

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

**DEFENDANT/COUNTER-PLAINTIFF
STATE FARM FIRE AND CASUALTY COMPANY'S
MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION**

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Defendant/Counter-Plaintiff State Farm Fire and Casualty Company, improperly denominated in the First Amended Complaint (“FAC”) as “State Farm Mutual Insurance Company” (“State Farm”),¹ respectfully submits this memorandum in support of its Motion to Dismiss for Lack of Federal Subject Matter Jurisdiction.

PRELIMINARY STATEMENT

In 1968, Congress enacted the National Flood Insurance Program (“NFIP”) to make federal flood insurance available to homeowners because flood insurance is generally unavailable in the private insurance market. In 1983, the Federal Emergency Management Agency (“FEMA”), which administers the NFIP, *see* 44 C.F.R. §§ 61.1-78.14 (2007), established the Write Your Own (“WYO”) program, by which commercial insurers sell and administer flood insurance policies backed by the United States. *See id.* at § 62.23. NFIP insurance policies are standard form contracts, the language of which is prescribed by federal regulation. *See id.* at § 62.23, App. A(2).

Given the magnitude and severity of the flood losses suffered from Hurricane Katrina, many claims were submitted to the federal government to indemnify NFIP policyholders. The Federal Insurance Administrator described Hurricane Katrina as a “monumental flooding event” that was “unprecedented in the history of the NFIP.”² Hurricane Katrina destroyed or made uninhabitable approximately 300,000 homes. More than 165,600 claims for indemnification from the NFIP have been resolved for approximately \$15.8 billion.³

¹ State Farm Fire and Casualty Company, not State Farm Mutual Insurance Company (an entity that does not exist), is the Write Your Own carrier under the National Flood Insurance Program.

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

³ *See* <http://www.fema.gov/business/nfip/statistics/sign1000.shtm> (last visited Mar. 31, 2008). By statute, homeowners may purchase up to \$250,000 of NFIP coverage on their dwelling and up to \$100,000 of NFIP coverage on their personal property. *See* 42 U.S.C. §§ 4013(b)(2), (3).

Relators Cori and Kerri Rigsby (the “Rigsbys”) are sisters who were employed by E.A. Renfroe & Company, Inc. (“Renfroe”) to assist in adjusting and managing State Farm’s Hurricane Katrina claims in Mississippi. (*See, e.g.*, FAC (Dkt. 16) ¶¶ 11-12, 27-28.) The Rigsbys knew that federal law requires that when a WYO company also provides homeowners insurance, one adjuster must be used. (*See id.* at ¶¶ 54-55.) At the heart of their claims, the Rigsbys allege that in adjusting claims for wind damage (as a covered peril under a homeowners policy) and flood damage (as a covered peril under a NFIP policy), State Farm shifted and misallocated claims from wind to flood so that the indemnity would be paid by the United States instead of State Farm. (*See id.* at ¶¶ 56-57, 65-77.)

The False Claims Act (“FCA”) prohibits a person from knowingly presenting false or fraudulent claims for payment to the federal government. While the FCA is primarily a device that allows the federal government to police false claims, the *qui tam* provisions of the FCA allow private individuals to bring actions on behalf of the United States. Yet stringent jurisdictional limits circumscribe the *qui tam* provisions and bar *qui tam* suits that are based on publicly disclosed information, unless the person bringing the action is an “original source” with “direct and independent knowledge” of the fraudulent acts and has timely provided the information to the government.

Allegations of federal flood insurance fraud arose soon after Hurricane Katrina struck. Within three weeks of Katrina, litigation was commenced in this Court which specifically alleged that State Farm was improperly attempting to shift its losses to the NFIP rather than making payments under its homeowners policies. So, too, less than two months after Hurricane Katrina, Congress held hearings about the NFIP, during which allegations were asserted that WYO carriers such as State Farm had a conflict of interest in allocating damages between wind

and flood, and were wrongly overpaying federal flood claims in an effort to reduce or eliminate payments on claims for wind damage. Immediate governmental audits of the WYO carriers were also urged in order to bring this situation to a quick end.

