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

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

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

STATE FARM MUTUAL INSURANCE COMPANY DEFENDANT/COUNTER-PLAINTIFF

and

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

MEMORANDUM IN SUPPORT OF STATE FARM FIRE AND CASUALTY COMPANY'S MOTION FOR SUMMARY JUDGMENT ON RELATORS' CLAIM FOR RETALIATORY DISCHARGE

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant State Farm State Farm Fire and Casualty Company ("State Farm"), incorrectly sued as State Farm Mutual Insurance Company,[1] submits this memorandum of law in support of its Motion for Summary Judgment as to Relators Cori and Kerry Rigsbys' claims against State Farm for violating 31 U.S.C. § 3730(h) of the False Claims Act, 31 U.S.C. § 3729-33 (the "FCA"), as alleged in Count V of the First Amended Complaint (the "FAC").

INTRODUCTION

Relators Cori Rigsby and Kerri Rigsby (the "Rigsbys") are sisters who worked for Defendant E.A. Renfroe & Company, Inc. ("Renfroe"). (FAC ¶ 27) Renfroe is "a company that

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

is an independent contractor for State Farm." (FAC ¶¶ 11-12) The Rigsbys were both employed by Renfroe to adjust and mediate claims by State Farm's policyholders in the aftermath of Hurricane Katrina, and had virtually plenary access to State Farm confidential policyholder information and claim files. The Rigsbys admit that, while working for Renfroe, they copied and stole thousands of confidential documents, searched through the State Farm database for e-mails, and accessed State Farm's password-protected computer databases, all without authorization or in excess of authorization.

The Rigsbys contend that, when State Farm learned of this activity, it discharged them from their employment with Renfroe in contravention of the anti-retaliation provision of the FCA. (FAC ¶¶ 148-50) But the anti-retaliation provision only protects an "*employee* who is discharged . . . by his or her *employer* because of *lawful* acts done by the employee" in furtherance of his or her investigation. 31 U.S.C. § 3730(h) (emphasis added). This plain language mandates dismissal of the Rigsbys' retaliatory discharge claim for at least three reasons.

First, the Rigsbys were employed by Renfroe, not State Farm. (FAC ¶¶ 11-12) "The anti-retaliation provision of the False Claims Act does not extend to independent contractors and [relator] is therefore not covered." *Vessell v. DPS Associates of Charleston*, *Inc.,* 148 F.3d 407, 413 (4th Cir. 1998).

Second, the Rigsbys were not engaged in "lawful" activity. To the contrary, they admit to stealing and copying documents, and illegally accessing State Farm computers, in order to supply information to attorneys representing State Farm policyholders (especially their primary patron, Richard F. "Dickie" Scruggs), in violation of federal and state law as well as their employment contracts with Renfroe. The fact that the Rigsbys filed a *qui tam* action does not excuse their malfeasance. *See United States v. Cancer Treatment Ctrs. of Am.*, 350 F. Supp. 2d

765, 770-71 (N.D. Ill. 2004) (finding relator who "under shroud of secrecy" removed documents for FCA action to be liable under breach of contract in spite of § 3730(h)). Further, even assuming that *some* of the Rigsbys' activities were protected under the statute (which they were not), the Rigsbys still cannot state a claim under section 3730(h) unless *all* of the activities that resulted in their termination were in furtherance of their claims under the FCA.

Finally, by their own admissions and uncontrovertable facts, the Rigsbys' activities were based on fabrications, rumor and imagination rather than legitimate proof that could reasonably lead to a viable FCA case. Such behavior is insufficient to support a Section 3730(h) claim. *See*, *e.g.*, *Lang v. Northwestern University*, 472 F.3d 493, 494-95 (7th Cir. 2006) ("[A]n employee who fabricates a tale of fraud to exact concessions from the employer, or who just imagines fraud that lacks proof, legitimately may be sacked.").

