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

STATE FARM FIRE AND CASUALTY COMPANY'S
MOTION TO DISMISS THE AMENDED COMPLAINT UNDER
FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6) AND RULE 9(b)

Defendant/Counter-Plaintiff State Farm Fire and Casualty Company, improperly denominated in the First Amended Complaint as "State Farm Mutual Insurance Company," ("State Farm" or "Defendant")[1] respectfully submits this Motion to Dismiss for failure to state a cognizable claim under Federal Rule of Civil Procedure 12(b)(6), and for failure to comply with the pleading standards of Federal Rule of Civil Procedure 9(b). State Farm would show:

1. On August 29, 2005, Hurricane Katrina struck the Gulf Coast, causing unprecedented storm surge and widespread damage to coastal Mississippi. The Federal Insurance Administrator described Hurricane Katrina as a "monumental flooding event" that was

[1] Plaintiffs have sued State Farm Mutual Insurance Company, an entity that does not exist. State Farm Fire and Casualty Company participated as a Write-Your-Own ("WYO") carrier in the NFIP. It was, therefore, State Farm Fire and Casualty Company that issued Standard Flood Insurance Policies pursuant to the NFIP and adjusted claims made under such policies. Accordingly, this motion is made on behalf of State Farm Fire and Casualty Company.

"unprecedented in the history of the [National Flood Insurance Program ("NFIP")]."[2] As one of the largest participants in the NFIP's Write Your Own ("WYO") program in Mississippi, State Farm received and adjusted approximately 4,000 flood insurance policies on residential properties. State Farm also received and adjusted approximately 85,000 Mississippi homeowner-type claims (including 31,000 in Mississippi's three coastal counties).

2. Undeterred by these or any other objective facts, Relators Cori and Kerri Rigsby (the "Rigsbys") are attempting to assert claims on behalf of the United States under the *qui tam* provision of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33. After reviewing the complaint and the Rigsbys' evidentiary disclosure for nine months, and conducting its own investigation, the United States declined to intervene in this action on January 31, 2008. (Dkt. 56) The gravamen of the Rigsbys' First Amended Complaint ("FAC") is that State Farm and other WYO carriers bilked the federal government out of "hundreds of millions of dollars in flood insurance claims" by improperly characterizing damage caused by wind as damage caused by flooding. (FAC ¶ 134) The Rigsbys further contend that the WYO program itself is fundamentally flawed because it gives State Farm and other WYO carriers "an incentive to charge off all damage to the government as flood damages" (*id.* ¶ 51), and that State Farm used engineering reports that were scientifically unsound to "len[d] enough credibility to the adjusters to assign wind claims to water damage." (*Id.* ¶ 45)

3. The Rigsbys' *qui tam* Complaint must be dismissed as a matter of law for failing to plead FCA violations with particularity, as required by Federal Rule of Civil Procedure 9(b). The Fifth Circuit has made clear that strict compliance with Rule 9(b) is required in *qui tam* actions, to protect the interests of both the government and defendants.

[2] Oct. 20, 2005 Statement of David I. Maurstad, 2005 WLNR 16997746, at 2 (Ex. 1 to Mtn.).

4. The FCA is intended to redress false claims knowingly submitted to the government. However, the Rigsbys have not alleged (and cannot allege) any facts supporting a violation in this case. Indeed, they barely even try. Instead, the Rigsbys attempt to support their assertion that "hundreds of millions of dollars in flood insurance claims" have allegedly been misallocated by extrapolation from what they contend are "two specific instances where Defendant State Farm has engaged in reallocation of claims from wind damage to flood damage." (FAC ¶ 65) But these "two specific instances," which concern two State Farm policyholders – McIntosh and Mullins, who, like the Rigsbys, are former clients of Richard F. Scruggs ("Scruggs") – do not support the Rigsbys' blanket fraud assertions as a matter of law. Significantly, in neither instance do the Rigsbys allege that a false claim was submitted to the government.