Given the public disclosure, the Rigsbys' *qui tam* claims are barred for lack of federal subject matter jurisdiction unless they can demonstrate that they satisfy the FCA's "original source" provisions – which they cannot do. Beyond issues concerning untimeliness, the only "two specific instances" of allegedly fraudulent federal flood claims that the Rigsbys advance – McIntosh and Mullins – fail.

The McIntosh property admittedly sustained significant flood damage. Additionally, the Mullins property never had federal flood insurance and no flood claim was submitted to the federal government. These deficiencies are fatal to the Rigsbys' claims and divest this Court of subject matter jurisdiction over them. Moreover, the Rigsbys' failure to provide evidence of even one fraudulent federal flood claim is not surprising. Following its investigation, the Department of Homeland Security's Office of Inspector General found no evidence that federal flood insurance had been used to subsidize wind claims, that wind damage had been attributed to flooding, or that flood insurance had paid for wind damage.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION UNDER THE "PUBLIC DISCLOSURE" BAR

The FCA expressly denies subject matter jurisdiction to federal courts over a cause of action based on allegations that were publicly disclosed before the lawsuit was initiated and for which the plaintiff is not the "original source." 31 U.S.C. § 3730(e)(4); *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1401, 1406 (2007). The *qui tam* provisions of the FCA create "incentives for potential whistle blowers to assist the government to discover fraud against the taxpayers." *United States v. United States ex rel. Thornton*, 207 F.3d 769, 771 (5th Cir. 2000).

Yet “[o]nce the information is in the public domain, there is less need for a financial incentive to spur individuals into exposing frauds,” *United States ex rel. Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 685 (D.C. Cir. 1997), and “there is little point in rewarding a second toot,” *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Thus, “these jurisdictional requirements . . . ensure that the Act’s rewards are available only where, at the time the *qui tam* claims were filed, the federal government was not already “on the trail” of the alleged wrongdoing.” *United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 42 (D.D.C. 2007) (citation omitted).

As a threshold matter, this Court must determine whether any of the Rigbys’ claims are blocked by the jurisdictional bar of section 3730(e)(4) **before** it can address any other issue. *Wang*, 975 F.2d at 1415. “[A] challenge under the FCA jurisdictional bar is necessarily intertwined with the merits and is, therefore, properly treated as a motion for summary judgment.” *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg’l Healthcare Sys.*, 384 F.3d 168, 173 (5th Cir. 2004) (citations and internal quotation marks omitted).⁴ There is no presumption of subject matter jurisdiction, *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), and, as the parties invoking federal jurisdiction, the Rigbys have the burden of proving its existence, *United States ex rel. Ward v. Comm’l Metals Co.*, No. C-05-56, 2007 WL 1390612, at *9 n.7 (S.D. Tex. May 9, 2007) (citing *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998)). Moreover, “statutes conferring jurisdiction on

⁴ In addition to the evidentiary record, the Court may take judicial notice of adjudicative facts. *See Fed. R. Evid.* 201; *In re Katrina Canal Breaches Consol. Litig.*, 533 F. Supp. 2d 615, 632 (E.D. La. 2008) (district court’s consideration of background information as to action against government relating to Hurricane Katrina floodwater damage, including facts from amended complaint and government publication which provided timeline and facts surrounding certain relevant legislation, did not require conversion of government’s motion to dismiss into motion for summary judgment) (authorizing judicial notice of adjudicative facts).

federal courts are to be strictly construed, and doubts resolved against federal jurisdiction.”
Boelens v. Redman Homes, Inc., 748 F.2d 1058, 1067 (5th Cir. 1984).

A. The Statutory Provisions of the “Public Disclosure” Bar

To prevent “parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud,” *Reagan*, 384 F.3d at 174 (citations omitted), Congress has denied federal courts subject matter jurisdiction over FCA claims based in whole or in part upon publicly disclosed allegations raised in civil or Congressional hearings unless the person bringing the action is an “original source” of the allegations of each false claim alleged in the complaint:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

An “original source” is defined, in turn, as an individual who has direct and independent knowledge of the fraudulent acts alleged in the complaint and who has made a timely prior disclosure of those facts to the federal government:

For purposes of this paragraph, “original source” means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(B).