ARGUMENT AND AUTHORITIES

I. STANDARD FOR SUMMARY JUDGMENT UNDER RULE 56

The federal courts shall grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Eaves v. K-Mart Corp.*, 193 F. Supp. 2d 887, 891 (S.D. Miss. 2001). This standard mandates the entry of summary judgment "'against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case . . . .'" *Wilkinson v. Haworth*, 186 F. Supp. 2d 687, 690 (S.D. Miss. 2002) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

A summary judgment movant demonstrates that there is no genuine issue of material fact by informing the court of the basis of its motion and identifying the portions of the record that confirm the absence of genuine factual issues. *See Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 762 (5th Cir. 1996). Once the movant produces such evidence:

> the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial -- that is, the nonmovant must come forward with evidence establishing each of the challenged elements of its case for which the non-movant will bear the burden of proof at trial. The nonmovant can satisfy its burden by tendering depositions, affidavits, and other competent evidence to buttress its claim . . . . Summary judgment is appropriate, therefore, if the nonmovant fails to set forth specific facts, by affidavits or otherwise, to show there is a genuine issue for trial.

Id. (quoting *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992)).

II. THE RIGSBYS' RETALIATORY DISCHARGE CLAIM FAILS AS A MATTER OF LAW

The Rigsbys allege that State Farm discharged them from employment in retaliation for their investigation of State Farm's alleged fraud on the United States government, in violation of 31 U.S.C. 3730(h), the "whistleblower" provision of the False Claims Act. This provision is intended to prevent an employer from harassing, retaliating against, or threatening an employee who brings or assists in bringing an FCA suit. Section 3730(h) provides:

> Any *employee* who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of *lawful* acts done by the employee on behalf of the employee or others *in furtherance* of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h) (emphasis added). Under the statute, then, the Rigsbys must prove that they were: (i) State Farm employees; (ii) engaged in lawful acts; (iii) in furtherance of an action under the FCA; and (iv) for which they suffered an adverse employment action. The record evidence – largely, admissions by the Rigsbys – establishes conclusively that: (i) the Rigsbys were *not* employees of State Farm; and (ii) the Rigsbys' self-styled investigatory activities were manifestly unlawful and could not have been in furtherance of a bona fide claim under the FCA. Therefore, any claims under Section 3730(h) should be dismissed with prejudice.

A. The Rigsbys' Section 3730(h) Claim against State Farm Fails Because They Were Never State Farm Employees

The Rigsbys' retaliatory discharge claim against State Farm founders before it even starts because even the Rigsbys agree that they were "employed by E.A. Renfroe, Inc.," not State Farm. (FAC ¶¶ 11-12.) The Rigsbys further concede that Renfroe "is an independent contractor for State Farm." (*Id.*; *see also* FAC ¶ 27 ("Relators worked for E.A. Renfroe, a company that provides disaster claims management services (and claims representatives) for defendant[ ] State Farm.").)[2] "By definition, independent contractors are . . . not employees." *Hardin v. DuPont Scandinavia*, 731 F. Supp. 1202, 1205 (S.D.N.Y. 1990). This distinction is a sharp one drawn by the Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989): "[W]hen Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." This common-law definition does not include independent contractors.[3]

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[2] The Rigsbys have made the same representations in pleadings filed in *E.A. Renfroe & Company, Inc. v. Cori Rigsby Moran and Kerri Rigsby*, 2:06-cv-01752-S-JEO (N.D. Ala.). *See*, *e.g.*, *Affidavit of Declarant Kerri Rigsby* at 1 (filed October 5, 2006) ("I worked for E.A. Renfroe, an adjustment company that leases adjusters to various insurance companies around the country."); *Affidavit of Declarant Cori Rigsby* at 1 (filed October 5, 2006) (same); *Cori and Kerri Rigsby's Motion to Reconsider and Reply to Renfroe's Response to Join State Farm* at 2 ("In their adjusting work on insurance claims, the Rigsbys were employed by Renfroe, but were also acting as State Farm representatives.") (filed March 2, 2007). The Rigsbys' deposition testimony in the *Renfroe* case was to the same effect. *See*, *e.g.*, Kerri Rigsby Depo. of January 26, 2007 in *Renfroe* at 18 (January 26, 2007) ("Q. When did you first go to work for Renfroe? A. I went to work for Renfroe in May or June of 1998. Q. Okay. And while you were employed with Renfroe, you signed a number of employment agreements, did you not? A. Yes."). *See* Exhibits 1-4 to Mtn.

[3] *See N.L.R.B. v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) ("Thus there is no doubt that we should apply the common law agency test here in distinguishing an employee from an independent contractor."); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 320 (1992) ("Agency law principles comport, moreover, with our recent precedents and with the common understanding, reflected in those precedents, of the difference between an employee and an independent contractor.").

