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

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

v. CASE NO. 1:06cv433-LTS-RHW

STATE FARM MUTUAL INSURANCE COMPANY DEFENDANT/COUNTER-PLAINTIFF

and

FORENSIC ANALYSIS ENGINEERING CORPORATION;
HAAG ENGINEERING CO.; and ALEXIS KING DEFENDANTS

DEFENDANT/COUNTER-PLAINTIFF
STATE FARM FIRE AND CASUALTY COMPANY'S REBUTTAL
MEMORANDUM IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER

The Rigsbys advance two arguments for expanding the scope of discovery in this case to engineering reports (and related engineering materials) and claim files beyond the McIntosh property. As demonstrated below, neither argument is well taken and State Farm's motion should be granted.

I. Discovery Related to Engineering Reports Beyond the McIntosh Property Should Be Denied.

As to engineering reports, the Rigsbys ignore two undeniable points. First, it is undisputed that the engineering report for the McIntosh property was ordered (1) in connection with the adjustment of the homeowners claim, and (2) only **after** State Farm paid the McIntosh flood claim. Under the False Claims Act, the law is well-settled that "'[t]he falsity of a claim is **determined at the time of submission**.'" *United States ex. rel. Longhi v. Lithium Power Techs., Inc.*, 513 F.Supp. 866, 875 (S.D. Tex. 2007) (citations omitted; emphasis in original). Accordingly, post-payment engineering reports, especially reports that do not even relate to the

McIntosh property, simply have nothing to do with this case.[1] *See also United States ex. Rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1171-72 (9th Cir. 2006) ("[F]alse claims must in fact be 'false when made.' . . . [A] palpably false statement, known to be a lie when it is made, is required for a party to be found liable under the False Claims Act.") (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996)); *United States v. National Wholesalers*, 236 F.2d 944, 950 (9th Cir. 1956) ("the test of whether a claim is false must be as of the date when the claim is made")).

Second, this Court's Hurricane Katrina related decisions have regularly rejected requests for engineer discovery dragnets of the type requested by the Rigsbys. *E.g.*, June 12, 2008 Order [117], *Perkins v. State Farm Fire & Casualty Co.*, No. 1:07cv116-LTS-RHW) (S.D. Miss.); March 28, 2008 Order [232], *Marion v. State Farm Fire & Casualty Co*., No. 1:06cv969-LTS-RHW (S.D. Miss.); December 18, 2008 Order [476], *Gagne v. State Farm Fire & Casualty Co.*, No. 1:06cv711-LTS-RHW (S.D. Miss.); August 24, 2007 Order [123], *Fowler v. State Farm Fire & Casualty Co., et al.*, No. 1:06cv489-LTS-RHW (S.D. Miss.); October 30, 2007 Order [747], *McIntosh v. State Farm Fire & Casualty Co.*, No. 1:06cv1080-LTS-RHW (S.D. Miss.). As stated in *Fowler*,

> Plaintiffs seek testimony regarding State Farm's decision to stop using engineers in Katrina slab cases. This area of inquiry is not reasonably calculated to lead to the discovery of admissible evidence. State Farm did in fact assign an engineer to inspect and prepare a report for Plaintiffs' property. Whether State Farm decided to stop using engineers for slab cases bears no relevance whatsoever on the issues presented by this case.

[1] The Rigsbys have previously admitted that they are making only a direct false claim (an improper payment to the defendant from the government) rather than a reverse false claim (the defendant has failed to pay the government when payment is otherwise obligated). Recognizing that this case does not involve a reverse false claim, the Rigsbys did not contest the dismissal of Count IV, *see* ([264] at 4), and further admitted in open court at the May 2009 evidentiary hearing that "a reverse false claim is not what's at issue here." (May 20, 2009 Hr'g Tr. At 237:20-238:11, Ex. A hereto).

The same reasoning and result are warranted here.

Finally, State Farm notes that the Rigsbys already have the McIntosh property engineering reports from Brian Ford and Jack Kelly. If any engineering reports were discoverable to this action, it would be those two reports and thus for all practical purposes the issue is moot. There is no reason to expand discovery beyond the McIntosh property and, therefore, State Farm's motion for protective order as to those requests should be granted.

II. Discovery Related to Claim Files Beyond the McIntosh Property Should Be Denied.

The Rigsbys' argument that the scope of discovery in Hurricane Katrina policyholder cases should control the scope of discovery in this False Claims Act action fails to account for the important jurisdictional differences between the two types of litigation. The False Claims Act "does not permit jurisdiction in gross just because a relator is an original source with respect to some claim." *Rockwell International Corp. v. United States*, 549 U.S. 457, 476 (2007). The Rigsbys are jurisdictionally limited to litigating, and therefore conducting discovery on, only those claims specifically alleged in their complaint – the McIntosh flood claim. They are not allowed under the False Claims Act to bring in through the discovery back door claims involving other properties that are not alleged in the complaint. As the *Rockwell* Court explained, "[w]e, along with every court to have addressed the question, conclude that § 3730 (e) (4) does not permit such claim smuggling." *Id.* at 476. Indeed, this quote from *Rockwell* was cited by Judge Senter in this case. *See* ([343] at p. 10).