Review of the law and the facts compels the conclusion that the Rigbys’ claims of NFIP fraud are based on publicly disclosed allegations, and they are not an original source with direct and independent knowledge of information that was provided to the government in a timely

manner. As the following analysis reveals, courts routinely dismiss *qui tam* claims for lack of subject matter jurisdiction under such circumstances.

B. Allegations of Fraud Were Publicly Disclosed Soon After Katrina Struck

“Section 3730(e)(4)(A) bars actions based on publicly disclosed allegations whether or not the information on which those allegations are based has been made public.” *Rockwell*, 127 S. Ct. at 1407. To this end, “it has been held, repeatedly, that ‘[d]isclosures which reveal *either* the allegations of fraud *or* the elements of the underlying fraudulent transaction are sufficient to invoke the jurisdictional bar.’” *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg’l Healthcare Sys.*, 274 F. Supp. 2d 824, 842 (S.D. Tex. 2003) (citation omitted), *aff’d*, 384 F.3d 168 (5th Cir. 2004). “All that is required is that public disclosures put the government on notice to the possibility of fraud,” *Dingle v. Bioport Corp.*, 388 F.3d 209, 214 (6th Cir. 2004), and “[t]he words fraud or allegations need not appear in the disclosure for it to qualify.” *Id.*

Allegations of fraudulent overpayments to flood victims surfaced publicly soon after Hurricane Katrina struck the Gulf Coast on August 29, 2005, and months before the Rigsbys provided their information to the government on April 24, 2006.

1. Allegations Were Publicly Disclosed in Civil Complaints

On September 20, 2005, plaintiffs were already alleging in complaints in civil actions that State Farm, among other insurers, was engaged “[i]n an effort to save money and *pass on the costs of the loss to the federal flood insurance program,*” rather than making payments under homeowners insurance policies. *See Cox v. Nationwide Mut. Ins. Co.*, No. 1:05-cv-436-LG-RHW (S.D. Miss.), Cmpl. (Dkt. 1) ¶¶ 1(d), 6, 12 (emphasis added) (Ex. 2 to Mtn.). On January 31, 2006, it was further alleged that State Farm and others had improperly sought to “*shift repayment obligations to the Federal Flood Insurance Program . . . at . . . taxpayers’*

expense.” See *Comer v. Nationwide Mut. Ins. Co.*, No. 1:05-cv-436-LTS-JMR (S.D. Miss.), Second Am. Cmpl. (Dkt. 53-1) ¶¶ 1(d), 5, 12 (emphasis added) (Ex. 3 to Mtn.).⁵

Allegations in civil complaints are “public disclosures” in a “civil hearing” under section 3730(e)(4)(A). See *Reagan*, 384 F.3d at 174; *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 939 (6th Cir. 1997); *Hockett*, 498 F. Supp. 2d at 46. Indeed, the Fifth Circuit has repeatedly held that “[a]ny information disclosed through civil litigation and on file with the clerk’s office should be considered a public disclosure of allegations in a civil hearing for the purposes of section 3730(e)(4)(A).” *Reagan*, 384 F.3d at 174 (emphasis added) (quoting *Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1995)).

2. Allegations Were Publicly Disclosed in Congressional Hearings

On October 18, 2005, a Congressional hearing expressly covered the topic of alleged fraudulent overpayments by WYO companies, and it included testimony specifically alleging that insurers were overpaying flood claims so that they would not have to pay wind claims – precisely the same allegation that the Rigsbys later made in their pleadings. To this end, J. Robert Hunter, the Director of Insurance for the Consumer Federation of America and a former Federal Insurance Administrator who ran the NFIP, testified before the Senate Committee on Banking, Housing and Urban Affairs that WYO carriers⁶ had incentives to unfairly allocate

⁵ *Cox* and *Comer* are the same case. It was brought as a putative class action on behalf of Mississippi property owners. When Mr. Cox withdrew, Mr. Comer was substituted as the first named plaintiff. (See *Comer* Dkt. 2.)