Accordingly, courts have repeatedly held that "[t]he retaliation provision of the FCA is limited to employees *and affords no protection to independent contractors.*" *United States ex rel. Watson v. Conn. Gen. Life Ins. Co.*, 87 F. App'x 257, 261 (3d Cir. 2004) (emphasis added); *Brooks v. United States of Am.*, 383 F.3d 521, 524 (6th Cir. 2004) ("3730(h) only applies to employees (rather than independent contractors)"); *Vessell v. DPS Associates of Charleston*, 148 F.3d 407, 413 (4th Cir. 1998) ("The anti-retaliation provision of the False Claims Act does not extend to independent contractors and [plaintiff] is therefore not covered."). The Rigsbys were independent contractors. On this point alone, their retaliatory discharge claim against State Farm must be dismissed.

The Rigsbys attempt to paper over this obvious and fatal flaw in their claim by alleging that "Defendant State Farm conspired with Defendant E.A. Renfroe . . . to impose retaliatory actions on Cori and Kerri Rigsby." (FAC ¶ 34) But "conspiracy" is not recognized under section 3730(h). *See Mruz v. Caring, Inc.*, 991 F. Supp. 701, 709 (D.N.J. 1998) (noting that "it is quite clear that had Congress intended to provide a remedy against those who aid and abet, or conspire to discharge, demote, suspend, or discriminate against their employees, it certainly knew how to do so" and refusing to extend the "whistleblower" provision in a "wholesale and unprecedented fashion"). Accordingly, any claim that State Farm is liable for conspiring to commit an adverse employment action against the Rigsbys must fail as a matter of law.

B. The Rigsbys Were Not Engaged in Protected Actions as Required by 31 U.S.C. § 3730(h)

1. The Rigsbys Were Not Engaged in Lawful Activity

The Rigsbys' retaliatory discharge claim suffers from a second fatal flaw, namely, the fact that section 3730(h) applies only to *lawful* actions taken by employees. *See Velazquez v. Landcoast Insulation, Inc.*, No. 06-0174, 2007 WL 902297, at *5 (W.D. La. Mar. 22, 2007) ("In

other words, plaintiff has failed to show he took lawful acts in furtherance of a potentially false claim for payment made by [his employer] to an agent of the United States. . . ."). As the Fifth Circuit observed, the statute provides no shield for employees discharged for unlawful actions. *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994). Rather, "the legislative history makes clear that a 'whistleblower must show the employer had knowledge the employee engaged in protected activity.'" *Id.* (citing S. Rep. No. 345, 99th Cong., 2d Sess. 35 (1986)). Thus, the Rigsbys' section 3730(h) argument "turns on whether the record supports an inference that . . . [Relators] engaged in 'protected activity.'" *Id.* The Rigsbys have not produced any facts supporting such an inference in this case.

To the contrary, the Rigsbys' actions in copying and disclosing to third parties the confidential documents of State Farm and private data of the insured cannot, by any interpretation, be considered lawful. Significantly, this Court recently precluded the Rigsbys from making use of State Farm documents obtained outside normal discovery procedures. In *McIntosh v. State Farm Fire and Casualty Co., et al.*, No. 1:06CV1080 LTS-RHW, the Court ordered that "any documents supplied by the Rigsby sisters to the Scruggs Katrina Group or the Katrina Litigation Group or its associates shall be **EXCLUDED** from evidence unless the plaintiffs can show that the documents were obtained through ordinary methods of discovery." (*McIntosh* Dkt. 1173 at 1 (emphasis in original). Although the basis for the Court's order was the improper payment of $150,000 per year to each of the Rigsbys by the Scruggs Katrina Group, the Court also observed that "the other ethical misconduct alleged by State Farm and Renfroe are substantial." (*McIntosh* Dkt. 1172 at 2.)

In fact, the Rigsbys admit to multiple violations of the Federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030, violations of contracts (namely, the State Farm Network Access

Agreement), the Mississippi Trade Secrets Act, Miss. Code Ann. § 75-26-1 *et seq.*, and several state-law torts.[4] Such behavior is unlawful and unprotected by the FCA.

