IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, *EX REL.* BRANCH CONSULTANTS, L.L.C.,	)	
Plaintiff	)	Case No. 2:06-cv-4091
v.	)	
	)	**JURY TRIAL DEMANDED**
ALLSTATE INSURANCE COMPANY, et al.,	)	
Defendants	)	

BRANCH CONSULTANTS, LLC'S OPPOSITION TO DEFENDANTS' MOTIONS TO COMPEL

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Pursuant to the Court's February 1, 2010 order (Dkt. # 333), Plaintiff-Relator Branch Consultants, LLC ("Branch") files this Opposition to Defendants Fidelity National Insurance Company, Fidelity National Property and Casualty Insurance Company (Dkt. #323), American Reliable Insurance Company (Dkt. #325), and Standard Fire Insurance Company (Dkt. #328) (collectively "Defendants") Motions to Compel. Branch has already produced all non-privileged documents that relate to the properties specifically identified in the First Amended Complaint. Defendants now seek to invade Branch's joint prosecution privilege with the government to obtain Branch's confidential work product. The Court should reject Defendants' attempt to subvert the adversarial process and obtain access to Branch's counsel's mental impressions, conclusions, opinions, and legal theories. Fidelity also moves to compel on eighteen different discovery requests. The vast majority of those issues are moot because the parties reached agreement at the Rule 37.1 conference *before* Fidelity filed its motion, and the remaining issues lack merit. Defendants' Motions should be denied.

I. PRELIMINARY STATEMENT

Defendants' principal complaint is Branch's assertion of the joint prosecution privilege and work product protection over the written disclosure statement that was written by Branch's counsel in preparation for this litigation and shared with the government. The Court should not be misled as to the nature of Branch's privilege claim. Branch has withheld as privileged only those documents that were privileged before sharing them with the government. Branch is not contending that the act of sharing a document with the government makes it privileged. The dispute is principally over three documents: (1) the written disclosure statement; (2) the supplemental written disclosure statement; and (3) a PowerPoint presentation that Branch's counsel made to the government attorneys.

Branch's written disclosure statements were prepared by Branch's counsel in preparation of litigation and are therefore protected work product. *See*, *e.g.*, *United States ex rel. Singh v. Bradford Regional Med. Center*, 2007 WL 1576406, *2 (W.D. Pa. May 31, 2007) ("As an initial matter, there is no question that the Disclosure Statements were prepared 'in anticipation of litigation.'") Because they contain Branch's counsel's opinions and strategies, the written disclosure statements are opinion work product, and are absolutely protected from disclosure. *See*, *e.g.*, *United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 554 (C.D. Cal. 2003) ("the court concludes that the disclosure statements prepared by relator and his counsel in this case . . . constitute opinion work product."). But even if the written disclosure statements constituted "fact" work product, they are not subject to discovery because Defendants have failed to demonstrate a substantial need for the work product *and* that they would incur an undue hardship if they did not obtain the work product. *See*, *e.g.*, *Singh*, 2007 WL 1575606, at *3 ("Until the depositions are taken and other factual discovery is completed [defendant] cannot show that they cannot obtain the substantial equivalent of the Disclosure Statements without undue hardship."). Finally, Branch did not waive the work product protection by sharing the written disclosure statement with the government's counsel pursuant to the joint prosecution privilege. *Bagley*, 212 F.R.D. at 562 ("T]he 'common interest' or 'joint prosecution' doctrine applies to prevent the relator's disclosure of work product (including the written disclosure statement) to the government from operating as a waiver."). Just like Standard Fire and Fidelity can share work product, a relator in a *qui tam* action may share its work product with the government's counsel. Defendants have multiple venues for obtaining *facts* concerning Branch's status as an original source. There is no reason for this Court to take the drastic measure of compelling the production of Branch's work product.

Standard Fire improperly attempts to discover privileged communications between Branch's counsel and Rigsbys' counsel. Standard Fire contends that the communications are discoverable because they might show that Branch obtained some of their information from the Rigsbys. There is no basis for that argument. First, the communication is a privileged communication from Branch's counsel to the Rigsbys counsel, and is therefore protected from discovery. Second, Branch represented to Standard Fire's counsel at the Rule 37.1 conference that Branch obtained none of its information from the Rigsbys. Finally, the communication is dated *after* Branch had already filed its complaint, and therefore could not have provided information that Branch relied on in its complaint and/or its written disclosure statement.

Finally, Fidelity raises a host of other issues in its Motion and again attempts to malign Branch's counsel by arguing that they are attempting to mislead this Court and shirk their discovery obligations. Nothing could be further from the truth. Branch has not attempted to, nor has it misled the Court. Branch has consistently alleged that "[t]he defendants have defrauded the Government through a practice of grossly overstating flood damages to insured properties damaged by Hurricane Katrina and then, based on those overstated damages, submitting claims for payment on Government-backed flood insurance policies to the National Flood Insurance Program." FAC ¶3. Fidelity's arguments concerning specific responses to its discovery requests lack merit. The vast majority of those issues are moot because they were *already* resolved at the parties' Rule 37.1 conference. The Court should deny Fidelity's Motion to Compel.

If anything, discovery to date wholly vindicates Branch's contention that false claims were filed by Defendants. For example, Standard Fire issued the flood policy on the property at 7732 Edwards Street. Standard Fire paid policy limits of $148,000 on this claim even though flood related losses totaled less than $32,000. Standard Fire's adjuster said that the building had

an 8' exterior and 7' interior flood lines. However, Branch found, and its photos and Standard Fire's photos show a one foot interior flood line, which is consistent with the NOAA flood maps. Standard Fire then ran up its false charges in a number of ways, including: 14 windows above the flood line, (or 9 @ $839.66 and 5 @ $617.32) for a $9,047.01 false claim; a new HVAC system (in the attic above the flood line) for $11,443.32; and the replacement of the ceiling drywall and insulation for $9,959.04 despite a one foot flood line. *See* Ex. 3.

II. LEGAL STANDARD

Parties cannot obtain discovery regarding privileged matters. Fed. R. Civ. P. 26(b). "Work product protection is designed to preserve the privacy of attorneys' thought processes, and to prevent parties from borrowing the wit of their adversaries." *United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 558 (C.D. Cal. 2003) (quotation omitted). Rule 26(b)(3)(A) instructs that a document is protected work product if it was "prepared in anticipation of litigation or for trial." The Rule distinguishes between "ordinary" work product and "opinion" work product. Ordinary or "fact" work product consists of factual material whereas opinion work product comprises the mental impressions, conclusions, opinions, or legal theories of an attorney or a party's representative. *Bagley*, 212 F.R.D. at 559. Both fact work product and opinion work product are protected from discovery and can be discovered only in limited circumstances. *Id.* Ordinary work product is not discoverable unless the party seeking it proves both a substantial need for the materials and that it would suffer undue hardship in obtaining the requested information some other way. *Id.* "Absent a waiver, opinion work product enjoys nearly absolute protection and is discoverable only in 'rare and extraordinary circumstances.'" *Bagley*, 212 F.R.D. at 559.

"Sharing of information between the Government and the relator does not waive either the attorney-client privilege or the work product protections." FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION, §9-4(a)(5), attached as Ex. 1. "Courts have long recognized that communication between two parties with a common interest or communications between counsel . . . does not waive the attorney client privilege or the work product doctrine." *Id.*; *see also Burroughs*, 167 F.R.D. at 685 ("Courts have also held that the [joint defense] privilege does not solely apply to cooperating defendants" but "[i]t also applies to cooperating plaintiffs."). "[W]hether the jointly interested persons are defendants or plaintiffs, . . . the rationale for the privilege is clear: Persons who share a common interest in litigation should be able to communicate confidentially with their respective attorneys, and with each other, to more effectively prosecute or defend their claims." *Burroughs*, 167 F.R.D. at 686. The False Claims Act "makes clear that plaintiff and the government essentially stand in the same shoes as against the defendants." *Burroughs*, 167 F.R.D. 686. Indeed, "for all practical purposes, plaintiff and the government are essentially the same party." *Id.* Accordingly, "[a] joint-prosecutorial privilege does exist between the government and the relator in *qui tam* cases." *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 24 (D.D.C. 2002).

III. BRANCH'S WRITTEN DISCLOSURE STATEMENTS ARE PRIVILEGED[1]

A. Branch's Written Disclosure Statements Constitute Work Product

Branch's written disclosure statements are work product. That they were made to the Government as required by law cannot reasonably be disputed. They were prepared by Branch's counsel in anticipation of litigation. Almost every court that has considered the issue has held that the written disclosure statement constitutes work product. *See*, *e.g.*, *United States v.*

[1] Fidelity, Standard Fire, and American Reliable all challenge the privileged status of Branch's written disclosure statement. Standard Fire Mot. at 5-13; American Reliable Mot. at 1-5; Fidelity Mot. at 18-20. This is the only issue raised in American Reliable's Motion.

Medica-Rents Co., 2002 WL 1483085, *2 (N.D. Tex. June 21, 2002) (holding that "the work-product doctrine clearly applies" to the written disclosure statement); *Burroughs*, 167 F.R.D. at 683-85 (holding that written disclosure statement was work product because it was prepared in anticipation of litigation); *Bagley*, 212 F.R.D. at 559-60 ("Most courts considering the application of the attorney work product doctrine have held that disclosure statements prepared pursuant to section 3730(b)(2) were work product because they were prepared 'in anticipation of litigation.'"); *United States ex rel. Singh v. Bradford Regional Med. Center*, 2007 WL 1576406, *2 (W.D. Pa. May 31, 2007) ("As an initial matter, there is no question that the Disclosure Statements were prepared 'in anticipation of litigation.'") ("Because the Disclosure Statements here 'were prepared in anticipation of litigation, they fall within the general protection of the Work Product Doctrine.") (citation omitted); *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 2004 WL 868271, *2 (W.D. Pa. April 21, 2004) (same). Even the cases cited by Defendants hold that written disclosure statements constitute work product. *See*, *e.g.*, *O'Keefe*, 918 F. Supp. at 1346 (holding that a disclosure statement is work product because "[t]he plain language of the [statute] requires the relator to prepare the document 'in anticipation of litigation.'") (citing 31 U.S.C. § 3730(b)(2)); *Stone*, 144 F.R.D. at 401 (describing the disclosure statement as work product). Therefore, there should be no question that Branch's written disclosure statements were prepared in anticipation of litigation by Branch's counsel and therefore constitute work product.