⁶ Unlike innumerable Medicare secondary payers, there were a limited number of NFIP carriers in Mississippi and Louisiana at the time of Hurricane Katrina, with State Farm being the largest and most easily identifiable. FEMA’s website identifies a total of only 43 WYO companies as offering flood insurance in Mississippi or Louisiana. See <http://www.fema.gov/nfipInsurance/companies.jsp> (last visited Mar. 31, 2008). Thus, the fact that these allegations did not specifically name State Farm is of no legal significance. See, e.g., *United States ex rel. Gear v. Emergency Med. Assocs. of Ill., Inc.*, 436 F.3d 726, 728-29 (7th Cir. 2006); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 572 (10th Cir. 1995); *Findley*, 105 F.3d at 687.

damages to NFIP policies in the wake of Hurricane Katrina, and he urged an audit by the Government Accountability Office (“GAO”).

Since Hurricane Katrina devastated the Gulf Coast, there has been much public discussion about whether damage to homes was caused by wind and rain, or by flooding.

....

To the extent that insurers underpay wind when *allocating damage between their homeowners’ policy and the NFIP policy*, taxpayers will suffer.

....

For the benefit of taxpayers’ and those with no flood insurance, it is essential that the government assure a fair and proper *allocation of the wind/flood damage by the WYO insurance companies* who have a serious conflict of interest. CFA urges this Committee to insure that the *GAO audits these allocations starting right now, so that any tendency of the insurers to diminish their wind losses for their own benefit is stopped quickly*.

Oct. 18, 2005 Written Test. of J. Robert Hunter, 2005 WLNR 16872930, at 6-8 (emphasis added) (Ex. 4 to Mtn.).

These allegations were underscored in Dr. Hunter’s oral testimony as well.

You must make sure that the Write Your Own insurers do not hurt taxpayers by overstating flood damage in their claims adjustment, as oppose to wind. You can see the conflict of interest. If it’s a flood damage, they don’t pay anything. They just adjust it and send the bill to us as taxpayers. If it’s a wind damage, it affects their bottom line. There are serious questions about where wind stops and flood starts. Many lawsuits have already been filed. And there will be more. It’s not a slam dunk that these damages are not wind related. . . . I think GAO – I’m glad to hear they’re there. You should make sure they do a really good audit.

Oct. 18, 2005 Statement of J. Robert Hunter, 2005 WL 2661294, at 24 (emphasis added) (Ex. 5 to Mtn.).⁷ The testimony of witnesses submitted at a Congressional hearing are “public

⁷ These allegations were made at a Congressional hearing two days *before* the issuance of the second (October 20, 2005) engineering report on the McIntosh property, the subsequent discovery of which the Rigsbys say caused them to first form their concerns about the activities at State Farm. (See, e.g., Kerri Rigsby Deposition of June 20, 2007 in *Melissa and Andrew Marion v. State Farm Fire and Casualty Company*, U.S.D.C. So. Dist. Miss., So. Div., 1:06-cv-969 LTS-RHW at 76:13-78:3 (Ex. 6 to Mtn.); Kerri Rigsby Deposition of November 20, 2007 in *Thomas C. McIntosh and Pamela McIntosh v. State Farm Fire and Casualty Company*, U.S.D.C. So. Dist. Miss., So. Div., 1:06-cv-LTS-RHW at 511:14-514:15, 650:9-651:4 (Ex. 7 to Mtn.); Cori Rigsby Deposition of November 19, 2007 in *McIntosh* at 308:12-313:24, 356:23-359:25, 513:1-25 (Ex. 8 to Mtn.).

disclosures” under 31 U.S.C. § 3730(e)(4)(A). *See, e.g., Dingle*, 388 F.3d at 211; *United States ex rel. Precision Co.*, 971 F.2d 548, 553-54, n.5 (10th Cir. 1992).

On February 2, 2006, months before the Rigsbys made their filings, another Congressional hearing was held on the NFIP before the same Senate Committee. Dr. Hunter again testified about alleged wind/water allocation issues and repeated his assertion of the need for a GAO audit. *See* Feb. 2, 2006 Written Test. of J. Robert Hunter, 2006 WLNR 1848600, at 6 (Ex. 9 to Mtn.).

