opposition* [Docket No. 235] *To Defendants E. A. Renfroe & Company Inc., Gene Renfroe and Jana Renfroe's Motion for Summary Judgment Under 31 U.S.C. § 3730(E)(4)"* [Docket No. 181].

INTRODUCTION

Relators recently conceded that the entirety of the First Amended Complaint [Docket No. 16] should be dismissed as to Gene and Jana Renfroe individually[1] and that three of the substantive False Claims Act ("FCA") counts – Counts I, II, and IV – should be dismissed as against Renfroe. *See* Relators' Opposition To "Motion To Dismiss For Failure To Comply With Rules 12(b)(6) and 9(b)" [Docket No. 224] at 1. Because the Department of Justice has declined to intervene in this case, has been served with copies of all pleadings, and has not indicated any intention to object to the dismissal of these counts against Renfroe and all counts against Gene and Jana Renfroe, we assume that the only remaining count that is the subject of this Motion is Count III -- the Section 3729(a)(3) conspiracy allegation against Renfroe. Additionally, Renfroe adopts the arguments made in support of dismissal under Section 3730(e)(4) in "State Farm Fire and Casualty Company's Rebuttal in Support of its Motion to Dismiss the Amended Complaint Under Federal Rules of Civil Procedure 12(b)(6) and 9(b) [Docket No. 238]" as to Counts I, II, III and IV of the Amended Complaint.

[1] Defendants Jana Renfroe and Gene Renfroe (the "Renfroe Individuals") have challenged and continue to challenge the Court's jurisdiction over them in their individual capacities and, therefore, do not appear for purposes of this rebuttal.

REBUTTAL ARGUMENT

Relators urge this Court to ignore interpretations of the FCA's public disclosure bar that have been adopted not only by courts in this Circuit, but also by the overwhelming majority of courts to have considered the issue. As will be demonstrated below, the widely-accepted majority view is that the public disclosure bar is triggered if information in a *qui tam* allegation is "substantially similar" to the public information. Additionally, the fact that Relators are unable to meet basic pleading requirements for their conspiracy claims has direct bearing on their ability to prove the "direct" and "independent" knowledge necessary to qualify as an "original source" for purposes of the FCA's *qui tam* provisions. Because their conspiracy claims are based upon publicly disclosed information and Relators do not qualify as "original sources," they have failed to meet their burden of proving that this Court has jurisdiction over this matter.

I. The Allegations Made by Relators in Count III Were in the Public Record Before Relators Filed Their *Qui Tam* Action

Relators concede in their Opposition that the FCA's "public disclosure bar," 31 U.S.C. § 3730(e)(4), is a jurisdictional provision. *See* Relators' Opposition [Docket No. 235] at 2. Because federal courts are courts of limited jurisdiction, "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). The Relators' Opposition demonstrates that they have utterly failed to meet that burden. Although justifiable inferences can be made in the nonmoving party's favor, when jurisdiction has been challenged "the court has no duty to accept factual allegations as true, especially sweeping, conclusory statements." *United States ex rel. J. Cooper & Assocs., Inc., v. Bernard Hodes Group, Inc.*, 422 F. Supp. 2d 225, 233 (D.D.C. 2006).

A. The *Cox/Comer* Complaint Discloses the Allegation of Collusion Between Insurance Companies and Adjusters

When the Count III allegations against Renfroe are reviewed under this standard, it is clear that Relators' conspiracy allegation is particularly appropriate for dismissal under the Section 3730(e)(4) public disclosure bar because the general allegation of an industry conspiracy to shift costs to the federal flood program with the cooperation of outside adjusters is exactly what was in the public record months before Relators filed their original Complaint (and nearly a year and a half before Renfroe was first added as a defendant in the Amended Complaint).[2] Moreover, the *Cox/Comer* Complaint specifically asserts that multiple insurance companies, including State Farm, used multiple adjusters who were acting on behalf of the insurance companies to accomplish the same alleged fraud on the government and homeowners.