Defendants argue that the written disclosure statements are not work product because relators are required by statute to prepare the written disclosure statements. Standard Fire Mot. at 9-10; Fidelity Mot. at 20. That is not the law. "[T]he fact that they are required by statute does not rob disclosure statements of their work product status." *Bagley*, 212 F.R.D. at 560.

Despite the fact that written disclosures statements are required by statute, nearly every court to consider the issue has concluded that written disclosure statements are work product.

B. Branch's Disclosures Statements Constitute "Opinion" Work Product

Because the written disclosure statements comprise Branch's counsel's mental impressions, conclusions, opinions, and legal theories, they constitute opinion work product and are not discoverable. *See*, *e.g.*, *Bagley*, 212 F.R.D. at 554 ("the court concludes that the disclosure statements prepared by relator and his counsel in this case . . . constitute opinion work product."). Inextricably intertwined with discussion of what Branch found is discussion about how the government could prove its case, which constitutes opinion work product. Opinion work product "includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses." *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985). The "selection and compilation of documents by counsel" also constitutes opinion work product. *Id.* "Where the selection, organization, and characterization of facts reveals the theories, opinions, or mental impressions of a party or the party's representative, that material qualifies as opinion work product." *Bagley*, 212 F.R.D. 563; *see also Burroughs*, 167 F.R.D. at 684-85 (stating that the court had not yet reviewed *in camera* the disclosure statement but "it would be difficult for the court to see how the documents could be characterized as anything other than 'opinion-work product'").

Defendants argue that the disclosure statement cannot constitute opinion work product because the statute merely calls for a factual statement. Standard Fire Mot. at 9-10; Fidelity Mot. at 21. Courts have rejected that exact argument:

> Contrary to defendant's assertion, the statutory requirement that relators disclose "substantially all material evidence and

> information" does not mean that disclosure statements are "kitchen sink" documents that indiscriminately catalogue the universe of facts known to the relator (and which therefore could not possibly reveal opinions, theories, or mental impressions). The statute calls for disclosure of "substantially all" of the "material" facts and evidence in the relator's possession. To meet that obligation, the relator and his or her counsel must engage in a process of selecting and winnowing from the totality of information known to the relator only those facts and evidence that are material to the relator's legal claims. Therefore, the factual narratives in the disclosure statements reveal "the mental impressions, conclusions, opinions, or legal theories of" the relator and his or her counsel.

Bagley, 212 F.R.D. at 564 (citing Fed. R. Civ. P. 26(b)(3)) (emphasis added). Accordingly, Branch's written disclosure statements are opinion work product and are afforded near absolute protection from discovery. *See Bagley*, 212 F.R.D. at 559 ("Absent a waiver, opinion work product enjoys nearly absolute protection and is discoverable only in 'rare and extraordinary circumstances.'").

Classifying written disclosure statements as opinion work product is consistent with the purposes of the False Claims Act. "[T]he statutory purpose of the disclosure requirement is best promoted by a bright-line rule precluding discovery of all portions of disclosure statements or drafts thereof." *Bagley*, 212 F.R.D. at 558 (emphasis added). This is true because it "encourages the relator and his or her counsel to make [the disclosure statements] as complete, detailed, and thoughtful as possible." *Id.* at 557. As the *Bagley* court explained, the relator should have the freedom to engage in full and frank communications with the government concerning the merits of the case in the disclosure statement without having to worry that the disclosure statement will later be produced to opposing counsel. *Id.* at 565.

C. Even if Branch's Disclosures Statements Were "Fact" Work Product, Defendants Have Not Demonstrated Substantial Need and Undue Hardship

Even if the Court were to conclude that the written disclosure statements constituted only "fact work product" rather than "opinion work product," Defendants have not shown that they have a substantial need for the disclosure statements *and* that they would suffer undue hardship in procuring the requested information in some other way.

i. Defendants Have Not Demonstrated Substantial Need

Defendants cite *Rockwell* and contend that they need Branch's written disclosure statement so that they can engage in a "claim by claim" analysis as to what was presented to the government. *See* Fidelity Mot. at 20; Standard Fire Mot. at 10-11; ARIC Mot. at 2-4. Unlike *Rockwell* and the other cases cited by Defendants, this is a single claim case—Branch filed a single count complaint alleging a single *type* of false claim. *Rockwell*'s reasoning concerning original source is applicable to cases where the complaint alleges different *types* of false claims. *Rockwell* involved three different *types* of alleged FCA violations—violations associated with "pondcrete," "saltcrete," and "spray irrigation"— that occurred at different *times*.[2] The passage Defendants rely on from *Rockwell* refers to those different claims, not to different examples of the same claim:

> Stone counters that his original-source status with respect to his ***spray-irrigation*** claim (which related to a time period different from that for his pondcrete claim, App. 492) provided jurisdiction with respect to ***all*** of his claims. We disagree. Section 3730(e)(4) does not permit jurisdiction in gross just because a relator is an original source with respect to some claim. We, along with every court to have addressed the question, conclude that § 3730(e)(4) does not permit such claim smuggling. *See United States ex rel. Merena v. SmithKline Beecham Corp.,* 205 F.3d 97, 102 (3d Cir. 2000); *Hays v. Hoffman,* 325 F.3d 982, 990 (8th Cir. 2003);

[2] *Rockwell*, 549 U.S. at 465, 476.

> *Wang ex rel. United States v. FMC Corp.,* 975 F.2d 1412, 1415-1416, 1420 (9th Cir. 1992).[3]

Like *Rockwell*, the *Merena*, *Hays* and *Wang* cases each also involved different *claims* and not different *instances* of the same claim. *See United States ex rel. Merena v. SmithKline Beecham Corp.,* 205 F.3d 97, 98-100, 102 (3d Cir. 2000) (referring to the "automated chemistry claims" and "automated chemistry scheme" as a single claim in an action where the "complaint contained eight separate claims under the False Claims Act" and the court did not evaluate each *instance* of the "automated chemistry claims" (e.g., each lab test) to determine whether the relator was the original source of that example); *Hays v. Hoffman,* 325 F.3d 982, 990-91, 992 (8th Cir. 2003) (using the term "claim-by-claim" to refer to the "eleven *types* of false claims" and not to the 336 *instances* of the eleven types of claims); *Wang ex rel. United States v. FMC Corp.,* 975 F.2d 1412, 1416, 1420-21 (9th Cir. 1992) (referring to different "claims" as "four separate projects" that allegedly defrauded the government).

Branch is not alleging that Defendants defrauded the government via multiple *types* of false claims such as false claims filed for Hurricane Rita or false claims involving the submission of claims on fictional houses. Instead, Branch alleges a single type of false claim and provides several *examples* of that false claim. Accordingly, Defendants do not have a substantial need for the disclosure statement to test the Court's jurisdiction because it is clear that Branch disclosed the false claim to the government. That much is apparent from the complaint, which was provided to the government along with the written disclosure statement.

ii. Defendants Have Not Demonstrated Undue Hardship

Defendants' failure to show a substantial need for the written disclosure statement is itself dispositive under Rule 26(b). But Defendants also cannot demonstrate that they would

[3] *Id.* at 476 (emphasis added).

suffer undue hardship in obtaining the requested information some other way. Courts routinely reject Defendants' claim of substantial need and undue hardship for obtaining written disclosure statements because defendants can obtain the same *facts* through the discovery process. For example, the Central District of California concluded, "there is no basis for concluding that defendants in qui tam actions are entitled, or need, to discover the disclosure statement in order to mount a jurisdictional challenge." *Bagley*, 212 F.R.D. at 558, n.1. "Like other civil litigants, a qui tam defendant can look to the complaint, which must be pleaded with particularity in compliance with Rule 9(b) of the Federal Rules of Civil Procedure" and "the defendant has recourse to ordinary disclosure and discovery procedures to ascertain the facts relating to subject matter jurisdiction." *Id.* "Thus, there is no reason to assume that a defendant would be unable to challenge the relator's standing without access to the disclosure statement." *Id.*

Similarly, the Eastern District of Texas has rejected defendants' attempt to obtain the written disclosure statement. *United States v. Medica-Rents Co.*, 2002 WL 1483085, *2 (N.D. Tex. June 21, 2002). The court held that defendants had failed to demonstrate undue hardship because the "information in the [written disclosure statements] could have been readily obtained through other means" and "any discoverable information should have been easily obtained (and probably was obtained) through other means of discovery." *Id.*

Here, Defendants have the opportunity to obtain the relevant *facts* through discovery. Each defendant has already notified Branch that they would like to depose the four Branch principals *and* take a Rule 30(b)(6) corporate representative deposition of Branch. The Western District of Pennsylvania addressed this exact situation where a defendant claimed substantial need and undue hardship in an effort to obtain the written disclosure statement, but had not yet even taken a deposition:

> The Court concludes that [defendant] has not met its burden. Most significantly, [defendant] has not taken any of the Relators' depositions. As Relators explain, [defendant] 'will certainly have an opportunity to ask the Relators directly about the factual information that was the subject of the disclosure to the United States.'" . . . **Until the depositions are taken and other factual discovery is completed [defendant] cannot show that they cannot obtain the substantial equivalent of the Disclosure Statements without undue hardship.** Thus, we deny [defendant's] motion to compel in this regard.