As courts have held, “[t]he level of public disclosure necessary to trigger the bar is relatively low, may be general in nature, and a relator’s ability to provide more specific information than that relayed by the public disclosure is irrelevant.” *Hockett*, 498 F. Supp. 2d at 46 (quoting *Findley*, 105 F.3d at 687). Here, the Rigsbys have “done little more than record in a lawsuit what can be heard in the public domain.” *Id.*

C. The *Qui Tam* Action Is “Based Upon” Publicly Disclosed Allegations

“[A]n FCA qui tam action *even partly based upon* publicly disclosed allegations or transactions is nonetheless ‘based upon’ such allegations or transactions.” *Fed. Recovery Servs.*, 72 F.3d at 451 (alteration and emphasis in original) (quoting *Precision*, 971 F.2d at 552); *accord Reagan*, 384 F.3d at 176. “[T]he jurisdictional bar is triggered whenever the relator files a complaint describing allegations or transactions substantially similar to those in the public domain, regardless of the actual source for the information in the particular complaint.” *Findley*, 105 F.3d at 682 (citing *Precision*, 971 F.2d at 552); *see also id.* at 683.

Thus, “[t]o be based upon a public disclosure, an action need not actually be derived from the publicly disclosed allegations or transactions,” *United States ex rel. Richardson v. E-Sys., Inc.*, No. 3:90-CV-0607-P, 1999 WL 324666 at *3 (N.D. Tex. May 18, 1999) (citing *Findley*,

105 F.3d at 682); *see also Wercinski v. IBM Corp.*, 982 F. Supp. 449, 458-59 (S.D. Tex. 1997), and as long as the publicly disclosed information is substantially similar to the allegations in the complaint, it need not “precisely mirror” or “precisely repeat” the allegations in the *qui tam* complaint for the jurisdictional bar to operate, *United States ex rel. Rosales v. San Francisco Hous. Auth.*, 173 F. Supp. 2d 987, 995-96 (N.D. Cal. 2001); *see also United States ex rel. Lam v. Tenet Healthcare Corp.*, 481 F. Supp. 2d 673, 682-83 (W.D. Tex. 2006); *Wercinski*, 982 F. Supp. at 459.

On April 24, 2006, the Rigsbys submitted their evidentiary disclosure to the federal government. On April 26, 2006, they filed their initial Complaint. On May 22, 2007, they filed their First Amended Complaint, which is the current live pleading in this action. The earlier allegations raised in civil cases and Congressional hearings about passing off or reallocating liability to the NFIP policies under the WYO program bear a striking similarity to the gravamen of the Rigsbys’ allegations in this matter.

In acting as the government’s agent in adjusting the [WYO] claim, the company has an incentive ***to charge off all damage as flood damage*** because when they do so, the government, acting through FEMA, pays the entire claim, thereby relieving the company of its obligation under its own policy of insurance.

....

REALLOCATION OF WIND CLAIMS TO FLOOD CLAIMS

On information and belief, beginning at about the time the first claims began to come through adjusters for Hurricane Katrina, defendant insurance companies made a corporate decision to misdirect and ***misallocate*** claims from those of ***hurricane coverage . . . to flood claims*** that could be submitted and paid directly from the United States Treasury.

(FAC (Dkt. 16) ¶¶ 51, 56 (emphasis added); *accord* Cmpl. (Dkt. 2) ¶¶ 28, 33 (same).) As the foregoing amply demonstrates, the Rigsbys’ claims fall under the FCA’s public disclosure bar.

“So long as the government is put on notice to the potential presence of fraud, even if the fraud is slightly different than the one alleged in the complaint, the *qui tam* action is not needed.”

Dingle, 388 F.3d at 214-16. “A ‘whistleblower’ sounds the alarm; he does not echo it.” *Wang*, 975 F.2d at 1419. “[B]ecause [the plaintiff’s] complaint merely echoes publicly disclosed, allegedly fraudulent transactions that already enable the government to adequately investigate the case and to make a decision whether to prosecute, the public disclosure bar applies.” *Findley*, 105 F.3d at 688.

D. The Rigsbys Are Not an “Original Source” of the Information

Because the public disclosure bar applies, the only way this Court will have jurisdiction is if the Rigsbys demonstrate that they are an “original source” of the information. They cannot. The law is clear that section 3730(e)(4) does not permit “claim smuggling” of claims for which the plaintiff is not an “original source.” *Rockwell*, 127 S. Ct. at 1410; *Hockett*, 498 F. Supp. 2d at 44-45.