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[4] See Exhibits 4 through 15. For example, Kerri Rigsby has testified

Q. Okay. Now, the first meeting, it would have been --
A. In the last week of February.
Q. Yeah. That was the first meeting. I'm sorry. And then as we fast-forward to the March -- the additional meetings that occurred at Cori's house?
A. Right. That would be March and April.
Q. Right. At the first March or April meeting, who was present at that meeting?
A. The first March or April at Cori's home?
Q. Uh-huh.
A. Cori, Dick, my mother. And my mother's husband, Bill Lobrano, may have been there, but I don't think -- remember him participating. I think he was there for the first meeting at Cori's home. I'm not sure he was there at any other meeting at Cori's home.

….

Q. The meeting that occurred -- the first March or April 2006 meeting at Cori's house.
A. The second meeting at Cori's house?
Q. Yes.

….

Q. Okay. And were there documents present at that meeting?
A. Yes. I believe there were.
Q. What about a computer?
A. I think there was a computer present. I know there was a computer present at our first meeting.
Q. And by "the first meeting," you mean the February 2006 meeting?
A. February. And I believe there was a computer present at our second meeting, as well.
Q. That occurred at Cori's house?
A. Yes.

….

Q. Okay. And was the computer accessed during the course of the meetings?
MR. BACKSTROM:
Let me object and instruct not to answer as to any materials reviewed during that meeting.
MS. LIPSEY:
I don't believe that's what I'm asking for.
Q. I'm just asking if a computer was accessed during that meeting?
A. Was accessed?
Q. Yeah. Did somebody get on the computer in the course of the meeting?
A. Yes.
Q. And who was that?
A. I know Cori did, and I believe I did as well.
Q. Okay. And was State Farm information accessed at that meeting?
MR. BACKSTROM:
I'm going to object and instruct not to answer.

For instance, in *Scott v. Metropolitan Health Corp.*, the Sixth Circuit found "secret" document alteration by an FCA relator to be a sufficient reason for discharge. 234 F. App'x 341, 351-52 (6th Cir. 2007). Similarly, in *United States v. Cancer Treatment Centers of America*, 350 F. Supp. 2d 765 (M.D. Ill. 2004), the court found that a relator who "under shroud of secrecy" removed documents for an FCA action was liable for breach of her employment contract despite her attempt to invoke section 3730(h). *Id.* at 770-71.

Here, the Rigsbys' admitted actions were in direct contravention of the law and the terms of their employment contracts with Renfroe and the terms of their network access agreements with State Farm. As one court explained in dismissing analogous claims, such violations are not shielded by section 3730(h):

> Endorsing such theft or conversion would effectively invalidate most confidentiality agreements, as employees would feel free to haul away proprietary documents, computers, or hard drives, in contravention of their confidentiality agreements, knowing they could later argue they needed the documents to pursue suits against employers under a variety of statutes protecting employees from retaliation for publicly reporting wrongdoing, such as Sarbanes-Oxley, the False Claims Act, and the Fair Labor Standards Act . . . . Indeed, were courts to adopt [plaintiff's] argument, litigation would likely blossom like weeds in spring: for every legitimate whistleblower aided by this rule, many more disgruntled employees would help themselves to company files, computers, disks, or hard drives on their way out the door to use for litigation leverage or for mere spite.

JDS Uniphase Corp. v. Jennings, 473 F. Supp. 2d 697, 702-03 (E.D. Va. 2007) (citations omitted). Cases addressing similar conduct under other federal retaliatory discharge statutes

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MS. LIPSEY:
Q. The computers that were at the meeting, I think you said it may have been either perhaps both your computer and Cori's computer. Both of these computers are laptops, right?
A. Yes.
Q. And both of these were State Farm computers, right?
A. Yes.