5. The Rigsbys' inability to identify with particularity even one fraudulent federal flood claim is not surprising. The Department of Homeland Security's Office of Inspector General has investigated the issue of possible attribution of wind damage to flood policies by WYO carriers, and found no evidence that federal flood insurance has been used to subsidize wind claims, that wind damage has been attributed to flooding, or that flood insurance has paid for wind damage.[3] Similarly, David Maurstad, Mitigation Division Director of the Federal Emergency Management Agency ("FEMA"), testified before Congress that the WYO insurance

[3] Dep't of Homeland Security, *Interim Report Hurricane Katrina: A Review of Wind Versus Flood Issues* at 1 (July 2007) (Ex. 2 to Mtn.).

companies and their claims adjusters and agents have "more than fulfilled their responsibility to help NFIP policyholders begin to rebuild their lives."[4]

6. In addition to their total failure to identify a single false claim that State Farm allegedly submitted to the government, the Rigsbys' Complaint must also be dismissed because the Rigsbys have failed to comply with the FCA's strict requirements for bringing a *qui tam* action. First, the Rigsbys and their counsel repeatedly violated the FCA's mandatory seal requirement by publicly disclosing the existence and content of their *qui tam* lawsuit. Second, by hiring the Rigsbys as "litigation consultants" and paying each of them lavish consulting fees of $150,000 per year while prosecuting this *qui tam* action, counsel have violated 31 U.S.C. § 3730(d)(2), which plainly provides that relators may not receive any compensation until the litigation is successfully concluded in their favor and caps the amount that relators can receive at 30 percent (in cases such as this where the government declines to intervene). Having failed to comply with the FCA's stringent requirements, the Rigsbys have forfeited any right they may have had to bring this lawsuit. Finally, because the Risbsys' allegations are predicated on matters inherently involving issues of judgment, they cannot support an FCA violation.

7. Under Rule 12(b)(6), conclusional allegations and legal conclusions masquerading as facts will not prevent dismissal or judgment on the pleadings. To avoid dismissal, the plaintiff must plead enough facts to state a claim to relief that is plausible on its face. Where (as here) it is clear that the plaintiff can prove no set of facts that would entitle him to relief, the defendant is entitled to dismissal of the Complaint. Moreover, although dismissal under Rule 12(b)(6) is ordinarily determined by whether the facts alleged in the complaint, if true,

[4] Feb. 28, 2007 Testimony of David I. Maurstad, Dir. and Fed. Admin., Mitigation Div., FEMA, Dep't of Homeland Security before H.R. Committee on Fin. Srvc. Subcommittee on Oversight and Investigations, *available* *(cont'd)*

give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings.

8. Importantly, under Fifth Circuit authority, a dismissal for failure to plead fraud with particularity as required by Rule 9(b) warrants dismissal for failure to state a claim upon which relief may be granted.

9. In addition to the facts alleged in the Complaint, the Court may also consider facts that are properly the subject of judicial notice. Furthermore, the Court may consider documents that are specifically mentioned in or attached to the Complaint.

10. A *qui tam* plaintiff must plead False Claims Act ("FCA") violations with particularity, as required by Federal Rule of Civil Procedure 9(b). In order to meet the Rule 9(b) standard, the Complaint must allege, at a minimum, the who, what, when, where, and how of the alleged fraud.

11. The purpose of this requirement is to give notice to defendants of the plaintiffs' claim, to protect defendants whose reputation may be harmed by meritless claims of fraud, to discourage strike suits, and to prevent the filing of suits that simply hope to uncover relevant information during discovery.

12. Significantly, the Rule 9(b) standard is not relaxed in the qui tam context. To the contrary, strict compliance with Rule 9(b) in qui tam actions protects the interests of both the government and defendants. Allowing qui tam plaintiffs to initially allege violations of the FCA generally and/or on information and belief would be contrary to the purpose of the FCA. Such a

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at 2007 WLNR 3868622 (Ex. 3 to Mtn.).

complaint would also fail to provide the government with sufficient information to determine whether to intervene.

13. Further, the policy behind Rule 9(b) of protecting defendants from the reputational harm caused by groundless accusations of fraud is heightened in a *qui tam* action. The FCA provides significant monetary recovery to persons who have not been injured and, therefore, the potential for strike suits is high. As a consequence, Rule 9(b) must be strictly enforced, Rule 9(b) is, therefore, intended to prevent fishing expeditions at a defendant's expense.