While the Rigsbys’ claims cannot thus even arguably pertain to claims arising outside of the two Mississippi catastrophe offices in which they worked, their work in those offices did not furnish them with any “direct and independent” knowledge of even a single specific fraudulent federal flood claim, nor did they furnish any such information to the government as required by section 3730(e)(4)(B). This conclusion is hardly surprising in light of the fact that the Department of Homeland Security’s Office of Inspector General’s July 2007 Interim Report, entitled “Hurricane Katrina: A Review of Wind Versus Flood Issues” (Ex. 10 to Mtn.), found no support for the central thesis of the Rigsbys’ allegations. “Our review of sample flood claims did not reveal evidence that NFIP was used to subsidize wind damage,” *id.* at 3, and “there was no indication that wind damage was attributed to flooding or that flood insurance paid for wind damage,” *id.*

The FCA only applies to claims that are submitted to the government that are knowingly false or fraudulent; it is not some sort of overarching anti-fraud statute that deputizes private individuals with a general warrant to pursue whatever they believe might be fraudulent conduct. *See United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 674-75 (5th Cir. 2003). “There is no liability under this Act for a false statement unless it is used to get [a] false claim paid” by the government. *Id.* at 675.

As the following analysis demonstrates, as a matter of fact and law, the Rigsbys are not an “original source” with “direct and independent” knowledge of fraudulent federal flood claims that was provided to the government in a timely manner. Indeed, here, there is no evidence of a false claim in the “two specific instances” that the Rigsbys purport to rely on because: (a) it is undisputed that the McIntosh property sustained extensive flood damage and hence no false claim was submitted; and (b) the Mullins property never had flood insurance and no flood claim was submitted.

1. Public Disclosure Occurred Before the Rigsbys Provided the Information to the Government

Based on “the language, structure, history and purpose of the FCA,” *Findley*, 105 F.3d at 678, including “Congress’s purpose in amending the Act and the plain meaning of the Act,” *McKenzie*, 123 F.3d at 942, some Circuits have held that “an ‘original source’ must provide the government with the information prior to any public disclosure,” *Findley*, 105 F.3d at 690-91; accord *McKenzie*, 123 F.3d at 942-43 (same); see also *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 645 (6th Cir. 2003) (same), *aff’d & rev’d on other grounds*, 501 F.3d 493 (2007); *United States ex rel. Settlemire v. D.C.*, 198 F.3d 913, 916, 918 (D.C. Cir. 1999) (same); *Hockett*, 498 F. Supp. 2d at 54 (same).

As these courts have explained, “[o]nce the information has been publicly disclosed . . . there is little need for the incentive provided by a *qui tam* action,” *Findley*, 105 F.3d at 691, and “it [is] difficult to understand how one can be a ‘true whistleblower’ unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain,” *McKenzie*, 123 F.3d at 942. Though the Fifth Circuit has not directly decided the issue, *Reagan*, 384 F.3d at 178, it has relied on related aspects of “[t]he legislative history and policy behind the Act” in effectuating “the False Claims Act’s goal of preventing parasitic suits based on information discovered by others,” *Fed. Recovery Servs.*, 72 F.3d at 452.

Moreover, this reasoning has been followed by district courts within the Fifth Circuit. Thus, in *Wercinski*, the court stated that “[w]hen, as in this case, the government has been alerted to potential wrongdoing and [is] in possession of all the information it needs to begin an investigation, *qui tam* actions brought by relators whose only contribution is to reinforce what the government already knows are unnecessary.” 982 F. Supp. at 460; *see also Lam*, 481 F. Supp. 2d at 686 (quoting *Findley*, 105 F.3d at 690). The Rigsbys did not provide information to the government until April 2006 – long after the public disclosures started in September 2005. They are not an “original source” on this ground alone.

2. Direct and Independent Knowledge of Fraudulent Acts Is Absent

Nor are the Rigsbys an “original source” because they do not have “direct and independent” knowledge of the fraudulent acts as alleged in their pleadings. *See Rockwell*, 127 S. Ct. at 1407.