Singh, 2007 WL 1575606, at *3 (emphasis added). The court in *Hunt* arrived at the same conclusion in denying defendants' motion to compel the production of a written disclosure statement:

> Therefore the factual bases of the Relators' claims are already known, or should certainly become known as discovery proceeds; and to the extent that Plaintiffs' answers to Medco Defendants' discovery requests have proven unsatisfactory, Medco Defendants have ample opportunity over the course of the next several months to discover, with specificity, the facts and individuals most important to their case. . . . **Medco Defendants argue that they need the Disclosure Statements in order to determine whether the Relators were the original sources of the allegations contained in the complaint**. See Pl.'s Br. at 6. **However, this information can be easily explored by Medco Defendants during their upcoming depositions of the Relators**.

Hunt, 2004 WL 868271 at *2 (emphasis added). Likewise, Defendants cannot demonstrate that they cannot obtain the substantial equivalent of Branch's disclosure statements without undue hardship until after depositions are taken and other factual discovery is completed. Defendants have propounded well over 300 separate written discovery requests on Branch. In response to Defendants' discovery requests, Branch has provided detailed responses. For example, attached as Exhibit 3 is Branch's supplemental response to Standard Fire's interrogatories in which Branch describes in detail the adjusting deficiencies that it identified and the rules, regulations, and guidelines that Standard Fire violated. As discussed above, Branch's interrogatory responses

demonstrate that Standard Fire improperly inflated the flood claim 7732 Edwards Street. *See* Exh. 3. The responses also demonstrate that Standard Fire improperly inflated the flood claim on the 7568 Horizon Drive property by, for example, replacing the ceiling and upper cabinetry even though the property had an interior flood line of only four feet. *Id.*

iii. The Circumstances in *Stone* Are Distinguishable

Defendants rely heavily on *Stone*, but the defendants in *Stone* were in an entirely different position.[4] The court held that the written disclosure statements were work product but concluded that the defendants had shown a substantial need and undue hardship because the relator "ha[d] provided little in the way of discovery which would reveal the factual basis for the allegations in the complaint" and the trial was only three months away. *See Stone*, 144 F.R.D. at 401. Neither of those circumstances is present here. As shown in Exhibit 3, Branch has provided significant details and the relators have yet to be deposed. And trial is over a year away—not three months. Therefore, Defendants have not carried their burden of showing substantial need *and* undue hardship.[5]

D. The Joint Prosecution Privilege Permits Branch to Share Its Work Product with the Government

Branch did not waive its work product protection by sharing the confidential written disclosure statements with the government. Each court that has considered the issue has concluded that the joint prosecution privilege applies to protect work product exchanged between the relator and the government. *See*, *e.g.*, *Burroughs*, 167 F.R.D. at 686 (holding that the "plaintiff and the government have sufficient commonality of interests such that they can

[4] Standard Fire Mot. at 10-12; American Reliable Mot. at 4; Fidelity Mot. at 19-20.

[5] If the Court disagrees and concludes that Defendants have demonstrated substantial need *and* undue hardship, then Branch respectfully requests that it be permitted to redact its opinion work product from the written disclosure statements before they are produced. Such an approach is consistent even with the cases Defendants cite that ordered production. *See*, *e.g.*, *Stone*, 144 F.R.D. at 401 ("I will permit redaction of those portions that counsel considers to be within the 'mental impressions' restriction of Fed. R. Civ. P. 26(b)(3).").

successfully assert the joint prosecution privilege"); *Bagley*, 212 F.R.D. at 562 (applying the joint prosecution privilege to conclude that "the relator's written disclosure to the government pursuant to section 3730(b)(2) does not operate as a waiver of work product protection"); *Purcell*, 209 F.R.D. at 24 (holding that "a joint-prosecutorial privilege does exist between the government and the relator in *qui tam* cases"); *Medica-Rents Co.*, 2002 WL 1483085, at *2 (holding that no waiver occurred because joint prosecution privilege shield the relators' disclosures to the government).

The joint prosecution privilege recognizes that a plaintiff may share a privileged document with a person or entity with a common interest without waiving the privilege. *Bagley*, 212 F.R.D. at 562. It does not turn a non-privileged document into a privileged document. Rather, it acts to prevent the waiver of the privilege on a document that was already privileged. It is identical to the joint defense privilege, but applies to plaintiffs instead of defendants. *See Purcell*, 209 F.R.D. at 25. Defendants no doubt are withholding hundreds or thousands of privileged documents based on the joint defense privilege, yet they fail to justify why Branch and the government are not entitled to the same type of protection. In fact, Branch and the government have a greater need to share work product because "for all practical purposes, plaintiff and the government are essentially the same party." *See Burroughs*, 167 F.R.D. at 686.

i. The Joint Prosecution Privilege Applies Even Where The Government Has Not Intervened

Defendants argue that the joint prosecution privilege does not apply here because the government has not yet intervened. Courts have rejected that same argument. For example, *United States ex rel. Burroughs v. DeNardi Corp. et al.*, 167 F.R.D. 680 (S.D. Cal. 1996) is directly on point, holding that the joint prosecution privilege applies to protect a written disclosure statement shared with the government even though the government had not

intervened. The court rejected the exact argument that Defendants are making here: "[D]efendants' arguments that the joint prosecution privilege applies only when the government chooses to intervene is equally unavailing." As the court properly found, "[T]he government has a substantial interest in seeing that the litigation is successful against the defendants, whether or not it elects to intervene in the action." *Id.* at 686, n.3. Despite being directly on point, neither American Reliable nor Fidelity even mention *Burroughs* and Standard Fire's only response is to say that it was "wrongly decided." Standard Fire Mot. at 8.

The *Burroughs* court did not get it wrong. It recognized that "the [joint defense] privilege does not solely apply to cooperating defendants" but "[i]t also applies to cooperating plaintiffs." *Id.* at 685 (citations omitted). Also, "the privilege is not limited to co-parties." *Id.* The court explained that *all* persons who share a common interest in litigation should be able to communicate confidentially with their respective attorneys:

> Therefore, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the privilege is clear: Persons who share a common interest in litigation should be able to communicate confidentially with their respective attorneys, and with each other, to more effectively prosecute or defend their claims.

Id. at 686 (emphasis added); *see also Purcell*, 209 F.R.D. at 25 ("[W]hether the jointly interested persons are defendants or plaintiffs . . . the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.") (citation omitted)).

The court found that "the False Claims Act . . . itself provides ample support that plaintiff and the government share sufficient common interests, as against the defendants" even where the government does not intervene. *Id.* Specifically, the court found,

- That the FCA "makes clear that plaintiff and the government essentially stand in the same shoes as against the defendants." *Id.*
- The FCA "sets forth a scheme whereby plaintiff and the government act together to prosecute the action." *Id.*
- "The action cannot be dismissed unless the government gives written consent to the dismissal." *Id.*
- "The government can request that it be served with all pleadings filed in the action and all deposition transcripts." *Id.*
- "All of plaintiff's claims, litigation strategies, and ultimate goals are all asserted on behalf of the government." *Id.*
- "Finally, the government may intervene in the action at any time, upon a showing of good cause." *Id.*

"In short," the court concluded, "the government has a substantial interest in seeing that the litigation is successful against the defendants, whether or not it elects to intervene in the action." *Id.*; *see also Bagley*, 212 F.R.D. at 561-62 ("the relator and the government are not adverse when the required disclosure occurs, and one of the purposes of the Act is to ally relators with the government to uncover and remedy fraud against the government."). Therefore, the court held that the "plaintiff and the government have sufficient commonality of interests such that they can successfully assert the joint prosecution privilege." *Id.*

The same is true here. Branch's interests are aligned with the government. Indeed, each of the interests identified in the bullet point list above apply to the government's relationship to this case. Additionally, the government has requested that all pleadings and discovery be served on it and even travelled to New Orleans to make an appearance on behalf of the United States at both the hearing on the Motion to Strike Third Party Complaints and at the Discovery Conference. Therefore, the joint prosecution privilege applies to protect Branch's written disclosure statement.

Burroughs is not alone in holding that the joint prosecution privilege applies. The court in *Bagley* held that "the relator's written disclosure to the government pursuant to section 3730(b)(2) does not operate as a waiver of work product protection." 212 F.R.D. at 562. The court noted that its holding "is consistent with several decisions holding that the 'common interest' or 'joint prosecution' doctrine applies to prevent the relator's disclosure of work product (including the written disclosure statement) to the government from operating as a waiver." *Id.*; *see also Medica-Rents Co.*, 2002 WL 1483085, at *2 (holding that no waiver occurred because joint prosecution privilege shield the relators' disclosures to the government)). Defendants do not attempt to distinguish these cases.

ii. The Reasoning in *Purcell* Applies

Defendants quickly dismiss the importance of *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 24 (D.D.C. 2002), by noting that the court's ruling was limited to the facts before the court—a case where the government had intervened. Although the court in *Purcell* did not address the situation where the government had not intervened, its reasoning applies equally to that situation. In fact, the court quoted extensively from *Burroughs*, where the government did not intervene. In *Purcell*, the court held that "a joint-prosecutorial privilege does exist between the government and the relator in *qui tam* cases." *Id.* at 24. The court reviewed the common interest privilege and the joint defense privilege and reasoned that "[t]he overarching principle that governs these privileges remains the same—protecting attorney-client correspondence on matters of common interest and protecting attorneys' preparations for trial and encouraging the fullest preparation without fear of access by adversaries." *Id.* at 25 (quotations omitted).