Deposition of Kerri Rigsby Vol. II in *McIntosh v. State Farm*, U.S.D.C. So. Dist. Miss. So. Div., 1:06-cv-1080-LTS-RHW (November 20, 2007) at 625-28 (Ex. 12 to Mtn.).

further confirm that the Rigsbys' document theft is not a protected activity. For instance, in *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 897 (10th Cir. 1994), a Title VII case, the Tenth Circuit found that there was no evidence of retaliation when a defendant discharged an employee after discovering the theft of documents. Where plaintiff "confirmed that she stole the confidential documents from [defendant] and that [defendant] did not fire her until it learned of the theft," the plaintiff "failed to show a causal connection between her termination and the lawsuit instituted against the [defendant]." *Id.*[5]

In short, the law fully comports with common sense: "[C]ompanies must be able to trust their employees and be assured that no one is stealing documents from offices or private files. It is also obvious that companies must be able to discharge a thief or an untruthful employee." *6 West Ltd. Corp. v. N.L.R.B.*, 237 F.3d 767, 778 (7th Cir. 2001). The Rigsbys violated that trust at the most basic level. Thus, any actual or constructive termination by Renfroe was more than justified.

2. The Rigsbys Must Show That All of the Actions Resulting in Termination Were in Furtherance of Their False Claims Act Suit

Even if the Rigsbys could establish that some portion of their activities were not unlawful, and therefore potentially protected under the statute, the Rigsbys must still show that the actions for which they were discharged were *in furtherance of an FCA claim*. *See Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 187 (3d Cir. 2001) ("In addressing what activities constitute

[5] *See also Kempcke v. Monsanto Co.*, 132 F.3d 442, 445-46 (8th Cir. 1998) (Under the ADEA "an employee who steals confidential company documents, even documents that may evidence discrimination, has not engaged in protected activity that will support a retaliation claim if he is discharged for theft."); *Echelkamp v. Beste*, 315 F.3d 863, 871 (8th Cir. 2002) (where plaintiff in ERISA action knew of stolen documents, "did not reveal that information to management when directly questioned him about it, and . . . attended meetings where the documents were discussed," employer had "legitimate nondiscriminatory reasons" that defeated retaliatory discharge claims); *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246 (5th Cir. 1985) (finding proof that plaintiff "was discharged because . . . she wrongfully took important company documents" enough to rebut accusation of pretextual discharge under Title VII).

'protected conduct,' the case law indicates that 'protected [conduct]' requires a nexus with the furtherance of 'prong of [a False Claims Act] action'") (internal quotation marks omitted); *McKenzie v. BellSouth Telecomms., Inc.*, 219 F.3d 508, 515 (6th Cir. 2000) ("The legislative history directive to 'broadly construe' the plaintiff's 'protected activity,' however, does not eliminate the necessity that the actions be reasonably connected to the FCA, which was designed to encourage and protect federal whistleblowers."). Plainly, the Rigsbys' actions were not *all* in furtherance of their FCA claim. To the contrary, the Rigsbys admit that they stole thousands of State Farm's confidential documents – guided in part by a list of Scruggs's clients – and turned them over to Scruggs for use in his civil litigation against State Farm.[6] Where, as here, a relator's activities have no nexus to an FCA claim, section 3730(h) provides no protection. *See, e.g.*, *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp. 2d 1034, 1052 (N.D. Ill. 1998) ("The statute's whistle blower protections are aimed at employees 'exposing fraud' or attempting to 'expose fraud,' not employees with concerns wholly detached from the purportedly fraudulent activity.").

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[6]

Q. Ms. Rigsby, you've testified regarding engineering roster. Was that the only roster I used to download data on or about June 3?

A. No.

Q. What other roster did you use?

A. I had a roster of Dick's clients.

Deposition of Cori Rigsby in *E.A. Renfroe & Company, Inc. v. Cori Rigsby Moran and Kerri Rigsby*, U.S.D.C. N.D. Ala., So. Div., 06-WMA-1752-JEO (January 14, 2008) at 91 (Ex. 15 to Mtn.).

3. The Rigsbys' "Investigation" Is a Hodgepodge of Fabrications and Objectively Unreasonable Suspicions That Could Not and Do Not Reasonably Lead To a Viable FCA Case.