In this Circuit, the public disclosure bar applies if the "essence" of a relator's allegations was publicly disclosed, so a few "nuggets" of non-public information purportedly added by a relator are not enough to rescue a *qui tam* complaint from a jurisdictional challenge under Section 3730(e)(4). *United States ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439, 442 (5th Cir. 2008). The Fifth Circuit has held that it is only necessary for a complaint to be "partly based upon" the previously disclosed allegations for Section 3730(e)(4) to apply. *Federal Recovery Servs., Inc. v. United States*, 72 F.3d 447, 451 (5th Cir. 1995). Courts in this Circuit (and in the overwhelming majority of circuits) have also held that it is only necessary for the publicly disclosed allegations to be "substantially similar" to or "supported by" the allegations in the *qui tam* complaint. *See, e.g., United States ex rel. Fried v. Hudson Indep. Sch. Dist.*, No. 9:05-CV-

[2] Renfroe is addressing only the public disclosures relevant to the Count III allegation that remains against Renfroe, but reiterates its arguments that Dr. Hunter's testimony (Docket No. 91-9) also triggers the application of the public disclosure bar as to Counts I, II, III and IV of the First Amended Complaint. At the very least, the general allegation of a conspiracy between adjusters and the insurance companies is implicit in Dr. Hunter's testimony, but as is demonstrated below, the *Cox/Comer* Complaint addresses this point directly.

245, 2007 WL 3217528 (E.D. Tex. Oct. 26, 2007); *United States ex rel. Stone v. AmWest Sav. Ass'n*, 999 F. Supp. 852, 857 (N.D. Tex. 1997). *See also United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 333 (3d Cir. 2005) (citing cases).

A side-by-side comparison of the relevant allegations in the *Cox/Comer* Complaint and the Relators' Amended Complaint reveals that there is little substantive difference between the allegations.[3] Both complaints contain the allegations (1) that insurance companies were improperly adjusting claims by shifting Katrina-related costs to the federal flood program, and (2) that they were doing so with the assistance of adjusters who were acting at the behest of the insurance companies.

***Cox/Comer* Class Action Complaint Filed January 31, 2006**	**Rigsbys' Amended Complaint Filed May 22, 2007**
¶ 12: *Insurance Defendant Class [defined to include State Farm]* have denied numerous claims by improperly relying on inapplicable exclusionary provisions in Plaintiff Class' policies. Insurance Defendant Class' actions are 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. . . .* (emphasis added).	¶ 112f: *Defendants inflated flood claims to the maximum amount possible to push off costs due to wind onto the Federal Government.*
¶ 13: In situations where the members of the Insurance Defendant Class have not denied claims outright, *adjusters working on behalf of the Insurance Defendant Class have not fairly and adequately adjusted losses. They have accomplished this by improperly allocating damage under applicable policy provisions . . . .* (Emphasis added.)	¶ 124: "*Defendants, State Farm Mutual Insurance Company, E. A. Renfroe, Inc.,* Jana Renfroe, Gene Renfroe, Alexis King, and the Engineering Defendants, *acting through their* officers, employees, *agents, adjusters, and independent contractors conspired to defraud the Government by getting false or fraudulent claims allowed or paid."* ¶ 126: "*Defendants conspired with . . . outside adjusters,* including adjusters specially hired to adjust the losses in the Hurricane Katrina area, and directed them to service homeowners with claims." (Emphasis added.)

[3] *Compare Comer v. Nationwide Mut. Ins. Co.*, No. 1:05-cv-436-LTS-JMR (S.D. Miss.), Second Am. Compl. [Docket No. 181-1] ¶¶12, 13, *with* Amended Complaint [Docket No. 16] ¶¶ 112f, 124, 126.

For the public disclosure bar to be triggered, the law of this Circuit requires only that *qui tam* allegations be "substantively identical to those previously disclosed." *Fed. Recovery Servs.*, 72 F.3d at 451. While the *Cox/Comer* complaint lacks certain details regarding the method by which the insurance adjusters and insurance companies acted in concert to accomplish this so-called fraud, the Relators' Amended Complaint suffers the very same deficiency -- a fact that strongly reinforces the conclusion that Relators here have merely parroted the same deficient allegation of fraud that was already in the public domain. Despite Relators' protestations to the contrary, the simple fact is that their allegations are "based upon" publicly disclosed allegations under the standard that governs this Court's review.