The *Purcell* court found that the relator and the government had a common legal interest, because:

- "Congress has made it clear that it intended to align the interests of the relator with the interests of the government in these cases." *Id.*
- The relator is allowed to bring the action in the name of the government. *Id.*
- The relator receives a percentage of the proceeds that the government recovers. *Id.*
- "[F]or all practical purposes, plaintiff and the government are essentially the same party." *Id.* (quoting *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 686 (S.D. Cal. 1996)).

Each of the four bullet points above is true with respect to Branch's relationship with the government: (a) Congress aligned Branch's interests with the government; (b) Branch brought this action on behalf of the United States, (c) Branch will receive a percentage of the proceeds that the government recovers; and (d) for all practical purposes, Branch and the government are essentially the same party. Therefore, Purcell supports the application of the joint prosecution privilege to Branch's written disclosure statement.

iii. Defendants' Attempt to Limit the Joint Defense Privilege to Cases Where the Government Has Intervened Is Not Workable

In addition to being contrary to well established law, Defendants' attempt to limit the joint prosecution privilege to cases where the government intervenes is not workable. In determining whether a document is privileged, courts evaluate the relationship between the parties at the time the document was exchanged. *See Bagley*, 212 F.R.D. at 561. When Branch prepared, mailed, and presented its written disclosure statement to the government, it was in the exact same position as the relator in every *qui tam* action, including *Purcell*—the government had not yet intervened. Defendants would have this Court rule that the government's later decision to intervene after receiving the written disclosure is the operative fact for the application of the joint prosecution privilege. But such a test is not workable in FCA cases because the government may intervene at any time, even after judgment. Thus, under Defendants' reasoning, the joint prosecution privilege would not apply today and Branch would have to produce the written disclosure statement, but if the government were to intervene next week, then the joint

prosecution privilege would spring forth and protect the disclosure statement. That is not how privilege law works. Courts look to the parties' position at the time the document was exchanged. *See Bagley*, 212 F.R.D. at 561 (concluding that "the relator and the government are not adverse when the required disclosure occurs"). "[I]t would be antithetical to the language and the purposes of the Act to characterize the government as an adversary or potential adversary of the relator at the time when the required written disclosure occurs." *Id.* (emphasis added).

iv. The Eastern District of Louisiana Has Cited Favorably to *Burroughs* and *Purcell*

Finally, the Eastern District of Louisiana has cited favorably to and relied on both *Burroughs* and *Purcell* as establishing the "existence of a joint prosecution or common interest privilege, as to documents protected by the attorney-cleint privilege and work product doctrine, between qui tam relators and the government with respect to documents that are shared between them." *United States ex rel. Stewart v. The Louisiana Clinic, et al.*, 2002 WL 31819130, *9 (E.D. La. Dec. 12, 2002). The court cited to *Purcell* as "recognizing joint privilege when the government intervened" and cited to *Burroughs* as "recognizing joint privilege when the government did not intervene." *Id.* at *9. While the Eastern District of Louisiana has cited favorably to both *Burroughs* and *Purcell*, neither the Fifth Circuit nor any district court in the Fifth Circuit has cited the cases on which Defendants rely for *any* issue related to written disclosure statements or privilege, even though each of those opinions have been issued for at least 14 years. *See*, *e.g.*, *O'Keefe*, 918 F. Supp. at 1345-46; *Burns*, 904 F. Supp. at 593-94; *Stone*, 144 F.R.D. at 401-02; *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 838-39 (N.D. Ill. 1993). Additionally, these cases cited by Defendants do not even mention the joint prosecution privilege. Defendants have not identified a single case holding that the joint prosecution privilege does not apply.

In short, Branch's written disclosure statements are protected work product, and Branch did not waive the privilege by sharing them with the government. Accordingly, they are protected from discovery.

IV. COMMUNICATIONS WITH RIGSBYS' COUNSEL ARE PRIVILEGED

Standard Fire's Document Request No. 20 seeks all communications with the Rigsbys. Standard Fire Mot. at 13. As Branch's counsel unequivocally told Standard Fire at the Rule 37.1 conference, Branch's principals have never communicated with the Rigsbys and did not obtain any information from the Rigsbys. *See* Ex. 2, at ¶ 3-4 (Clarke Decl.). The only documents responsive to this request are communications between Rigsbys' counsel and Branch's counsel that were drafted in the course of this litigation *after* the complaint was unsealed and are therefore protected work product. S*ee* Section III.A, *supra*.

Standard Fire's attempt to obtain communications from Branch's counsel to Rigsbys' counsel is a thinly veiled fishing expedition hoping to link Branch in any way to the disgraced Dickie Scruggs. Standard Fire has not articulated any good faith basis for pursuing these communications, especially given that Branch's counsel represented that the Branch principals did not communicate with the Rigsbys and are not relying on information from the Rigsbys. The Court should put an emphatic end to this attempt to smear Branch and/or Branch's counsel.

Branch does not have any non-privileged documents relating to this document request, and Standard Fire has not challenged the privilege in its Motion to Compel. *See* Ex. 2, ¶ 3-5 (Clarke Decl.). Therefore there is nothing to compel on this document request.

V. REMAINING ISSUES RAISED IN FIDELITY'S MOTION LACK MERIT

Fidelity has moved to compel responses to 18 separate discovery requests. The vast majority of the issues raised in Fidelity's Motion are moot because Branch and Fidelity have

already arrived at an agreement or because Branch has agreed to supplement its response to a particular request. For example, Branch has already produced all non-privileged documents that relate to the exemplars in the First Amended Complaint. *See* Ex. 2, ¶ 5 (Clarke Decl.). Nevertheless, Fidelity has moved to compel Branch to do just that—produce the non-privileged documents relating to the exemplars. *See* Fidelity Mot. concerning Document Requests Nos. 2 (p. 18), 11 (p. 21), and 17 (p. 21). There is no need for the Court to compel Branch to do what it has already done.

Before addressing the discovery requests, Fidelity again argues, as it has done with each of its pleadings and during its arguments before the Court, that Branch has intentionally misled the Court as to the nature of this action.[6] Nothing could be further from the truth.[7] As plainly stated in Branch's First Amended Complaint, "The defendants have defrauded the Government through a practice of grossly overstating flood damages to insured properties damaged by Hurricane Katrina and then, based on those overstated damages, submitting claims for payment on Government-backed flood insurance policies to the National Flood Insurance Program ('NFIP')." Dkt. # 49 ¶ 3. Fidelity is wrong that the FAC limits itself to properties where (1) the expedited claims process was used; or (2) where Defendant issued both the homeowners and the flood policies. In fact, in the subparagraphs of the FAC where Branch provided detailed allegations on the exemplar properties, Branch did not allege that any of the properties were

[6] Fidelity Mot. at 3-5. Fidelity's new contention that Susman Godfrey has intentionally attempted to create surprise at the trial by failing to respond fully to Fidelity's document requests is completely without merit and is an argument that none of the other six defendants bothered making. The particular section of Susman Godfrey's website that Fidelity cites is directed at serving discovery on opposing parties—not responding to discovery served by the opposing party, and correctly states that "excessive discovery" is nonproductive. Finally, on the same page, the website states, "Upon receipt of the other side's document request, an experienced attorney, in consultation with the client, determines what should be objected to. We have found that it is better to produce too much than too little." (emphasis added).

[7] Branch responds to these allegations only briefly here, but incorporates by reference its responses to the same arguments in its Opposition to Defendants' Motion for a Protective Order, which will be filed February 12, 2010. Specifically, Branch's response to this Court's Questions #11-13 (Dkt. # 320) are relevant. Branch also incorporates its Motion for Leave to File a Second Amended Complaint (Dkt. # 280) and its Reply to its Motion for Leave (Dkt. # 305).

adjusted through the expedited claims process and did not allege that Defendants also issued the homeowners policies on those properties. Branch did not plead those allegations because the scheme that it pled was much broader. Indeed, "[t]here is no question that [Branch] *has pleaded the existence of a broad scheme to defraud the government*, as well as provided numerous individual examples that are allegedly part of the scheme."[8]

Finally, Fidelity lectures the Court that it "has taken jurisdiction (a.k.a. 'power') . . . over the future of the NFIP itself." Mot. at 7. Fidelity predicts the apocalypse if Branch succeeds in proving its claims—"the Government would quickly shut down the current operating system, and private industry would just as quickly retreat from it." *Id.* These cries of Chicken Little are nothing more than self-serving prophesies. Requiring defendants who defraud Medicare and Medicaid to repay false claims has not endangered those federal programs. Likewise, a judgment against Defendants would do nothing more than require Defendants to repay to the government funds that were obtained based on fraudulent claims. Holding WYO companies who defrauded the government responsible will ensure the continued vitality of the NFIP—a NFIP free from fraud is in everyone's best interests. *Old Republic Ins. Co. v. Fed. Crop Ins. Corp.*, 947 F.2d 269, 275 (7th Cir. 1991). ("Requiring that [the insurer] refund the moneys paid on the basis of these errors, as the district court found, 'will only serve to discourage such potentially wrongful or negligent adjustment practices by insurance companies participating in the federal program. This is a goal which the FCIC should pursue to efficiently administer its resources.'").

A. Interrogatory No. 6—Branch Already Agreed to Supplement

[8] Order dated 10/19/2009 (Dkt. # 228) at 57-58 (emphasis added).

Although Fidelity has moved the Court to compel a response to this interrogatory, Fidelity failed to advise the Court that Branch told all parties at the January 27, 2010 Rule 37.1 conference that it would supplement all discovery requests seeking greater detail on Defendants' adjusting deficiencies and greater detail on the rules, regulations, and guidelines that were violated. That supplementation is in progress and will be done before Fidelity's motion is noted for hearing on February 19, 2010. Therefore, Fidelity's motion is moot as to this issue.