The Rigsbys' pretense of protected activity under section 3730(h) fails not only because their actions were unlawful and not done in furtherance of an FCA claim, as shown above, but also because their actions could not and did not lead to a viable FCA case. Section 3730(h) only protects an "*employee* who is discharged . . . because of *lawful* acts." "[A]n employee who fabricates a tale of fraud to extract concessions from the employer, or who just imagines fraud but lacks proof, legitimately may be sacked." *Lang v. Northwestern University*, 472 F.3d 493, 494 (7th Cir. 2006). Here, the Court need look no further than the three "specific instances" of false claims alleged in the Rigsbys' complaint to see clearly that their accusations are either fabricated or nothing more than unreasonable suspicion.

a. The McIntosh Property

The centerpiece of the Rigsbys' FCA claim is two engineering reports prepared by Forensic Analysis Engineering Corporation ("Forensic") regarding the McIntosh property. (FAC ¶¶ 65-70) The FCA theory of fraud on the federal government is that "State Farm has engaged in reallocation of claims from wind damage to flood damage." (FAC ¶ 65) The McIntosh claim is alleged by the Rigsbys to be an example of State Farm's procuring a second engineering report in order to falsify and reallocate financial responsibility for the loss from the State Farm homeowners' policy to the federal flood policy.

The fantasy of the Rigsbys' assertion, however, is demonstrated by the fact that Kerri Rigsby was integrally involved in the adjustment of the McIntosh claim and has testified under oath that an appropriate payment was made under the McIntosh flood policy.

Q. First of all, you were actually an adjuster that worked on the McIntosh claim; correct? Or you were a supervisor, I think.
A. Right. Correct. I was a supervisor to the adjuster who worked the McIntosh claim.
Q. And actually went out and inspected that loss.
A. I did.

. . . .

Q. And as a result of your inspection, a determination was made to pay the policy limits under the flood policy and also to make a wind payment for what you could determine to be wind damage.
A. Correct.

. . . .

Q. And according to -- according to the initial investigation and adjustment, there was flood damage and wind damage; correct?
A. Whose initial?
Q. Yours.
A. Yes, we thought there was flood and wind damage.

. . . .

Q. And when you made the payment or agreed or authorized your subordinate, who was working -- primarily working the claim, to request authority for $250,000, you thought there was at least that much flood damage to the home, didn't you?

. . . .

A. It was a large home. It was insured for a lot of money, and I -- **yeah, I believe I thought there was $250,000 worth of flood damage to that home**.

Kerri Rigsby Deposition, *Melissa and Andrew Marion v. State Farm,* U.S.D.C. So. Dist. Miss., So. Div., 1:06-cv-969-LTS-RHW, at 131:12-20, 133:1-6, 140:9-15, 139:13-23) (June 20, 2007) (emphasis added) (Ex. 10 to Mtn.).

Kerri Rigsby's sworn testimony that the flood loss (which she approved for payment under the NFIP flood policy) is legitimate forecloses any reasonable argument that the federal government was defrauded in connection with the McIntosh flood claim. Consequently, allegations related to the Forensic reports are irrelevant.

But even if the Forensic reports were relevant, Kerri Rigsby's sworn testimony also acknowledges the falsity of the allegations of the FAC that the second Forensic report was "completely different" and "did not contain any observations from the previous report, and contained numerous observations that were completely contrary to the findings in the first report." (FAC ¶ 70)

Q. This second report that we just marked as Exhibit 33 is a report that was dated October 20th, 2005. Comparing the two reports, the one we looked at a moment ago, the first forensic report of October 12 and this October 20th report, would you agree that in both reports, the engineers, in one case being Mr. Brian Ford, the other case being Mr. John Kelly, both of them addressed wind damage?
A. Yes.
Q. And then in addition to -- and the change or the difference is in addition to wind damage, the Kelly report of October 20th also reaches a conclusion that the damage to the first floor walls and floors appear to be predominantly caused by rising water from storm surge and waves. As far as conclusions, that's the -- that's the major difference, isn't it?
A. Correct.
Q. In addition, under wind damage, Mr. Kelly puts a little bit more detail in with regard to what was damaged by wind in this second bullet point. Do you see that?
A. Yes.

. . . .

Q. The top two bullet points, are those – in Mr. Kelly's report of October 20th, were those consistent with what you saw when you went out to the McIntosh home? And I'm talking about the top two bullet points in his conclusions.
A. Yes.
Q. The third bullet point, which states the damage to the first floor walls and floors appears to be predominantly caused by rising water from storm surge and waves, was that consistent with what you saw when you went out to the McIntosh home?
A. Yes.
Q. I've heard these two reports described by different individuals as being a change, that the first report said it was wind and the second report said it was water. Would you agree with me that the second report, other than being a little longer, says it was wind and water?

. . . .