B. The Relators' Conspiracy Allegations Against Renfroe Are Insufficient to Overcome A Public Disclosure Challenge

When jurisdiction is challenged under Section 3730(e)(4), *qui tam* relators have the burden of proving jurisdiction -- not with mere allegations or statements by lawyers in pleadings -- but with competent proof sufficient to overcome a motion for summary judgment. Relators fail to meet that burden of proving that their allegations were not publicly disclosed or that they are "original sources" within the meaning of the FCA. They assert in their Opposition that "Renfroe conspired with State Farm to defraud the government by instructing its adjusters to 'hit the limits' when assessing damage under flood policies.'" Relators' Opposition [Docket No. 235] at 3, *citing* Amended Complaint [Docket No. 16] ¶ 61. But the *actual* text of the Amended Complaint leaves out any reference to a conspiracy, and instead asserts that *State Farm's* -- not Renfroe's -- alleged "'hit the limits' instruction was a *quid pro quo* to E. A. Renfroe for its compliance with the flood–fraud scheme in that adjusting costs paid to State Farm under the Flood Insurance Program are linked directly to the amount of damage paid to the insurer [sic]." Amended Complaint [Docket No. 16] ¶ 61.

Relators also argue in their Opposition that Renfroe profited from the alleged misconduct (*see* Relators' Opposition [Docket No. 235] at 3), but this assertion falls far short of establishing the elements of a conspiracy allegation. Entirely absent from the Relators' Amended Complaint is the required allegation of an agreement between State Farm and Renfroe to defraud the government. "The essence of a conspiracy under the FCA is an agreement between two or more persons to commit fraud." *United States ex rel. Riley v. St. Luke's Episcopal Hosp*., 200 F. Supp. 2d 673, 676 (S.D. Tex. 2002) (quoting *United States ex rel. Atkinson v. Pa. Shipbuilding* Co., No. Civ. A. 94-7316, 2000 WL 1207162 (E.D. Pa. 2000)). The Relators' Count III claims are substantially identical to the collusion allegations that were already in the public domain by virtue of the *Cox/Comer* Complaint, and Relators have not met their burden of establishing jurisdiction under Section 3730(e)(4).

II. Relators' Status As Former Renfroe Employees Does Not Automatically Make Them "Original Sources"

A. Purported Insiders Must Still Prove They Have Direct and Independent Knowledge of the Alleged Fraud

Relators assert in paragraph 27 of their Amended Complaint that "they learned of State Farm's fraud and Renfroe's conduct 'in their capacity as employees, and through no other source,'" but their status as former Renfroe employees standing alone does not confer a special presumption that they are also "original sources" as defined by Section 3730(e)(4)(B). For example, in each of the following cases, the courts held that purported insiders failed to prove that they were "original sources" within the meaning of the FCA. *See United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 559 (8th Cir. 2006) (affirming the dismissal of a *qui tam* case by a physician who asserted that he was an original source who learned the allegations through his staff position at a hospital), *cert denied*, 127 S. Ct. 189 (2006); *United States ex rel.*

Lam v. Tenet Healthcare Corp., No. 07-51042, 2008 WL 2835215, at *5 (5th Cir. July 22, 2008) (unpublished decision) (former employees were not original sources because their allegations were based on suspicions, speculation, and secondhand information); *United States ex rel. Aflatooni v. Kitsap Physicians Servs*, 163 F.3d 516, 525-26 (9th Cir. 1999) (physician's suspicions regarding his employer's billing practices did not constitute direct and independent knowledge). Other examples abound.

Courts properly demand that so-called insiders demonstrate that they bring real value to the table when their allegations are already in the public domain. This expectation is based in part on the fact that the government offers a generous share of its right to a recovery to true "insiders to the fraud." As the Fifth Circuit noted when affirming the dismissal of the claims of an alleged employee-insider, "the False Claims Act grants a right of action to private citizens only if they have independently obtained knowledge of fraud. *See* 31 U.S.C. § 3730(e)(4). With this requirement the government seeks to purchase information it might not otherwise acquire." *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999) (emphasis added). Because Relators cannot meet even basic pleading requirements for Count III, it is clear that they have nothing to sell.

B. Relators' Reliance On Public Information Is Directly Relevant To This Court's Original Source Analysis

Relators argue that this Court should ignore Kerri Rigsby's 2007 concession that she obtained information about the *Mullins* case from newspaper articles. Relator's Opposition [Docket No. 235] at 4. They assert that, because those articles were published in April 2007 and the original Complaint in this case was filed in April 2006, their suit is not based upon publicly disclosed information. By focusing only on the timing of the disclosure, however, Relators attempt to obscure the real point, which is Kerri Rigsby's admission that she was gathering

information about the *Mullins* case from public sources:[4] "Ms. Rigsby gained information regarding one of these cases, the *Mullins* case, from reading media reports . . . ." Docket No. 181-5 at 2. The fact that Kerri Rigsby depended on public sources for information about *Mullins* is directly relevant to whether she and her sister qualify as "original sources" here.