B. Interrogatory No. 7—Branch Answered Fully

Interrogatory No. 7 requests that Branch provide every fact relating to Fidelity's use of the expedited claims handling procedure. Branch fully responded to this interrogatory and does not have any additional facts to disclose. Therefore, Fidelity's motion is moot as to this issue.[9]

C. Interrogatory No. 8—Branch Already Agreed to Supplement

Interrogatory No. 8 seeks "every fact" known to Branch when it filed the FAC that supported three specific allegations that related to misattributing wind damage to flood claims. The supplementation that Branch is preparing concerning Fidelity's adjusting deficiencies will provide additional information responsive to this interrogatory. Therefore, Fidelity's motion is moot as to this issue.

D. Interrogatory No. 11—Branch Already Agreed to Supplement

Branch believes that it fully responded to this interrogatory.[10] However, the supplementation that it is preparing will provide greater detail on the adjusting deficiencies for each of the Fidelity properties identified in the FAC.

[9] Branch disagrees completely with Fidelity's attempt to construe or characterize the FAC.

[10] Branch disagrees with the interrogatory's characterization of the FAC. Branch does not contend that each exemplar property was rendered a "substantial ruin" or "constructive total loss" before the arrival of floodwaters. Instead, Branch alleges that Fidelity improperly inflated flood damages on the claims it submitted to the government.

E. Interrogatory No. 15—Calls For Information that Is Not Relevant to Any Claim or Defense

Interrogatory No. 15 states,

> Given that Fidelity was not the homeowner's carrier on any of the claims put at issue in paragraph 23 of the FAC, please state as to each of the ten claims listed in that paragraph: the name of the person or persons to whom Fidelity is alleged to have paid the alleged overpayment, and, the amount of the overpayment that person allegedly received from Fidelity.

Strangely, Fidelity asks for the name of the person who Branch *believes* was paid under the flood policy. As Branch stated in its objections, "To the extent Fidelity is merely requesting the names of the insureds, this information is equally or more readily available to Fidelity from its own records than it is to Plaintiff." Fidelity already has their names and addresses, so it is not clear why Fidelity is asking Branch for that information. In addition, the interrogatory seeks information that is not relevant to the claims or defenses in this case. The parties have fully briefed and argued the issue of whether Fidelity's Third Party Complaint is proper. Branch incorporates by reference the arguments in its Motion to Strike the Third Party Complaint (Dkt. # 253-2) and its Reply (Dkt. # 271-3), which explains why this interrogatory seeks information that is not relevant. In short, Fidelity does not have standing to sue insureds to recover fraudulent overpayments—that right rests solely with the government. (Dkt. # 253-2, p. 2-3) Additionally, "*qui tam* defendants lack a right to bring claims that will have the effect of offsetting FCA liability." *United States v. Nardone*, 782 F. Supp. 996, 999 (M.D. Pa. 1990) (dismissing a FCA defendant's third party complaint because "a defendant who is found liable under the False Claims Act is not entitled to indemnification from a third-party defendant").

F. Interrogatory No. 18—Branch Fully Responded

Interrogatory 18 requests that Branch state all facts supporting its allegation that Fidelity "actively concealed" its fraudulent practices from the government. The nature of Fidelity's scheme is self-concealing. Branch has identified the properties at issue and described Fidelity's failure to disclose it, and the nature of the claims that had the effect of deceiving the government. Branch does not understand what further information Fidelity is seeking. Branch's response is full and complete—there is nothing to compel.

G. Interrogatory No. 20—Branch Fully Responded

Fidelity asked Branch to "put a number to the word 'numerous' used in paragraph 19 of the FAC." Branch did exactly that in its response. There is nothing to compel.

H. Document Request[11] No. 2—Branch Agreed to Produce All Non-Privileged Documents

Branch told Fidelity that it would produce all non-privileged documents responsive to this request and has already done so. *See* Ex. 2, at ¶ 5-6 (Clarke Decl.). This issue is moot.

I. Document Request No. 10—The Joint Prosecution Privilege Applies

This document request seeks documents that Branch produced to the government. Contrary to Fidelity's suggestion, Branch is not claiming that giving a document to the government converted a non-privileged document into a privileged document. Instead, Branch

[11] Fidelity states, "All defense counsel have worked quite hard to achieve an agreement with counsel for Branch as to the exchange of documents." Mot. at 17. That statement is not accurate. Even after the other six defendants agreed to produce their responsive, non-privileged documents, Fidelity refused to provide even a single document until it had the opportunity to review Branch's document production to ensure that it met Fidelity's satisfaction. Such a position is a gross abuse of the discovery process. *See*, e.g.*, See*, *e.g.*, *Lee v. Flagstaff Industries Corp.*, 173 F.R.D. 651, 656-57 (D. Md. 1997) ("[T]he defendant, unilaterally decided to hold the plaintiff's discovery responses hostage until he obtained discovery responses which met his satisfaction. This was a flagrant violation of both the letter and spirit of the Federal Rules of Procedure, Local Rules, and Discovery Guidelines discussed above.") (ordering the defendant to show cause as to why sanctions should not be imposed). Branch went through the expense and trouble of preparing and finalizing a motion to compel the production of Fidelity's documents but never filed it as Fidelity changed course and produced its documents only hours before the deadline for filing motions to compel. Such conduct is counterproductive and violates not only Fidelity's discovery obligations but also the Sedona Proclamation.

withheld only documents that were privileged *before* giving them to the government. As explained above in Section II.D, Branch's privilege is not waived by sharing a privileged document with the government. Fidelity's motion seeking Branch's privileged documents should be rejected.

J. Document Request No. 11—Branch Agreed to Produce All Non-Privileged Documents

Document request No. 11 seeks documents related to Fidelity's use of the expedited claims process. Branch told Fidelity at the Rule 37.1 conference that Branch would produce all non-privileged documents that are responsive to this request. *See* Ex. 2, at ¶ 5-6 (Clarke Decl.). This issue is moot.

K. Document Request Nos. 12, 14, 15, and 19—Resolved at Rule 37.1 Conference

At the Rule 37.1 Conference, Fidelity identified four responses that included the phrase "if any" after stating that Branch had no responsive documents. Branch explained that it inadvertently included the phrase, and withdrew it from those responses. This issue is moot.

L. Document Request No. 16—Resolved at Rule 37.1 Conference

Branch objected to this document request to the extent that it sought documents that were subject to a protective order issued in another case or subject to a third-party confidentiality agreement. Defendants lodged similar objections in their responses to Branch's discovery. At the Rule 37.1 Conference, *all parties* agreed that to the extent they withhold a responsive document because it is subject to a protective order or confidentiality agreement, that party will notify the requesting party and will produce a copy of the protective order and/or confidentiality agreement, if possible. This issue is moot.

M. Document Request No. 17—Branch Agreed to Produce All Non-Privileged Documents

This document request seeks "all documents related to any efforts by Branch to obtain higher payments from the homeowner's carrier on the properties put at issue at paragraph 23 of the FAC." Branch agreed to produce all non-privileged documents that are responsive to this request. *See* Ex. 2, at ¶ 5-6 (Clarke Decl.). This issue is moot.

N. Document Request No. 34—Branch Agreed to Produce All Non-Privileged Documents

This document request seeks "[a]nything that would demonstrate or indicate in any way that Fidelity either knew or should have known as of when Hurricane Katrina struck, that any of the independent adjusting companies that it retained to adjust Hurricane Katrina flood claims was either not competent, or not trustworthy." At the Rule 37.1 Conference, Branch agreed to produce all non-privileged documents that are responsive to this request. *See* Ex. 2, at ¶ 5-6 (Clarke Decl.). This issue is moot.

O. Document Request No. 35—Request is Premature

This document request seeks documents related to Branch's Second Amended Complaint. Branch has a motion pending in which it seeks leave to file the Second Amended Complaint. Until the Court grants the motion for leave, this request is premature—it seeks documents relating to allegations in a complaint that has not yet been filed.

P. Request for Admission No. 1—Branch Fully Responded

Request for Admission No. 1 asks, "At the time of Hurricane Katrina, Fidelity was not the issuer of the homeowner's policy on any of the properties put at issue at paragraph 23 of the First Amended Complaint FAC)." Branch fully responded: "Denied, the information it knows or can readily obtain is insufficient to enable it to admit or deny." *See* Fed. R. Civ. P. 36(a)(4) ("The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information

it knows or can readily obtain is insufficient to enable it to admit or deny."). Whether Fidelity in fact issued homeowners policies on those properties is a *fact* known to Fidelity. The request for admission does not ask Branch for its understanding, and the information sought is not in Branch's personal knowledge.

Q. Request for Admission No. 14—Beyond Scope of Permissible Discovery

Request for Admission No. 14 asks, "If the NFIP claims put at issue at paragraph 23 of the FAC were in fact overpaid, then the persons who received those payments received federal funds to which they were not entitled." Branch responded, "Objection as to relevance. Not within the scope of Admission allowed within Fed. R. Civ. Proc. 26(b)(1)." As explained above in section V.E, there is no right to contribution under the False Claims Act and Fidelity lacks standing to sue homeowners to obtain the money that Fidelity fraudulently disbursed. Moreover, Fidelity has failed to cite a federal law that would characterize a WYO false claim as something to which the insured is not entitled to retain. Branch's Motion to Strike Fidelity's Third Party Complaint is fully briefed and argued.