A. It says "predominantly" for the first floor water. But, yes, it discusses wind and water.

BY MR. BANAHAN:

. . . .

Q. Based on what you saw when you went out there, and looking at the photographs you've seen of the McIntosh home, and the flood payment of $250,000 that was made, can you understand how anyone in State Farm management might have been concerned with the lack of completeness of the October 12th, 2005, report?

. . . .

A. Yes, I could see where they could be.

. . . .

Q. If Ms. King did not feel or anyone at State Farm management did not feel that this October 12, 2005, report was in any way complete, would it be unreasonable not to pay for it until you got a complete report?

. . . .

A. It would not be unreasonable.

June 20, 2007 Kerri Rigsby *Marion* Deposition at 141:2-143-9, 144:14-20 (Ex. 10 to Mtn.). The McIntosh property provides no objective support for an FCA claim.

b. The Mullins Property

The allegations regarding the Mullins property demonstrate that the Rigsbys are at best "Chicken Littles" who "imagined fraud but lacked any objective basis for that belief . . . ." *Lang,* 472 F.3d at 495. Advertised by the Rigsbys as the second "of two specific instances where Defendant State Farm has engaged in reallocation of claims from wind damage to flood damage" (FAC ¶ 65), the Mullins property did not even have a NFIP flood policy. Consequently, State Farm could not have submitted a false claim to the federal government concerning the Mullins property.

More particularly, the Mullins have executed sworn interrogatory responses that they never had NFIP flood insurance on the property described in the FAC and have never received

any benefits under any policy for any Hurricane Katrina-related damages to that property. *See* Exhibit 16 (Pls.' Resp. to Interrogs. 9 & 10 in Mullins filed October 30, 2006.). Nothing could more completely establish the fact that the Rigsbys' allegations are baseless speculation. *See also Hoyte v. American Nat'l. Red Cross*, No. 06-5230, 2008 WL 564649 at *4 (D.C. Cir. 2008, March 4, 2008)(investigation activity of relator not protected under Section 3730(h) "because under any view of the facts as alleged the claim lacked one of the legal requirements for a reverse false claims charge").

c. Backdating of Agent Meyers' Flood Policy

Finally, the Rigsbys boldly allege that "State Farm Agent Mike Myers [sic] did not have Flood Insurance through the NFIP before Katrina hit" (FAC ¶ 97) and that "Myers [sic], working with someone in underwriting at State Farm, backdated a policy for himself and for several others who did not have flood coverage." (FAC ¶ 99) Such allegations are plainly incendiary; it is the stuff of newspaper headlines designed to ruin reputations and attract media attention. And the allegations simply are not true according to the sworn testimony of Kerri Rigsby:

> Q. Do you have any personal knowledge yourself that would support or provide any evidence that such backdating allegedly occurred had actually occurred?
>
> A. I have no personal knowledge.
>
> ....
>
> Q. But other than Mike Meyers, any other specific agency name or agent name that you can recall?
>
> A. No, no.
>
> 386
>
> Q. Even in the form of an allegation against an agent?
>
> A. Not even in the form of an allegation.

Deposition of Kerri Rigsby in *McIntosh v. State Farm,* U.S.D.C. S.D. Miss., So. Div., 1:06-cv-LTS-RHW (April 30, 2007) at 383-84 (Ex. 13 to Mtn.). At best, the backdating allegations are purely speculative. *See, e.g., Lang*, 472 F.3d at 495 ("What Lang actually believed is irrelevant, for people believe the most fantastic things in perfect good faith; a kind heart but empty head is not enough.").

CONCLUSION

The Rigsbys' claims are either demonstrably false or plainly fantastic. They should never have been made in the first place. "Denouncing other persons as criminals . . . is serious business; considerable trouble and expense may be required to set things straight, if the stain can ever be erased." *Lang*, 472 F.3d at 495.

The Rigsbys' claim of retaliatory discharge under the FAC is fatally flawed. The Rigsbys were not State Farm employees, their activities were not lawful, and their allegations are admittedly either false or based entirely on rumor and speculation.

For the foregoing reasons, the Court should enter summary judgment against the Rigsbys on the retaliatory discharge claims under 31 U.S.C. § 3730(h) as set forth in Count V of the First Amended Complaint.

Dated: April 8, 2008

Respectfully submitted,

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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 Electronic Filing System:

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