14. In Counts I and II of the Complaint, the Rigsbys allege violations of 31 U.S.C. § 3729(a)(1) & (2). To plead a Section (a)(1) violation, the complaint must allege facts showing that: (1) the defendant presented, or caused another person to present, a "claim for payment or approval" to the United States; (2) the claim was "false or fraudulent"; and (3) the person acted knowing that the claim is false. 31 U.S.C. § 3729(a)(1). Section 3729(a)(2) of the FCA imposes liability on one who makes or uses a false record or statement "to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). To state a § 3729(a)(2) claim, the relator must identify both a false claim and a false record or statement made or used to get that false claim paid. Thus, to plead a claim under Section (a)(2), the relator must also allege with particularity the three elements of Section (a)(1).

15. The *sine qua non* of a False Claims Act violation is a false or fraudulent claim for payment submitted to the government. The FCA defines a "claim" as "any request or demand . . . for money or property" from the Government. 31 U.S.C. § 3729(c). Alleged fraudulent activity, violations of government regulations or improper internal policies do not give rise to liability under the FCA. Rather, the FCA attaches liability to the claim for payment. As a result, to comply with Rule 9(b), *qui tam* relators must identify the specific false claims that were

submitted to the government for payment. Such information should include, for example, the dates of the claims, the content of the forms or bills submitted, the amount of money charged to the government, and the items for which the government was charged.

16. In this case, the Rigsbys have failed to identify with particularity any allegedly false claim that was submitted by State Farm to the government for payment, let alone the who, what, when, where, and how of each such transaction. An examination of the FAC makes patent its deficiencies under Rule 9(b). Paragraphs 1 through 26 contain introductory remarks, jurisdictional allegations and a description of the parties. Paragraphs 27 through 39 contain allegations that purport to support the Rigsbys' claim in Count V that they supposedly suffered a retaliatory discharge, but include no facts supporting Counts I and II and do not identify any allegedly false claims submitted to the government.

17. In paragraphs 40 through 91, the Rigsbys attempt to describe a scheme pursuant to which wind claims might have been improperly allocated to flood claims. Such allegations include a description of storm surge (FAC ¶¶ 40-45), a description of how insurance sold pursuant to the National Flood Insurance Program ("NFIP") works (*id.* ¶¶ 46-55), and wholly conclusory and speculative allegations that State Farm directed adjusters and engineers to characterize wind losses as flood. (*Id.* ¶¶ 56-64)

18. Initially, such allegations are deficient under Rule 9(b) because they are made on information and belief. (FAC ¶¶ 56, 59, 63) In limited circumstances, the Rule 9(b) pleading requirement is relaxed to allow pleading on information and belief, but only "when the facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge." *Russell,* 193 F.3d at 308. These circumstances are not present here. To the contrary, the Rigsbys allege that

they accessed State Farm's files in an effort to find documents in support of their allegations. (FAC ¶ 31)[5] Under such circumstances, relators may not rely upon information and belief.

19. Indeed, because FCA actions brought by private persons are intended to be based upon the relator's independent knowledge, courts have rarely allowed the relaxed "information and belief" standard in *qui tam* actions.

20. Further, the Fifth Circuit has warned that even in cases where the relevant facts are exclusively within the defendant's possession, this exception must not be mistaken for license to base claims of fraud on speculation and conclusory allegations. Even in the limited cases where the 9(b) pleading standard is relaxed, the plaintiff must nonetheless supply the underlying facts that form the information and belief. Here, the FAC is devoid of any such allegations.

21. Rather than pleading their claims with particularity, the Rigsbys base their entire FCA claim on a vague, factually unsubstantiated assertion that State Farm engaged in a broad scheme to shift wind damage to flood coverage. In doing so, the Rigsbys merely describe a general methodology or scheme by which a false NFIP claim *could* be submitted to the government. However, courts have repeatedly held that describing a scheme without the particular details of a specific false claim submitted for payment is insufficient.