R. Request for Admission No. 18—Branch Fully Responded

Request for Admission No. 18 asks, "Branch has no 'direct, first-hand knowledge' (FAC, ¶ 9) of even one flood claim handled by Fidelity where Fidelity employed FEMA's 'expedited claims handling process' (FAC, ¶ 17) to adjust that claim." Branch responded, "Denied for lack of sufficient information." Branch's response is full and complete. *See* Fed. R. Civ. P. 36(a)(4) ("The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny."). Branch has direct, first-hand knowledge of a large number of flood claims handled by Fidelity but lacks sufficient

information to determine whether Fidelity employed the expedited process on those claims. As discovery progresses, Branch expects to have sufficient information to determine this, but does not at this time.

S. Fidelity's Arguments Concerning Branch's Document Production Lack Merit

Fidelity complains to the Court that it is confused as to what was included in Branch's document production. Mot. at 24. Fidelity's confusion likely was due to the fact that it reviewed Branch's document production for only a few hours before filing this Motion to Compel. Fidelity "was not able to start examining what [Branch] produced until the afternoon of Friday, January 29, 2010," which was only hours before Fidelity filed its Motion to Compel. Mot. at 17. Although Fidelity had not thoroughly reviewed Branch's document production, it requests an order from the Court that "directs Branch to specifically identify which Bates numbers apply to which Request for Production of Documents" and "to direct Branch to identify which Bates-numbered documents constitute the entirely of Branch's documents that are specific to the individual properties pleaded at paragraph 23 of the FAC." Mot. at 24. The Court should reject Fidelity's request for at least three independently dispositive reasons.

First, it is improper for Fidelity to raise this issue in a discovery motion because it has not conducted a Rule 37.1 Conference on this issue. Second, it is premature for Branch to raise this issue given that it had not even carefully reviewed Branch's document production prior to filing this motion. Third, Fidelity cites no authority supporting its request that the Court order Branch to identify certain categories of documents by Bates number. Fidelity's request is contrary to Federal Rule of Civil Procedure 34, which governs the production of documents. Rule 34(b)(2)(E)(i) provides, "A party must produce documents as they are kept in the usual course of business **or** must organize and label them to correspond to the categories in the request." Branch

has produced its documents as they are kept in the usual course of business and therefore is under no obligation to organize and label them to correspond to the categories in the request. Finally, if the Court grants Fidelity's request, then the Court should draft its order to apply equally to all document productions in this case—both Branch's and Defendants'.

VI. CONCLUSION

The Court should reject Defendants' transparent attempt to obtain Branch's counsel's legal opinions and strategies through production of the written disclosure statement. Because the disclosure statement is opinion work product, it cannot be obtained even if Defendants could show substantial need and undue hardship. Additionally, Fidelity's motion lacks merit, as the vast majority of issues were already resolved by the parties. Defendants' Motions should be denied.

DATED: February 10, 2010

Respectfully submitted,

SUSMAN GODFREY LLP

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Attorneys for Plaintiff/Relator

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2010, a copy of the foregoing was served upon Defendants via electronic mail, pursuant to the parties' agreement on e-mail service. I further certify that a true and correct copy of the above also was sent via electronic mail (pursuant to agreement) to Assistant United States Attorney, Jay D. Majors.

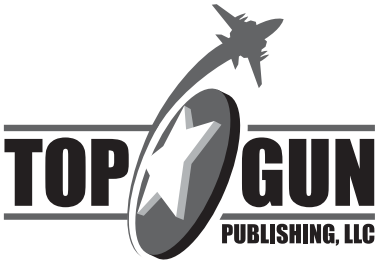
/s/ Matthew R. Berry

EXHIBIT 1

FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION

Fifth Edition

James B. Helmer, Jr.



(4)—Discoverability of Documents.

A second recurring issue in a *qui tam* proceeding arises because the defendant is usually in possession of most, if not all, of the relevant information forming the basis of the relator's complaint. Preexisting documents are not protected by the attorney-client privilege merely because the client sends them to an attorney. Such documents are protected only if they were actually prepared in anticipation of litigation. Thus, documents prepared for ordinary business purposes, (such as a routine accident report), or prepared for public regulatory purposes, (such as an affirmative action report), will not be protected.[68]

(5)—Sharing Privileged Information Between Government and Relator: The Joint Prosecution Privilege.

Sharing of information between the Government and the relator does not waive either the attorney-client privilege or the work product protections. The courts have long recognized that communication between two parties with a common interest or communications between counsel and such parties in the presence of the other party with a common interest does not waive either the attorney-client privilege or the work product doctrine.[69]

United States ex rel. Burroughs v. DeNardi Corp. states that in False Claims Act cases, "the [relator] and the government essentially stand in the same shoes as against the defendants…For all practical purposes, plaintiff and the government are essentially the same party."[70] The court concluded that relators and the Government have sufficient commonality of interests in FCA cases to assert the joint prosecution privilege.[71] As a result, a relator's disclosure of the documents to the Government of work product documents does not waive the protections afforded such.[72] Similarly, *United States ex rel. Cericola v. Ben Franklin Bank*[73] holds that a relator's sharing of opinion work product memoranda with the Government does not constitute a waiver of privilege from the work product doctrine.

Accordingly, with the agreement of both the Government and the relator to share and treat attorney-client privileged and work product materials as

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[68] *See* § 9-4(b), "Self-Evaluative Privilege in False Claims Act Cases," *infra; see generally,* 4 James W. Moore et al., *Moore's Federal Practice* ¶ 26.01[18] (2d ed. Supp. 1993-94).

[69] *See* Edna S. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 62–63, 206–219 (4th ed. 2001, Supp. 2004 ABA Publishing) (and cases cited therein); *United States ex rel. Cericola v. Ben Franklin Bank*, 2003 U.S. Dist. LEXIS 15451 (N.D. Ill. 2003).

[70] *Burroughs*, 167 F.R.D. 680, 686 (S.D. Cal. 1996).

[71] *Id.*

[72] *Id.*

[73] *Cericola*, 2003 U.S. Dist. LEXIS 15451 *10 (N.D. Ill. 2003).

confidential, these two parties can cooperate to prosecute the action against the defendant without sharing privileged and protected information with the defendant. These same principles have been applied to other actions in which the Government and private plaintiffs share common law enforcement goals.[74]

The United States District Court for the District of Columbia has now expressly ruled that information shared between the relator, his counsel and the United States is protected from discovery by the joint-prosecutorial privilege.[75] The joint-prosecutorial privilege is the Government/relator counterpart to the recognized joint defense or common interest privilege.[76] It is grounded in the language of the False Claims Act itself which empowers the relator to bring the action "in the name of the Government" and awards the relator a percentage of the proceeds recovered by the United States.[77] Such statutory language make clear Congress' intent to align the interest of the Government with that of the relator.[78]

In fact, the unique relationship arising from the statutory requirement that the relator serve upon the United States a "written disclosure of substantially all material evidence and information the person possesses"[79] requires the sharing of work product generated by the relator and his attorney in order for the case to proceed.[80] Such material disclosed to the United States is protected from discovery by the joint-prosecutorial privilege.[81]

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[74] *See, e.g., Castle v. Sangamo Weston, Inc.,* 744 F.2d 1464, 1466–67 (11th Cir. 1984) (no waiver in private plaintiff turning work product over to EEOC while both engaged in preparation for joint trial); *United States v. American Telephone & Telegraph Co.,* 642 F.2d 1285, 1299–1300 (D.C. Cir. 1990) (regarding private plaintiff sharing of work product with DOJ in antitrust litigation).

[75] *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 24–27 (D. D.C. 2002).

[76] *United States ex rel. Purcell v. MWI Corp*., 209 F.R.D. 21, 25–27 (D. D.C. 2002); *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990); *Sedlacek v. Morgan Whitney Trading Group*, 795 F. Supp. 329, 331 (C.D. Cal. 1992).

[77] 31 U.S.C. §§ 3730(b), (d).

[78] *Purcell,* 209 F.R.D. at 26; *United States ex rel. Burroughs v. DeNardi Corp*., 167 F.R.D. 680, 686 (S.D. Cal. 1996) ("[the *qui tam*] plaintiff and the Government essentially stand in the same shoes as against the defendants").

[79] 31 U.S.C. § 3730(b)(2).

[80] *Purcell,* 209 F.R.D. at 27; *United States v. AT&T Co.*, 642 F.2d 1285, 1300 (D.C. Cir. 1980); *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994).

[81] *Purcell,* 209 F.R.D. at 24–27; *contra*, *United States ex rel. Grober v. Summit Medical Group, Inc.*, 2006 U.S. Dist. LEXIS 26898 (W.D. Ky. 2006) (An Assistant United States Attorney voluntarily turned over to the False Claims Act defendant three volumes of relator's disclosure statement memoranda and associated documents after reaching a settlement of the False Claims Act allegations but before resolution of the relator's False Claims Act retaliation claims. All of this was done without notice to relator or his counsel and was then used by the defendant against the relator on his retaliation claim. Relator maintained that the Assistant United States Attorney's unauthorized disclosure of disclosure statement documents to the defendant was designed to punish the relator for objecting to the False Claims Act settlement.).

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, *EX REL.* BRANCH CONSULTANTS, L.L.C.,	)	
Plaintiff	)	Case No. 2:06-cv-4091
v.	)	
	)	**JURY TRIAL DEMANDED**
ALLSTATE INSURANCE COMPANY, et al.,	)	
Defendants	)	

DECLARATION OF RICK CLARKE

1. My name is Rick Clarke. I am 49 years old and am fully competent to make this declaration. I have personal knowledge of the facts below.

2. I am the Operations Manager for Branch Consultants L.L.C. ("Branch") and have held that position since 2005.

3. I have never communicated with the relators in *United States ex rel. Rigsby v. State Farm*, and no one at Branch has ever been authorized to communicate or, to my knowledge, has communicated with the *Rigsby* relators.

4. The factual information that Branch submitted to the Government as part of its written disclosure statement and accompanying exhibits was obtained by Branch without any input, assistance, or information from the relators or lawyers in the *Rigsby* case.

