UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, EX REL. BRANCH CONSULTANTS, L.L.C. Plaintiff	*	**CIVIL ACTION**
	*	**NO. 06-04091-SSV-SS**
VERSUS	*	**SECTION "R"**
ALLSTATE INSURANCE COMPANY, ET AL Defendants	*	**MAG. DIVISION "1"**

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REPLY MEMORANDUM IN SUPPORT OF PILOT CATASTROPHE SERVICES, INC.'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Defendant Pilot Catastrophe Services, Inc. ("Pilot") respectfully submits this Reply Memorandum in Support of its Motion to Dismiss Branch Consultants, LLC's ("Branch") Second Amended Complaint ("Complaint" or "SAC"). As Pilot demonstrated in its opening memorandum, there are two, independent reasons why Branch's claims against Pilot should be dismissed. First, they are jurisdictionally barred by the False Claims Act's first-to-file provision, 31 U.S.C. § 3730(b)(5). Second, Branch's "inflated revenue" theory fails to satisfy Rule 9(b) of the Federal Rules of Civil Procedure. Nothing that Branch asserts in its opposition demonstrates otherwise. Accordingly, Branch's claims against Pilot should be dismissed.

I. The First-To-File Bar Precludes Branch From Proceeding Against Pilot

The Fifth Circuit could not have been more clear: if an earlier-filed action "pertain[s] to . . . a narrow or readily-identifiable group of potential wrongdoers," its bars a later action against those potential wrongdoers – even if not specifically named or identified in the earlier action – pursuant to the first-to-file provision of the FCA. *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 380 (5th Cir. 2009). *See also* 31 U.S.C. § 3730(b)(5) (first-to-file rule). Here, defendant Pilot was easily among the readily-identifiable group of potential wrongdoers identified in the earlier-filed action of *United States ex. rel. Rigsby v. State Farm Ins. Co.*, No. 1:06-CV-433 (S.D. Miss. Apr. 26, 2006) ("*Rigsby*"). As a result, Branch's instant claims against Pilot must be dismissed.

Just like Branch attempts to do here, the *Rigsby* relators – the first relators to the courthouse – alleged that Allstate Insurance Company ("Allstate") engaged in fraud against the federal government by shifting wind losses to flood losses on insurance claims and by fraudulently inflating revenue by directing their co-conspirators to "hit the limits" of flood coverage. (*See Rigsby* Compl., Ex. A to Pilot's Mtn. (Doc. No. 682), ¶¶ 1, 10-13, 33, 83-89, 90-95, 96-105, 106-116.) The *Rigsby* relators, while not specifically naming Pilot as a defendant or otherwise mentioning Pilot by name, repeatedly and clearly identified Allstate's adjuster – *i.e.*, Pilot – as a co-conspirator throughout their complaint:

- Allstate ***and its adjuster "conspired . . . to adjust the losses in the Hurricane Katrina area***," *id.* ¶ 98(a) (emphasis added);
- "[f]alse statements [were made by] ***adjusters*** reflecting findings of flood damage when the real structural damage had been caused by wind, or rain," *id.* ¶ 92(c) (emphasis added);

- "[d]amage to property that was more properly reflected as wind damage, and structural damage due to wind and flying debris was characterized ***in adjusters' reports*** as 'flood damage' even though it did not meet the definition of 'flood,'" *id.* ¶ 86(a) (emphasis added);

- "***adjusters*** were told, when ***adjusting*** claims involving flood insurance, to 'hit the limits' regarding the flood coverage," *id.* ¶ 78 (emphasis added);

- the insurance companies "***acting through their . . . independent contractors***" – *i.e.*, ***the adjusters and engineers*** – "knowingly presented claims for payment of flood damage," *id.* ¶ 84 (emphasis added); and

- the insurance companies "***and their co-conspirators [i.e., the adjusters]*** acted with the intent to deceive and defraud the United States Government," *id.* ¶ 102 (emphasis added).