22. The Rigsbys' conclusory allegations that State Farm encouraged adjusters and engineers to find flood damage are completely insufficient under Rule 9(b).

[5] For the reasons set forth in its Counterclaim, State Farm contends that the Rigsbys' actions were illegal; however, that issue need not be decided for this motion.

23. In a vain attempt to provide the missing specificity, the Rigsbys allege that they "are aware of two specific instances where Defendant State Farm has engaged in reallocation of claims from wind damage to flood damage." (FAC ¶ 65) With respect to the first, the McIntosh claim, the Rigsbys allege that two engineering reports were obtained by State Farm, one which identified some damage to the property resulting from wind, and a second that identified, in addition to wind damage, damage caused by rising water from storm surge and waves. (*Id.* ¶¶ 66-70) However, nowhere is it alleged that a false claim for payment under the NFIP was submitted to the government.[6]

24. The second example given is the Mullins claim. Again, the Rigsbys allege that two engineering reports were obtained on the property. (*Id.* ¶¶ 71-77) However, there are no facts alleged indicating that a false claim was made to the government. Indeed, Plaintiffs do not even allege that Mr. Mullins had an NFIP policy or made an NFIP claim.[7]

25. There is only one other specific claim described in the Complaint: the Anna Vela claim. (*Id.* 86-91) The Rigsbys do not describe any false claim that was submitted for Ms. Vela's property. Instead, they allege only that the policy limits of the homeowners policy were paid for wind damage. (*Id.* ¶ 90) In the case of Vela, as with Mullins, the Rigsbys do not allege that she had an NFIP policy or that she made an NFIP claim to the government. The inclusion of this example is, therefore, wholly irrelevant to the FCA.

[6] The Rigsbys' allegations regarding the McIntosh claim are deficient on their face. For the reasons discussed in State Farm's Memorandum in Support of Its Motion to Dismiss for Lack of Subject Matter Jurisdiction at 15-17, the Rigsbys will not be able to allege that a false claim was submitted to the government as to the McIntosh property because it is undisputed that the McIntosh property sustained substantial flood damage, entitling the insureds to receive the limits of their flood policy. As a result, no false claim was submitted for payment.

[7] The Rigsbys cannot make such an allegation because Mr. Mullins did not, in fact, have NFIP coverage for the property at issue.

26. Even if the Rigsbys had identified specific claims that State Farm submitted to the government for payment, they would, in addition, have to identify the who, what, when, where, and how of each such transaction. In short, they would have to identify the persons involved in the transactions, the dates of the transactions and sufficient facts to show both falsity and scienter.

27. Thus, it is not enough to provide examples of claims that might have been false.

28. It is equally clear that length does not equate with particularity.

29. Likewise, facts supporting allegations of scienter must be pled with particularity.

30. The Rigsbys should not be allowed to pursue serious charges of government fraud against State Farm based upon the scant and conclusory allegations of the Complaint. In this case, the Rigsbys have failed to identify with particularity any of the elements of their claims under Counts I and II of the Complaint. Accordingly, such claims should be dismissed.

31. The Complaint includes several additional allegations which, like the rest of the FAC, lack the specificity required by Rule 9(b). For example, the Rigsbys' allegations about backdating of claims (FAC ¶¶ 97-100), fail to satisfy Rule 9(b) because such allegations are made on information and belief. *See supra* at 8-9. Second, the Rigsbys provide absolutely no details as to how, when and where this alleged backdating occurred, or that it was done with State Farm's knowledge. Lastly, and most importantly, the Rigsbys provide no link between these vague and baseless allegations and the submission of a false claim for payment to the government.

32. For these same reasons, the Rigsbys' allegations of grant fraud (Am. Cmpl. ¶¶ 92-96), and shifting adjusting expenses must also fail. (*Id.* ¶¶ 101-07) The Complaint provides no factual basis whatsoever for any of these allegations, fails to identify any particular

false claims submitted to the government, and fails to allege any facts to support that State Farm had knowledge of these alleged activities.