5. I am familiar with the documents that Branch has produced in this action. To my knowledge, Branch has produced all documents that relate to the example properties specifically identified in the First Amended Complaint (less properties of defendants not currently in the case) with the exception only of those documents that Branch's counsel has determined are privileged.

6. In addition, to my knowledge, Branch has produced all documents that relate to the following topics with the exception only of those documents that Branch's counsel has determined are privileged:

    a. Documents referenced in the September 14, 2007 Declaration of Max Johnson that relate to the properties identified as examples in the First Amended Complaint (less properties of defendants not currently in the case);

b. Documents relating to Fidelity's use of the expedited claims process relating to the properties identified as examples in the First Amended Complaint;

c. Documents relating to any efforts by Branch to obtain higher payments from the homeowners carriers on the properties identified as examples in the First Amended Complaint (less properties of defendants not currently in the case); and

d. Documents that would demonstrate that Fidelity knew or should have known that its independent adjusting firms were not competent or trustworthy.

7. I swear under penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

DATED: February 10, 2010

Rick Clarke

EXHIBIT 3

STANDARD FIRE EXEMPLAR PROPERTIES

Branch has inspected the properties identified below on which Standard Fire issued a flood insurance policy through the National Flood Insurance Program. Branch's inspection revealed that the amounts Standard Fire caused the Government to pay for purported flood damage were grossly inflated and cannot be justified by any reasonable adjusting standards or guidelines. In this supplemental response,[1] Branch has endeavored to describe the adjusting deficiencies that it has identified and the rules, regulations, and guidelines that were violated. Branch has not had the opportunity to review all of Standard Fire's documents relating to the NFIP, and reserves the right to further supplement this response as necessary.

I. 7568 Horizon Dr, New Orleans, LA 70129

Standard Fire issued a flood policy (Policy Number 6500508939) on the property at 7568 Horizon Dr, with a policy limit of $81,000.00. The property suffered damage from Hurricane Katrina, and a claim was submitted to Standard Fire under the flood policy. American Catastrophe Claims adjusted the claim on behalf of Standard Fire, and calculated an ACV loss after depreciation of $102,719.23. Because this number exceeded policy limits, Standard Fire submitted a claim to the NFIP for the policy limits of $81,000.00.

The adjustment and the claim amount submitted to NFIP were grossly inflated and were not supported by the rules, regulations, and guidelines governing flood adjustments. An adjustment conducted in accordance with the applicable rules, regulations, and guidelines would show that Katrina caused flood damages of at most $31,306.40 at this property. Branch's estimate does not account for depreciation, which would further decrease Branch's estimate of damages.

A. ADJUSTING DEFICIENCIES

In completing its adjustment, Branch used Xactimate software and the price list LANO4S6D. Branch measured the interior flood line at approximately four feet and an exterior flood line that is approximately six feet from street level.

Based on its adjustment of the property at 7568 Horizon Dr, Branch concluded that numerous aspects of the Standard Fire claim do not comport with the rules, regulations, and guidelines governing flood adjustments, including the following:

[1] Branch provides the below information to supplement its responses to Standard Fire's Interrogatory Nos. 6 and 9. In doing so, Branch specifically preserves any and all objections to those interrogatories, including that they are vague in "requiring as much detail as possible;" call for the premature disclosure of expert information and testimony; call for information protected by the attorney client privilege; and because they call for information that is in Standard Fire's possession. Branch has endeavored to provide greater detail as to Standard Fire's adjusting deficiencies, but expressly reserves the right to supplement and/or revise this information for any reason.

1. Based on the flood line of four feet, only four feet of drywall should have been replaced. There was no reasonable justification for Standard Fire's adjustment to include the removal and replacement of eight feet of drywall. Additionally, Standard Fire used a price per foot of Gypsum Drywall of $1.71 (removed and replaced). Standard Fire paid a total of $2,742.44 for Wall Drywall. If Standard Fire had paid for four feet of drywall, it would total $1,371.22, inflating the adjustment by **$1,371.22**.

2. Standard Fire improperly paid for damage caused to the ceiling. Based on the flood line of approximately four feet and Branch's inspection, the flood did not damage the ceiling. Standard Fire's adjustment included several items relating to purported damage to the ceiling, which is inconsistent with the rules, regulations, and guidelines governing flood adjusting. These items include removing and replacing the drywall in the ceiling at $1.71 per square foot; painting the ceiling at $0.60 per square foot; on these errors alone, Standard Fire's adjustment was improperly inflated by **$2,725.14.**

3. Standard Fire improperly paid for damage caused to the ceiling insulation. Based on the flood line of approximately four feet and Branch's inspection, the flood did not damage the ceiling insulation. Standard Fire's adjustment included several items relating to purported damage to the ceiling insulation, which is inconsistent with the rules, regulations, and guidelines governing flood adjusting. These items include removing and replacing the insulation in the ceiling at $1.27 per square foot. Standard Fire's adjustment was improperly inflated by **$1,819.65.**

4. Standard Fire improperly paid to Clean, Treat & Seal Ceiling Framing System at a cost of $0.75 per square foot, inflating the adjustment by **$1,299.75.**

5. Standard Fire improperly paid to paint the ceiling at a cost of $0.60 per square foot, inflating the adjustment by **$930.62.**

6. Standard Fire improperly paid to replace the entire wall framing system at $20.21 per linear foot. Branch disagrees that the flood damaged the framing system which then required Standard Fire to pay $4,234.00. Anti-microbial would have been sufficient. This caused the adjustment to be inflated by **$4,234.00**

7. Standard Fire improperly paid to replace 1744 square feet of exterior wall sheathing. Branch found approximately 384 square feet of exterior wall sheathing and none of it was damaged by flood. Standard Fire's adjustment was improperly inflated, inflating the adjustment by $**3,266.51.**

8. Standard Fire improperly paid for the removal Exterior Siding. Standard Fire estimated 1744 square feet of removal of Exterior Siding at $0.53 per square foot. Standard Fire determined the property only had 1306 square feet of exterior vinyl siding and only Standard Fire's flood line of five feet was exposed to flood waters (653 square feet). Based on Standard Fire's report, the adjustment was improperly inflated by **$432.48.**

9. Standard Fire improperly paid for the replacement of Exterior Siding. Standard Fire estimated 1306 square feet of replacement Exterior Siding at $2.28 per square foot. Standard Fire determined five feet was exposed to flood waters (816 square feet). Based on Standard Fire's report, the adjustment was improperly inflated by **$1,860.48.**

10. Standard Fire improperly paid for the removal of Brick Veneer. Standard Fire estimated 1744 square feet of removal of brick veneer at $2.78. The property does not have 1744 square feet of brick veneer that could be removed. The property has brick veneer only on the right front face (approximately 240 square feet). Standard Fire improperly paid, inflating the adjustment by **$4,846.32.**

11. Standard Fire improperly paid for replacement of Brick Veneer. Standard Fire estimated 436 square feet of replacement to the brick veneer at $11.46. Standard Fire improperly paid, inflating the adjustment by **$4,849.96.**

12. Standard Fire improperly paid for 1733 square feet of Residence H.V.A.C. This property is built upon a concrete foundation. All ductwork and furnaces are in the attic, well above the five foot interior flood line. Standard Fire improperly paid, inflating the adjustment by **$7,534.22.**

13. Standard Fire improperly paid for the removal and replacement of a 3 ton heat pump that was located in the attic. If this item was damaged, it would not be covered by the flood policy. Standard Fire improperly paid, inflating the adjustment by **$2,322.73.**

14. Standard Fire improperly paid for the removal and replacement of two commodes. Standard fire estimated each commode to cost $369.18. Standard fire improperly paid, inflating the adjustment by **$525.24** after depreciation.

15. Standard Fire improperly paid for the removal and replacement of two bathtubs that were not damaged by flood. Standard Fire improperly paid, inflating the adjustment by **$812.14.**

16. Standard Fire improperly paid a generalized line item for "Residence Plumbing" at a cost of $7.60 per square foot (1733). The flooding does not cause any damage to the plumbing fixtures or pipe work. Standard Fire improperly paid, inflating the adjustment by **$11,529.12.**

17. Standard Fire improperly paid a generalized line item for "Residence Electrical" at a cost of $8.37 per square foot (1733). That cost is not supportable. Xactimate figures approximately $2.83 per square foot. $8.37 - $2.83 = $5.54 X (1733) sq ft = **$9,600.82** in overpayment

18. Standard Fire improperly replaced all windows at this property.

Standard Fire's adjustment improperly overpaid at least **$59,960.40** before overhead and profit. When adding the 10% ($5,996.04) overhead and the 10% ($5,996.04) profit, the Standard Fire adjustment was inflated by at least **$71,952.48** on this claim.

After taking into account the above items that were grossly inflated, Branch concluded that the *maximum* amount of flood damages was $31,306.40, which includes 10% overhead, 10% profit, and 9% tax. It does not account for depreciation, which would *lower* the damages in the adjustment.

II. 7732 Edward St

Standard Fire/Travelers issued a flood Policy Number (6-0020-3154-7) on the property at 7732 Edward St. with a policy limit of $148,100. The property suffered damage from Hurricane Katrina, and a claim was submitted to Standard Fire under the flood policy. American Catastrophe Claims (Don Tigart) adjusted the claim on behalf of Standard Fire, and calculated a loss of $176,206.98. Because this number exceeded policy limits, Standard Fire submitted a claim to the NFIP for the policy limits of $148K.

The adjustment and claim amount submitted to NFIP were grossly inflated and not supported by the rules, regulations, and guidelines governing flood adjustments. An adjustment conducted in accordance with the applicable rules, regulations, and guidelines would show that Katrina caused flood damages of at most $31,825.11 at this property. Branch's estimate does not account for depreciation, which would further decrease Branch's estimate of damages.