Further, as Branch itself alleges, Pilot was Allstate's "exclusive or near-exclusive adjuster" in connection with Hurricane Katrina. (SAC ¶ 24.) Thus, Pilot was clearly within the "narrow or readily-identifiable group of potential wrongdoers" identified by the *Rigsby* action. *Branch*, 560 F.3d at 380. As a result, the government was on notice of Branch's claims against Pilot, and Branch should be barred from proceeding against both Allstate and Pilot under the first-to-file provision.[1]

Predictably, Branch does not address the merits of this argument in its opposition to Pilot's Motion to Dismiss. Rather, Branch wrongly contends that the Fifth Circuit already considered and rejected Pilot's first-to-file argument. (Branch's Opp. at 3-5). It did not. Indeed, the Fifth Circuit did not at all address the role that Pilot plays in this case and it made no direct statement about Pilot in its opinion. Had it done so, the Fifth Circuit clearly would have dismissed Pilot.

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[1] Pilot incorporates the arguments asserted by Allstate as to why the Fifth Circuit's first-to-file decision as to Allstate remains the correct decision under present circumstances.

Instead, the Fifth Circuit focused in its opinion on whether Branch's claims in this action were barred as to the parties ***specifically named*** as defendants in *Rigsby* (Allstate and State Farm), to which the Fifth Circuit answered that they were; and whether Branch's claims against the ***industry*** of ninety-one other WYO insurers that were ***not named or identified*** in *Rigsby* (and their unreferenced adjusters) were also barred, to which the Fifth Circuit answered "no." The Fifth Circuit simply did not address the role of Pilot or Crawford and Company, the two adjusters identified by the *Rigsby* action, which are alleged to be the exclusive or near exclusive adjusters of Allstate and State Farm, the two defendant insurers actually named in *Rigsby* and which the Fifth Circuit found should be dismissed. Indeed, unlike any of the ninety-one other insurers not named in *Rigsby* (or the adjusters for those insurers), Pilot and Crawford were identified in *Rigsby* as "co-conspirators" that worked on the same "sites" as Allstate and State Farm, the defendant insurers for which they provided adjusting services. *See, e.g.*, *Branch*, 560 F.3d at 380 (first-to-file bar should apply to defendants that, although not named in earlier suit, allegedly "conspired or acted in concert" with named defendants or "work[ed] together on a particular site" with named defendants). As a result, Pilot and Crawford clearly fell within the group of "narrow or readily-identified potential wrongdoers" identified in *Rigsby*.[2]

The Fifth Circuit's lack of focus as to Pilot is demonstrated by its finding with respect to the "other defendants," where it held that the first-to-file bar could not apply to the "other defendants" because it would be difficult to argue that *Rigsby* placed the government on notice of fraud by all of the ***ninety-one other WYO insurers*** involved with Hurricane Katrina and their

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[2] Tellingly, Branch – in deciding not to try to pursue its claims against State Farm – also decided not to pursue its claims against Crawford and Company, State Farm's alleged adjuster.

adjusters. *Branch*, 560 F.3d at 380 ("Thus, *Rigsby* tells the government nothing about which of the ***ninety-one other WYO insurers*** (and adjusting firms working for or with those insurers), if any, actually engaged in any fraud.") (emphasis added); *id.* ("[F]orcing the government to . . . wad[e] through the records of ***ninety-one WYO insurers*** . . . would completely undermine the enforcement component of the FCA's *qui tam* provisions") (emphasis added).

The Court simply did not focus on the issue of Pilot, who, as Allstate's "exclusive or near exclusive" adjuster, was alleged to have co-conspired with Allstate, specifically named in *Rigsby*. In other words, Pilot stands in a totally different position – as an alleged co-conspirator of one of the parties named and identified in *Rigsby* – than the rest of the "other defendants." It is easy to argue that as Allstate's alleged co-conspirator, as asserted in *Rigsby*, Pilot was among the "narrow or readily-identifiable group of potential wrongdoers" identified in *Rigsby*. As a result, Branch's claims against Pilot are subject to dismissal under the standard articulated by the Fifth Circuit.