33. The Rigsbys' tangential and irrelevant spoliation allegations (FAC ¶¶ 78-85) also fail to allege with particularity any FCA violations. Instead, such allegations are made in a misguided attempt to justify the Rigsbys' own illegal activities. (*See* FAC ¶ 85.) Not only do they fail to allege any facts supporting an FCA violation, the Rigsbys' baseless and conclusory allegations rely on rank speculation. *See* FAC ¶ 78 (admitting that the Rigsbys have no knowledge of any actual spoliation).

34. In Count III, the Rigsbys allege a violation of 31 U.S.C. § 3729(a)(3). (FAC ¶¶ 123-134) Section (a)(3) imposes liability on "[a]ny person who . . . conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3). A conspiracy claim necessarily includes a showing of a false or fraudulent claim. Thus, where a conspiracy to defraud is alleged, the allegations must comply with Rule 9(b).

35. Initially, if the conspiracy allegations do not plead with particularity that a false claim was submitted to the government, they cannot satisfy Rule 9(b). In support of the conspiracy claim, the Complaint broadly alleges, *on information and belief*, that defendants conspired with each other, but does not identify a single false claim submitted to the government, or provide the who, what, when, where, and how of the transactions. (FAC ¶¶ 123-34) Without a false claim, no conspiracy to submit a false claim can exist.

36. In addition, the Rigsbys fail to allege with particularity any facts supporting their conspiracy allegations. A conspiracy claim requires (1) that defendants knowingly agreed to defraud the government, (2) that at least one act was performed in furtherance of that conspiracy, (3) that the government suffered damages as a result of the acts alleged.

37. In addition, general civil conspiracy principles apply to conspiracy claims under the False Claims Act.

38. Here, the Rigsbys broadly allege that State Farm conspired with Renfroe and the Engineering Defendants (Am. Cmpl. ¶ 130), yet they provide no factual basis for this allegation. Because they have failed to allege with particularity facts supporting the existence of a conspiracy, Count III of the Complaint must be dismissed.

39. The Rigsbys also purport to allege a claim under the reverse false claims provision, 31 U.S.C. § 3729(a)(7). Section (a)(7) prohibits the knowing use of a false record or statement to decrease or avoid an obligation to pay money to the government. *See* 31 U.S.C. § 3729(a)(7). The predicate of a reverse false claim is an economic relationship between the government and the defendant (such as a lease or a contract or the like) under which the government provides some benefit to the defendant wholly or partially *in exchange* for an agreed or expected payment or transfer of property by (or on behalf of) the defendant to (or for the economic benefit of) the government.

40. First, and dispositively, no such economic relationship is alleged here. State Farm is under no obligation to pay the government money. The Rigsbys do not identify a basis for such an obligation, and their mere *allegation* of FCA liability does not create such a duty or obligation.

41. The Rigsbys try to twist their Count I and Count II claims into a Reverse False Claims violation, but do no more than merely restate their allegation that State Farm mischaracterized wind damage as flood loss in order to allocate losses to the NFIP. Because the Rigsbys have failed to allege particular facts showing a non-contingent obligation on the part of State Farm to pay money to the government, such claims fail. Further, because such claims are

inherently dependent on Count I and Count II, which fail to satisfy Rule 9(b), dismissal of Count IV is likewise required.

42. Accordingly, for all the reasons set forth above, Plaintiffs have failed to allege with particularity facts supporting any violation of the FCA and Counts I, II, III and IV of the Complaint should be dismissed. This Court's recent order in *McIntosh v. State Farm Fire and Casualty Co., et al.*, No. 1:06CV1080 LTS-RHW, precludes the Rigsbys from using "any documents supplied by the Rigsby sisters to the Scruggs Katrina Group or the Katrina Litigation Group or its associates" unless they "can show that the documents were obtained through ordinary methods of discovery." (*McIntosh* Dkt. 1173 at 1.) As there has been no discovery in this action, the Rigsbys will be unable to re-plead without resort to such illegally obtained and excluded documents and, therefore, dismissal of this action should be with prejudice.

43. The Rigsbys' claims also must be dismissed as a matter of law because they repeatedly violated the FCA's mandatory seal requirement by publicly disclosing the existence and content of their *qui tam* lawsuit. Specifically, the FCA provides that the complaint "*shall* be filed in camera, *shall* remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2) (emphasis added).