The Third Circuit recently addressed exactly this point in *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 522 (3d Cir. 2007), holding that "the extent of [a relator's] reliance on information already in the public domain should be a consideration during the original source inquiry, even if that information is not a public disclosure within the meaning of § 3730(e)(4)(A)." 473 F.3d at 522. As the *Atkinson* court noted, "it is the nature and extent of reliance upon that information that determines whether the relator is an original source." *Id.* Where a putative relator has "simply gather[ed] information," she is deemed "a recipient of information and not a direct source." *United States ex rel. Reagan v. E. Tex. Med. Ctr.*, 274 F. Supp. 2d 824, 859-60 (S.D. Tex. 2003) (quoting *United States ex rel. Barth v. Ridgedale Elec. Inc.*, 44 F.3d 699, 704 (8th Cir. 1995)).

When this rule is applied to the facts of this case -- especially with regard to the only remaining count against Renfroe -- it is eminently clear that the Rigsbys have no information as to any alleged conspiracy between State Farm and Renfroe, much less the "direct" and "independent" knowledge required to establish themselves as "original sources." Relators bear the burden of establishing this Court's jurisdiction in this matter, and their Opposition fails to provide this Court with any factual basis -- other than their *ipse dixit* claim to "insider"

[4] Relators indulge in the same sort of mischaracterization that they attribute to Renfroe when they assert that Renfroe conceded Relators' "original source" status in the Alabama proceedings. Relators' Opposition [Docket No. 235] at 7. We note for the record, however, that the point being made by Renfroe in the Alabama matter – a non-FCA case – was that the Rigsbys were the original sources for the disclosure and distribution of information in violation of an existing injunction (conduct that also violated the seal in this pending *qui tam* matter). In any event, the term "original source" is a legal term of art that has a precise meaning in the context of FCA litigation, and that meaning simply had no place in or application to the Alabama proceedings.

knowledge because of their status as former employees -- for deeming them to be true "original sources." Because of the jurisdictional nature of Section 3730(e)(4), Relators' inability to establish themselves as original sources mandates that this case be dismissed.

III. The Deficiencies In Relators' Conspiracy Allegations Are Directly Linked To Their Inability To Prove Original Source Status

The fact that Relators' Amended Complaint lacks the necessary detail to satisfy Rule 9(b) is additional proof that Relators lack the direct and independent knowledge necessary to qualify as original sources and overcome Renfroe's jurisdictional challenge. As the Eighth Circuit explained in linking a relator's deficient pleadings to an inability to establish original source status:

> A relator has direct knowledge when he sees it with his own eyes. . . . Rule 9(b) requires that "all averments of fraud . . . shall be stated with particularity.". . . If Kinney had possessed direct knowledge of the asserted fraud in [the Kinney case] he was obligated to identify [it] in his initial complaint.

United States ex rel. Kinney v. Stoltz, 327 F.3d 671, 674-75 (8th Cir. 2003) (emphasis added, internal citations omitted). In other words, a *qui tam* relator's inability to satisfy Rule 9(b)'s heightened pleading requirements is compelling evidence that the relator does not have the type of inside information that the FCA's whistleblower provisions demand of an "original source." *See, e.g.*, *Joshi*, 441 F.3d at 560 (a relator's inability to satisfy Rule 9(b) without discovery "conflicts with his allegation he is an 'original source'"); *Russell*, 193 F.3d at 308-09 (citing the public disclosure requirements when denying relator's request for relaxed Rule 9(b) standard). Although Relators' unsupported claim to be original sources may be sufficient at the pleading stage, Relators must produce evidence in the form of competent proof supporting their claim now that Renfroe has raised this jurisdictional challenge.[5] Their wholesale inability to submit a

[5] Of course, under this Court's April 4, 2008 order [Docket No. 1173] in *McIntosh v. State Farm Fire & Cas. Co.*, No. 1:06cv1080-LTS-RHW (S.D. Miss.) (the "*McIntosh* Order") Relators may not testify in this matter, so their

response to this Court that provides the necessary detail -- in either their Opposition to Defendants' Motion to Dismiss for Failure to Comply With Rule 9(b) [Docket No. 224] or in their Opposition to Renfroe's Motion for Summary Judgment [Docket No. 235] -- demonstrates that this Court lacks jurisdiction to hear this case and the Amended Complaint must be dismissed in its entirety as to Renfroe.