Nor is Branch correct in asserting that Pilot's raising this issue – without substantive response from the Fifth Circuit – in a Petition for Rehearing determines the instant motion. Pilot was correct in raising this issue before, and a Panel's summary denial of rehearing does not provide any guidance or precedential weight. *Alpha/Omega Ins. Serv. Inc. v. Prudential Ins. Co. of Am.*, 272 F.3d 276 (5th Cir. 2001) (denial of motion for rehearing has no precedential effect); *see also Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991) (summary denial of rehearing "is insufficient to confer any implication or inference regarding the court's opinion relative to the merits of a case").

In sum, the law and language from the Fifth Circuit's decision in this case demonstrates that Pilot should be dismissed from this action. The Fifth Circuit affirmed the dismissal of Allstate – for whom Pilot allegedly provided "exclusive or near exclusive" adjusting services – and held that if a first-filed complaint includes allegations regarding a "narrow or readily identifiable group of potential wrongdoers," latter actions against those potential wrongdoers must be dismissed. Pilot – as Allstate's alleged "exclusive or near exclusive adjuster" – was clearly one of those alleged potential wrongdoers identified by *Rigsby*.

II. Branch's "Inflated Revenue" Theory Should Also Be Dismissed Pursuant to Rule 9(b)

Additionally, even if the Court declines to dismiss Branch's case against Pilot on first-to-file grounds, Branch's "inflated revenue" claims should be dismissed pursuant to Rule 9(b) of the Federal Rules of Civil Procedure. Despite hemming and hawing in its opposition brief, Branch has not – and cannot – provide any particularity in support of its "inflated revenue" allegations against Pilot. Branch does not provide one example, for instance, of Pilot using "inflated prices" or ordering the replacement of undamaged property, which is the heart of this new theory. (SAC ¶ 17.) Indeed, Branch only identifies ***one property*** that it claims Pilot provided adjustment services for, and it provides absolutely no details about how Pilot used "inflated prices" with respect to that (or any other) property or ordered the replacement of undamaged property. (*Id.* ¶ 22.) Neither Branch's First Amended Complaint nor its Second Amended Complaint provides the name of a single Pilot employee who allegedly engaged in this conduct. And there is not one date – or any other details whatsoever – to support Branch's allegation that Pilot submitted false claims to the government, either on its own or through

Allstate, for which Pilot allegedly provided adjusting services. These allegations utterly fail to satisfy Rule 9(b).

III. Conclusion

For the reasons set forth above and in Pilot's opening brief, Pilot respectfully requests that the Court dismiss Branch's claims against Pilot with prejudice. The totality of Branch's case against Pilot is barred by the first-to-file provision, and Branch has failed to satisfy Rule 9(b) with respect to its "inflated revenue" theory.

Respectfully submitted,

CHOPIN, WAGAR, RICHARD & KUTCHER, LLP

By: */s/ Robert A. Kutcher*
ROBERT A. KUTCHER (LSBA #7895)
NICOLE S. TYGIER (LSBA #19814)
Two Lakeway Center, Suite 900
3850 North Causeway Boulevard
Metairie, Louisiana 70002
Telephone: (504) 830-3838

GIBSON, DUNN & CRUTCHER LLP
TIMOTHY J. HATCH (CA Bar #165369)
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000

CROSBY LAW FIRM PC
JAMES H. CROSBY
(AL Bar #ASB-7501-R61)
6404 Hillcrest Park Court
Mobile, Alabama 36695
Telephone: (251) 476-3000

Attorneys for Defendant,
Pilot Catastrophe Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and I served a copy of the foregoing pleading on all counsel for all parties, via the CM/ECF system and/or mailing same by United States Mail, properly addressed, and first class postage prepaid, to all counsel of record in this matter.

/s/ Robert A. Kutcher