44. A relator who violates the seal provision forfeits her right to bring a claim under the FCA.

45. A relator who discloses the contents or existence of the sealed *qui tam* complaint to a third party violates the seal by revealing the existence and nature of her *qui tam* suit. In this case, the Rigsbys and their attorneys violated the seal provision on multiple occasions. Here, the Complaint – which was filed on April 26, 2006 and amended on May 22, 2007 – remained under seal until August 1, 2007, when this Court ordered that it be unsealed. (Dkt. 25) Yet written

Congressional testimony given by United States Representative Gene Taylor on February 28, 2007 – five months *before* the seal was lifted – plainly shows that the Rigsbys or their counsel told him that they had brought this *qui tam* action against State Farm and other insurers.

46. Indeed, Representative Taylor's testimony essentially paraphrases the allegations in the *qui tam* complaint:

> I urge the subcommittee to seek the testimony of Cori and Kerri Rigsby. The Rigsby sisters were claims adjusters working for E.A. Renfroe and Company. Renfroe worked exclusively for State Farm. The sisters were disturbed by the fraud being committed by State Farm and Renfroe officials, so they copied incriminating documents and gave them to federal and state law enforcement officials. *The Scruggs Law Firm represents the sisters in a False Claims Act filing against State Farm and Renfroe. The federal fraud case is still active*.

Insurance Claims Payment Processes on the Gulf Coast: Hearing Before the H. Fin. Serv. Comm. Subcomm. on Oversight and Investigation at 6 (Feb. 28, 2007) (statement of U.S. Rep. Gene Taylor) (emphasis added) (Ex. 4 to Mtn.).[8]

47. Notably, Rep. Taylor's testimony establishes conclusively that the source of this information regarding the *qui tam* suit was the Rigsbys or their counsel. This is so because in February 2007, when Rep. Taylor gave testimony, the Rigsbys had not yet amended their Complaint to add Renfroe as a defendant. At that time, only the Rigsbys and their counsel knew that they were "filing [a qui tam lawsuit] against State Farm *and Renfroe*."

48. The Rigsbys further violated the seal on numerous occasions by making detailed statements to the media revealing the substance of their *qui tam* suit. For instance, the Rigsbys turned over several of the documents at the heart of this case – including the October 12, 2005 engineering report conducted on the McIntosh property – to ABC News for a feature story on the

[8] Available at www.house.gov/apps/list/hearing/financialsvcs_dem/hr022807.shtml.

nationally broadcast *20/20* on August 26, 2006.[9] The Rigsbys were also featured in the broadcast, where they repeated allegations against State Farm substantively identical to those raised in their *qui tam* complaint.[10] After the *20/20* broadcast, the Rigsbys repeated these allegations in several other media stories.[11]

49. In short, a central purpose behind the FCA's strict seal provision is "protecting the defendants from damaging reputational injuries associated with possibly baseless public accusations." *Windsor*, 895 F. Supp. at 847. Here, the Rigsbys and their attorneys purposely engaged in an elaborate media campaign specifically designed to *cause* reputational injuries to State Farm. In doing so, the Rigsbys and their counsel violated the letter and spirit of 31 U.S.C. § 3730(b)(2). As a result, the Rigsbys have forfeited any right they may have had to bring this *qui tam* action.

50. The Rigsbys are not strangers to this Court. To the contrary, this Court has previously noted the multiple relationships between the Rigsbys and their former counsel Richard F. Scruggs ("Scruggs"), and the problematic situation that these multiple relationships create for the Court:

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[9] *See* Tr. of *20/20* at 8 (Ex. 5 to Mtn.).