In addition to the jurisdictional bar, there are important practical reasons for limiting the discovery in this case to the claim files for the McIntosh property. As Judge Senter has explained in analogous circumstances, issues related to the adjustment of Hurricane Katrina property damage claims necessarily vary from property to property. "The proof available in any

particular 'slab case' will vary greatly from the evidence in other 'slab cases.' Location along the coast, proximately to the shore line, the quality of construction, and the way the claims were handled are only four of the many possible variations that may exist." *Guice v. State Farm Fire & Casualty Co.*, 2007 WL 912120 at *2 (S.D. Miss. 2007). Judge Senter has further stated:

> Three "slab cases" have now been tried to verdict, and I have learned some important lessons from these trials, lessons that are relevant to the merits of this motion: 1) the forces exerted by Hurricane Katrina varied substantially from one location along the Mississippi Gulf Coast to another; 2) the forces exerted against a particular building varied substantially depending on the building's proximity to the shore line; 3) the damage any given building may have sustained varied substantially depending on its age, quality of construction, and even its design (e.g. gable roof compared with hip roof) and orientation to the forces exerted by the storm, particularly the wind; and 4) claims were handled by Defendant in a variety of ways. These lessons confirm the reasoning of my decisions on the plaintiff's previous motions [103][104] for class certification and inevitably lead me to the conclusion that there are as many differences between the "slab cases" as there are similarities in terms of the evidence available to ascertain the cause of the destruction and damage to these properties. For this reason, I do not believe there is any procedural advantage in creating a class of State Farm "slab cases" that would not be offset by the factors that will ultimately require the individual treatment of these claims.

Id. at *1.

State Farm submits that Judge Senter's reasoning as to the myriad differences among properties damaged during Hurricane Katrina undergirds his direct and repeated instructions to the parties that "[t]he trial of this case will be limited to the McIntosh claim," September 24, 2009 Order [363], and that the Court "will limit the presentation of evidence in this action to facts relevant to the McIntosh claim." September 24, 2009 Order [343].[2] It has become increasingly clear that the Rigsbys have never accepted those admonitions because they are

[2] State Farm notes that the Rigsbys' demand for homeowner and flood claim files for properties located within a half mile of the McIntosh property is at odds with this Court's prior discovery ruling in the McIntosh homeowner claim litigation. The Court limited the production to certain streets near the McIntosh property and rejected the demand for a half-mile radius production. November 20, 2007 Order [880]. *McIntosh v. State Farm Fire & Casualty Co.*, No. 1:06cv1080-LTS-RHW (S.D. Miss.).

bound by the monumentally important fact that Kerri Rigsby not only handled the allegedly fraudulent McIntosh flood claim but actually approved the claim for payment. The Rigsbys hope to unreasonably expand the scope of discovery in this case beyond the McIntosh property for one reason: they are fishing for flood claims that do not directly implicate the exculpatory actions and decisions of Kerri Rigsby. That is not a valid justification for their request for discovery and, accordingly, State Farm's Motion should be granted.

Respectfully submitted, this the 3rd day of February, 2010.

STATE FARM FIRE AND CASUALTY COMPANY

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CERTIFICATE OF SERVICE

I, Robert C. Galloway, one of the attorneys for State Farm Fire and Casualty Company, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following, via the means directed by the Court's CM/ECF System:

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THIS the 3rd day of February, 2010.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
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UNITED STATES OF AMERICA ex rel.
CORI RIGSBY and KERRI RIGSBY — RELATORS/COUNTER-DEFENDANTS
v. — CASE NO: 1:06cv433-LTS-RHW
STATE FARM MUTUAL INSURANCE COMPANY — DEFENDANT/COUNTER-PLAINTIFF

and

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

TRANSCRIPT OF MOTION HEARING
VOLUME 1
PAGES 1 - 186
BEFORE HONORABLE L.T. SENTER, JR.
UNITED STATES DISTRICT JUDGE

MAY 20 - 22, 2009
GULFPORT, MISSISSIPPI

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Exhibit A

to Your Honor that -- and cite to the Court that in their -- the brief, which is Document 16, that reverse false claim, which is Count Four of their complaint against State Farm -- it's Count Four of their complaint, the reverse false claim, and that's what he is making an allegation to support the relevance.

I would cite the Court to Document 64, which was the relators consolidated prehearing response to all dispositive motions, that the party represented -- the relators represented that accordingly, the relators do not oppose the motions to dismiss Count Four against State Farm. Now, this was well before this hearing and, Your Honor, we would submit that that is totally irrelevant if they're now wanting to advance some reverse false claim by State Farm from discovering a report to which they needed to either hide or disguise to the government of an improper payment, i.e., the McIntosh payment. They've represented that they're willing to dismiss Count Four against State Farm. This was before this hearing.

THE COURT: Do you want to reply?

MR. MATTEIS: Do you want me to address that one specifically? That only addressed a small portion of what I said, but I'll address it anyway.

We've dismissed the reverse false claim -- we didn't even dismiss it. We just said we wouldn't oppose it, so technically it's still in play. If they are calling this a reverse false

claim, then we would submit that now we withdraw our agreement and we'd like to keep it in play. But we don't need to because a reverse false claim is not what's at issue here. A reverse false claim is if the government -- if you falsely represent that you don't need to make a payment that you owe to the government, so, like, a tax return might be a good example of it.

This is a false claim. There's only one claim at issue here. There was a continuing duty to make sure that that claim was not false. So we're not in the reverse false claim situation at all.

MR. BEERS: And I would simply reply, Your Honor, with regards to his initial argument, there is -- it's undisputed that -- from the evidence that Your Honor has heard to this date that all efforts and actions conducted by State Farm or any of its representatives that made the determination of the amount of money paid to the McIntoshes under the flood policy occurred well prior to this engineer being assigned to conduct an examination of the McIntosh home to address structural issues and address at the request of the policyholder the payment made under the wind policy. It has nothing --

THE COURT: Let me resolve it this way so that we can move on. Even though I overruled an objection, I'm going to rethink this. I'm going to reserve a ruling on the relevance