A. ADJUSTING DEFICIENCIES

In completing its adjustment, Branch used Xactimate software and the starting price list of "LANO4B6B". Branch measured the flood line at approximately one foot interior. This low flood line can be seen in both Branch's and Standard Fire's photos. Standard Fire's photos show many contents still in place on top of the counters/tables. Any flood waters above these tables would have moved these contents from the original location. The flood line is very evident, and there are NOAA Flood Maps that show the water was 1' to 2' ft from street level.

Standard Fire states that the house was made of "wood frame and brick construction and is non-elevated." Standard Fire then makes a contradicting statement that the building had an 8' exterior and a 7' interior flood. The difference in water levels would seem to indicate the house was raised off the ground by 1 foot; which it is not. Both Standard Fire's and Branch's photos show approximate interior flood line of 1'.

Standard Fire made the claim that all the exterior brick, vinyl siding, including the interior framing was damaged by flood. None of these items suffered substantial damage from flood. Based on Standard Fire's report, the property should have been demolished. If you replace the wall framing system, the brick, and the siding; the only thing left is the roof framing. None of the items needed to be fully replaced due to flood damage. Standard Fire's own report supports this statement.

The 1' flood line was well below any windows. Standard Fire paid for 14 windows; 9 @ 839.66 and 5 @ $617.32 for an …….. Overcharge of $9,047.01.

Standard Fire paid for 2,052 SF of wall insulation with an RCV of $1,846.80. Branch estimated approximately 1,477 SF = 1,329.30. …….. Overcharge = $517.50

Standard Fire replaced 12 interior doors @ $277.86 + $84.05 for door hardware (RCV: $4,342.92). Branch estimated 13 interior doors @ $153.68 for a RCV of $1,997.84. Overcharge of $2,345.08

The 1' flood line was below any electrical wiring in the building, yet Standard Fire paid for 2,394 SF of electrical @ $8.28 for a RCV of $19,822.32. There was little damage to electrical system that was caused by flood. Xactimate's normal price for whole-house wiring is: $2.83 X 2,394 = $ 6,775.02 = Overcharge of $13,047.30.

Flood waters would not have damaged any of the plumbing in this building, yet Standard Fire replaced 2,394 SF of plumbing @ $6.45 SF for a RCV of $15,441.30. (Overcharge of $15,441.30)

Branch estimated the drywall & paint to repair the walls below the 1' flood line @ $3,620.12. Standard Fire paid for all the drywall/paint on the walls for $10,995.27 and a difference and overcharge of $7,375.15.

The 1' flood line that is shown in both Branch's and Standard Fire's photos would never have damaged the HVAC system located in the attic. Standard Fire paid for 2,394 SF of HVAC @ $4.78 SF for a RCV of $11,443.32. Xactimate's (LANO 436D) normal price for whole-house HVAC system is Approx. $6,944.02 which is an ……..….. Overcharge of $ 4,499.30

Branch is not aware of any adjustments which allow for Construction materials Debris pick up "after County /Parish service stops". (pg. 000029 Simsol Estimate) equals $ 7,182.88 Overcharge.

If you use his stated Sq. Ft. of Exterior wall insulation or his sq. ft. of exterior wall sheathing of 2052 divided by 8 ft. high equals 256.5 Lin. Ft. (Pg. 000025 Simsol estimate).

Yet, on page 000025 of the Simsol estimate he charges for 561 lin ft. of framing at $ 19.76 = …… Overcharge $ 11,085.36.

There was no reason to replace any of the exterior brick or vinyl siding in this building. You would not need to remove both the wall framing and the brick veneer in order to replace the moldy insulation board (or exterior sheathing).
Therefore:
1,026 Sq. ft. exterior Vinyl siding @ $ 4.17 equals. ……. $ 4,278.42 Overcharge.
And .. 1,026 Sq. ft. Brick Veneer @ $ 13.84 equals ……. $ 14,199.84 Overcharge.

Since there was only 1 ft. of flooding, the ceilings and insulation would not have been damaged by flooding:
Therefore: 2,394 Sq. Ft. Ceiling Insulation @ $ 1.33 equals …….. $ 3,184.02 Overcharge.
And: 2,394 Sq. Ft. of Ceiling Drywall @ $ 1.75 equal …….. $ 4,189.50 Overcharge.

And: 2,394 Sq. Ft. Paint/finish Ceiling @$ 0.58 equals …… $ 1,388.52 Overcharge.
And: 2,394 Sq. Ft. of Texture Ceiling @$ 0.50 equals …….. $ 1,197.00 Overcharge.

Standard Fire's adjustment was improperly inflated by at least $98,978.18 before overhead and profit. When adding the 10% ($9,897.81) overhead and the 10% ($9,897.81) profit, Standard Fire's adjustment was inflated by at least **$118,773.80** on this claim.

III. VIOLATIONS OF FLOOD ADJUSTING RULES, REGULATIONS, AND GUIDELINES

Standard Fire's use of grossly inflated prices and inclusion of items not damaged by flood violated numerous rules, regulations, and guidelines governing flood adjustments, including:

1. 44 C.F.R 62.23(e) requires that a WYO company use "its own customary standards" as it would in the ordinary and necessary conduct of its own business affairs. No reasonable adjuster would have used the above prices and included the above items in the ordinary and necessary conduct of its own business affairs.

2. 44 C.F.R 62.23(i) sets forth a number of procedures that must be followed in the adjustment of flood claims. Standard Fire's adjustment violated a number of the procedures set for in this section, including: (a) subsection (i)(1), which requires that WYO companies adjust claims in accordance with general company standards and the NFIP Claims Manual (discussed in more detail below); (b) subsection (i)(2), which requires that the WYO company's claims department verify the correctness of the coverage interpretations and reasonableness of the payments recommended by the adjusters—no reasonable claims department would sign off on the reasonableness of the payments described above or would interpret the flood policy as covering items such as the replacement of the ceiling or would agree with the flood lines used; and (c) subsection (i)(10), which governs the content of claims files—Standard Fire's claims files covering this property do not justify the coverage conclusions.

3. 44 C.F.R 62.21 states, "All adjustment of losses and settlements of claims shall be made in accordance with the terms and conditions of the policy and parts 61 and 62 of this subchapter." As discussed above, the adjustment was not made in accordance with the terms and conditions of part 62. As discussed below, the adjustment was not made in accordance with the policy.

4. The adjustment procedures that were used to arrive at the grossly inflated amounts described above violate Standard Fire's provider agreement, found at 44 C.F.R 62, Appx. A. Article II section A.2 and section G.1 require that Standard Fire comply with FIA Policy Issuances and other written standards, procedures, and guidance issued by FEMA or FIA relating to the NFIP. As further described below, Standard Fire's adjustment did not comply with the written standards, procedures, and guidance issued by FEMA.

5. As discussed above, Standard Fire is required to follow the Claims Manual issued by FEMA. Despite that obligation, Standard Fire's adjustment was entirely inconsistent with several provisions of the Claims Manual, including:

A. Section II.C.1 provides the general standards and requirements for selecting adjusters. It requires that every adjuster handling flood losses be "thoroughly familiar with the provisions of the SFIP, including coverage interpretations issued by FEMA, as explained in the NFIP Claims Presentations conducted by NFIP staff, and to adjust NFIP losses in accordance with these provisions." Standard Fire violated this provision by grossly inflating the items on the adjustment and replacing items that did not warrant replacement. For example, the NFIP Claims Presentations and SFIP would not permit the replacement of the ceiling on these properties with flood waters of only one foot or four feet.

B. Section II.C.2 provides specific standards and requirements for adjusting flood claims. Standard Fire's adjustment violated several of these requirements. Subsection (l) requires that the adjuster verify whether the reported loss resulted from flood as defined in the SFIP. Much of the damage at this property resulted in damage caused by wind. The roof shingles were blown off, the soffit and fascia as well as the vinyl siding were damaged by the winds, and the rain penetrated these breaches. And at the 7568 Horizon Drive property, the high winds blew away most of the roofing shingles, the felt and flashing. Some turbine vents, plumbing jack flashings as well as some of the windows were blown out or badly damaged. These breaches allowed the wind-driven rains to enter the dwelling. Additionally, subsection (t) requires that the adjuster accurately identify the covered damages caused by flood and to allow in the adjustment only those repairs and replacements reasonably required to restore the structure. Standard Fire violated this subsection by replacing items that did not need to be replaced, such as the wall framing system, which only needed to be cleaned. Finally, subsections (p) and (u) describe the contents of the claims file and states that the file must contain adequate notes regarding the scope of the damages and include as many photographs as are necessary to portray the damage. The photographs and notes in the claims file are not sufficient to support the flood lines or to support the adjustments.

C. Standard Fire's adjustment violated several of the guidelines set forth in Section VII, which covers "Basic Adjustment Issues." For example, the section addresses the adjuster's responsibilities and states that an adjuster must check for exterior and interior waterlines and provide the height of each in the report as well as photographs and to investigate and document all other evidence of loss. Standard Fire's adjustment failed to adequately document the flood line. As discussed above, flood waters rose to four feet (7568 Horizon) and one foot (7732 Edwards Street), but Standard Fire's claims file includes different flood lines that are not supported by the evidence as described above. Also, in failing to exclude the loss caused by wind, Standard Fire failed to properly investigate and document all other evidence of loss. Additionally, subsection K addresses repair v. replacement and instructs that "[e]verything that becomes wet is not necessarily a total loss. . . . Many buildings and contents items will respond to cleaning and need not be replaced." Standard Fire failed to heed that requirement in replacing items that could have simply been cleaned.