[10] *Compare* Tr. of *20/20* at 4 (describing Rigsbys' allegations that "damage reports be buried, replaced or changed so that insurance claims would not have to be paid), *with* Am. Compl. ¶¶ 79-85; *compare* Tr. of *20/20* at 4 (describing post-it on the McIntosh report), *with* Am. Compl. ¶ 69; *compare* Tr. of *20/20* at 4 (describing allegation that there was a "special shredding truck" and the sisters' belief the shredding was done to destroy key documents), *with* Am. Compl. ¶ 78; *compare* Tr. of *20/20* at 5 ("The sisters say they saw a senior State Farm coordinator go to great lengths to pressure outside engineers to prepare reports concluding that damage was caused by water, not wind."), *with* Am. Compl. ¶ 89; *compare* Tr. of *20/20* at 5 (where the Rigsbys describe a stack of engineering reports on a State Farm coordinator's desk and claim that she told them they all had to be changed), *with* Am. Compl. ¶ 80; *compare* Tr. of *20/20* at 4 (where Kerry Rigsby claims she was suspended by State Farm when she told them that they had given prosecutors thousands of company documents), *with* (FAC ¶¶ 32-34).

[11] *See, e.g.*, Michael Kunzelman, *Sisters Blew Whistle on Katrina Claims*, Assoc. Press, Aug. 27, 2006 (Ex. 6 to Mtn.); Anita Lee, *Sisters copied State Farm files; Insurer underpaid on purpose, they believe*, Biloxi Sun Herald, Aug. 26, 2006 (Ex. 7 to Mtn.).

> [The Rigsbys] were E.A. Renfroe employees assigned to work State Farm *Katrina* claims in Mississippi immediately after the hurricane. At least by February 2006, the Rigsbys began copying and/or taking State Farm documents and giving them to Richard Scruggs. While still employed by Renfroe/State Farm, the Rigsbys continued to secretly provide State Farm documents to Scruggs. This conduct continued until June 2006, culminating in what has become known as the "data dump" weekend in early June when the Rigsbys and some of their friends copied thousands of confidential State Farm documents which they also turned over to Scruggs. Shortly after the "data dump" weekend, the Rigsbys, who have been characterized by Plaintiffs' counsel as key witnesses in the McIntosh case, were hired by the Scruggs Firm as "consultants" in the *Katrina* litigation, at annual salaries of $150,000.00 each. To further complicate matters, the Rigsbys are also plaintiffs in a *qui tam* action filed under seal by Scruggs on their behalf on April 26, 2006. That case remained sealed until August 1, 2007, when the Court ordered the seal lifted. Thus, the Rigsbys are not only material witnesses in this [*McIntosh*] case, they are both employees and clients of the Scruggses. The multiple relationships involved have repeatedly resulted in situations where it became difficult to determine just whose interests the Scruggses were purportedly representing.

(*McIntosh* Dkt. 911 at 2.) More recently, this Court has ruled that "[t]he Rigsby Sisters will be disqualified as witnesses in any actions now pending on this Court's docket against State Farm or Renfroe in which the [Scruggs Katrina Group ("SKG")] or the [Katrina Litigation Group ("KLG")] has represented the plaintiffs, and any documents supplied by the Rigsby sisters to the SKG or the KLG or its associates shall also be excluded from evidence unless the plaintiffs can show that the documents were obtained through ordinary methods of discovery." (*McIntosh* Dkt. 1172 at 3.)

51. This Court has recognized that the SKG's payment of $150,000 a year to each of the Rigsbys was improper and unethical. As the Court explained:

> I have determined that disqualification is required because Scruggs, acting in furtherance of the SKG, paid the Rigsby Sisters a substantial sum of money (a consulting fee of $150,000 per year) despite Scruggs's knowledge that the Rigsby Sisters were material witnesses in connection with many hurricane damage claims that were likely to become the subject of litigation. . . . While the other ethical misconduct alleged by State Farm and Renfroe are substantial, the payments to the Rigsby sisters are, in and of themselves, sufficient to warrant disqualification.

> It is apparent to me, from my review of the deposition testimony of the Rigsby sisters, that there was no legitimate reason for these payments and that the "consulting" work that ostensibly justified these payments was a sham. . . . These payments were clearly improper.