IV. Discovery By Relators Is Inappropriate And Unnecessary Because The Only Relevant Knowledge Is Already In Relators' Possession

A. The Information Relevant To An Original Source Inquiry Is What Relators Knew And When They Knew It

Perhaps the most compelling evidence that the Relators do not qualify as original sources is their request for discovery on this issue. *See* Relator's Opposition [Docket No. 235] at 8 (arguing that Renfroe's motion should be denied under Rule 56(f) of the Federal Rules of Civil Procedure). The plain language of the FCA makes it clear that the relevant inquiry when original source status is challenged is what the *relator* knew or did, and when the relator knew or did it: "For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). Nowhere in this language do the acts or knowledge of an FCA defendant come into play, and no amount of discovery from a defendant in this case can bridge the chasm between the allegations in the Amended Complaint and the Relators' own lack of direct and independent knowledge of facts supporting those allegations.

The Sixth Circuit correctly summarized the original source evaluation as follows:

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reliance on their deposition testimony in Relators' Opposition to Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction (*see, e.g.,* Docket No. 223 at 6-7, 9-2) violates the *McIntosh* Order. Even considering their testimony, however, Relators cannot meet their burden.

> At the center of this appeal lies the question: What did [the relator] know? Although the parties offer very different accounts of what [the relator] did know, could know, or should have known, one immutable truth remains: either [the relator] had direct knowledge of [the alleged fraud], or he did not. If he did not have direct knowledge of the facts underlying this lawsuit, then he is not an original source of the information in this lawsuit and this court lacks jurisdiction. A relator has direct knowledge when he sees it with his own eyes. . . . If [the relator] had possessed direct knowledge of the asserted fraud . . . he was obligated to identify [it] in his initial complaint.

Kinney, 327 F.3d 671 at 674-75 (internal citations omitted). Because the entire focus in an original source analysis is on a *relator*'s knowledge, there is no reason for this Court to defer a decision on this threshold jurisdictional issue so that Relators can obtain wholly irrelevant discovery from Renfroe. The time for the Rigsbys to have in their possession the required "direct and independent knowledge" of their allegations was when they filed their complaint. Moreover, they now have had the opportunity to delineate their "knowledge" in their Amended Complaint and in their Opposition here; yet, they have failed abysmally. It is now far too late for the Rigsbys to be seeking evidence from Renfroe as to the Rigsbys' knowledge of their own allegations.

B. Relators May Not Obtain Discovery To Bolster A Defective Complaint

As demonstrated above, there is a clear link between a relator's inability to satisfy Rule 9(b) pleading requirements in an FCA case and the inability to demonstrate original source status. The Fifth Circuit has already unequivocally rejected the suggestion that relators should be able to pursue discovery to bolster *qui tam* allegations that are deficient on their face, and the Fifth Circuit specifically cited the FCA's public disclosure/original source requirements to support that decision:

> We decline to further relax Rule 9(b) in the context of *qui tam* suits. The text of the rule provides no justification for doing so. . . . Furthermore, the False Claims Act grants a right of action to private citizens only if they have independently obtained knowledge of fraud. *See* 31 U.S.C. § 3730(e)(4).

Russell, 193 F.3d at 308-09. The rationale in *Russell* applies with equal force to the facts of this case, and Relators' last-ditch argument that they should be allowed to take discovery in order to establish their own knowledge must be rejected.

WHEREFORE, and for the foregoing reasons, E. A. Renfroe & Company, Inc. respectfully requests that the Court grant Renfroe's Motion for Summary Judgment Under 31 U.S.C. § 3730(e)(4) in its entirety and dismiss all counts against Renfroe in the Amended Complaint with prejudice.

THIS, the 10th day of October 2008.

Respectfully submitted,

E. A. RENFROE & COMPANY, INC.,
Defendant

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

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

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s/ H. Hunter Twiford, III
H. HUNTER TWIFORD, III