(*Id.* at 2.) Notably, the multiple conflicts and ethical violations caused by these payments are further exacerbated in this *qui tam* action. Where, as here, the government declines to intervene, the FCA narrowly restricts a relator's compensation for bringing a successful lawsuit to "not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement." 31 U.S.C. 3730(d)(2). Moreover, the FCA clearly contemplates that the relator is *not* to be paid *anything* until the end of the lawsuit, and then *only* if she prevails. *Id.*

52. As discussed in Section I above, the significant monetary relief available to successful *qui tam* relators creates a very real risk of strike suits. As a result, it is important that the fee limitations in the FCA be strictly enforced. These specific fee limitations serve as an important check on frivolous *qui tam* actions (like this one) because they insure that a relator will not get a penny in compensation before the merits of the lawsuit are subject to judicial scrutiny. In this case, the Rigsbys' counsel displaced this Congressionally-mandated compensation scheme by paying the Rigsbys lavish "consulting fees" while the *qui tam* action was pending. But the *qui tam* statute will not tolerate counsel's "pay-as-you-go" scheme; the Rigsbys' lawsuit should be dismissed.

53. The Rigsbys' claims under 31 U.S.C. § 3729 are further deficient as a matter of law because they are predicated on engineering site reports, which are distillations of professional opinions. But the cornerstone of section 3729(a)(1)-(3) is the existence of "a false or fraudulent claim" *knowingly* made by Defendants for the purpose of defrauding the government**.** In this case, the Rigsbys attempt to predicate liability on engineering reports

assessing causation in the aftermath of Hurricane Katrina. Engineering reports, however, cannot support liability under the FCA because they are – by definition – assertions of professional judgment. Claims under the FCA must be predicated on an objectively verifiable fact, not on judgment calls.

54. In this case, the heart of the Rigsbys' FAC is: (i) "inconsistent engineering assessments" of flood damage and (ii) allegedly altered engineering reports. (FAC ¶¶ 86-91, 68-72) In particular, the Rigsbys criticize State Farm's use of an engineering report prepared by Haag Engineering, claiming that the conclusion reached in the Haag report "was contrary to science and normative models of hurricanes in the past 100 years." (*Id.* ¶¶ 43-45) According to the Rigsbys, the incorrect scientific model used in "the Haag Report lent enough credibility to the adjusters to assign wind claims to water damage." (*Id.* ¶ 45) These engineering assessments, however, cannot form the basis of a "false" claim or record under the FCA.

55. Similarly, the act of adjusting a claim, which requires distinguishing between possible causes of damage well after the fact, is an exercise of professional judgment and is beyond the scope of the FCA. Tellingly, even if the Rigsbys could show that any one determination or judgment is wrong, the common failings of engineers and other scientists are not culpable under the Act and would not suffice to state a claim.

56. Finally, the Rigsbys fail to identify a single statement made by State Farm that is objectively false. Instead, they allege that State Farm "characterize[d]" "damage due to wind and flying debris . . . as 'flood damage,'" and submitted claims for flood damage "for property that were [sic] outside the area designated as flood damaged by FEMA." (FAC ¶ 112 (a-b)) The Rigsbys' sole "evidence" of this "fraud," then, centers on the professional judgments of independent contractors, engaged to analyze conditions in the Gulf Coast in the aftermath of

Hurricane Katrina. These analyses, which require the recreation of events for which there were often no witnesses, and which were dependent on individual judgment and expertise, cannot constitute fraud as a matter of law. What the Rigsbys' Complaint contemplates, then, is – *at best* – nothing more than a "battle of experts."

WHEREFORE, PREMISES CONSIDERED, the Rigsbys, based on naked speculation and conclusory allegations, have failed to allege a single violation of the FCA with particularity. Accordingly, the FCA allegations in Counts I through IV of the First Amended Complaint must be dismissed pursuant to Rules 9(b) and 12(b)(6). Dismissal of these counts is required for several additional reasons as well. First, the Rigsbys have failed to comply with the seal mandated by the FCA. Second, their attorneys further violated the FCA when they put the Rigsbys on their payroll. Finally, the Rigsbys' allegations all involve matters dependent on the exercise of professional judgment and cannot give rise to an FCA violation. For all the foregoing reasons, State Farm requests that Counts I, II, III and IV of the First Amended Complaint be dismissed with prejudice.

This the 8th day of April, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey A. Walker, 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:

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