First, the knowledge is not “independent” because as discussed above, *see, e.g.*, n.7, the Rigsbys did not have “evidence of the fraud prior to its public disclosure,” *Richardson*, 1999 WL 342666 at *3, and “[w]hen knowledge has been publicly disclosed, it cannot be said to be

‘independent’ for purposes of the public disclosure bar,” *Lam*, 481 F. Supp. 2d at 685 (citing *Reagan*, 384 F.3d at 178).

Second, knowledge is not “direct” when it is not “gained by the relator’s own efforts rather than learned second-hand through the efforts of others.” *Reagan*, 384 F.3d at 177 (citations omitted); *see also United States ex rel. Koerner v. Crescent City E.M.S., Inc.*, 946 F. Supp. 447, 453 n.19 (E.D. La. 1996). “[T]o hold the status of an ‘original source,’ for purposes of the FCA, ‘a *qui tam* plaintiff must allege specific facts – as opposed to mere conclusions – showing exactly how or when . . . she obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support those allegations with competent proof.” *Reagan*, 274 F. Supp. 2d at 853 (quoting *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162-63 (10th Cir. 1999)). The Rigsbys do not appear to have direct knowledge of one of the two claims they rely on: Mullins.

Third, to be an “original source,” the Rigsbys must have produced some evidence showing that a fraud had been committed. *Reagan*, 274 F. Supp. 2d at 852. That is, they must “produce ‘potentially specific, direct evidence of fraudulent activity’ by the defendant to establish standing to pursue an FCA claim.” *Id.* (quoting *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 568 n.12 (11th Cir. 1994)). Because the Rigsbys cannot show that they produced “evidence of a meritorious fraud claim,” *id.* at 853, they lack standing and are not an “original source.”

Fourth, in addressing the “original source” provisions in the context of determining subject matter jurisdiction, the Supreme Court recently indicated that courts must look behind a relator’s mere allegations and examine the actual “state of things.” *Rockwell*, 127 S. Ct. at 1409. Thus, as the Court held, “[t]he state of things and the originally alleged state of things are not

synonymous; demonstration that the [relator's] original allegations were false will defeat jurisdiction." *Id.* The original allegations regarding the "two specific instances" of fraudulent federal flood claims ostensibly identified by the Rigsbys are false.

In their evidentiary disclosure and in their pleadings, the Rigsbys assert only "two specific instances" where State Farm allegedly "misallocated" the burden of paying claims to the federal treasury – McIntosh and Mullins. *See* Relators' Evidentiary Disclosure Pursuant to 31 U.S.C. § 3730 at 8-14; FAC ¶¶ 63-77; Cmpl. ¶¶ 40-53. "Because this is necessarily a fact-based inquiry, each of these claims must be examined in detail." *Reagan*, 274 F. Supp. 2d at 854. While both McIntosh and Mullins revolve around exaggerated allegations of conflicting engineer reports, the Rigsbys do not specify what was false or fraudulent about a flood claim, if any, submitted to the government for those properties. As discussed below, the McIntosh claim fails because, as Kerri Rigsby admits, that property suffered significant flood damage and, thus, the flood claim was properly paid and not fraudulent. The Mullins claim fails because there was *no* NFIP flood policy, flood claim, or flood payment on that property and, thus, the allegations are legally irrelevant. Neither constitutes "direct and independent" knowledge of a false claim.

a. The McIntosh Property Admittedly Suffered Substantial Flood Damage

The McIntosh house, a waterfront property in close proximity to the Gulf of Mexico, sustained an interior flood mark of 5½ feet due to Hurricane Katrina, causing extensive damage to the main floor. That claim was adjusted by Cody Perry and by his supervisor, Kerri Rigsby, who personally approved the payment of the flood policy limits. Kerri Rigsby's sworn testimony confirms that such flood payments were wholly appropriate.

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. [A]ccording 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 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 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 Dep. in *Marion* of June 20, 2007 at 131:12-20, 140:9-15, 133:1-6, 139:13-23; *see id.* at 137:7-13 (Ex. 6 to Mtn.). In sum, as Kerri Rigsby's sworn admissions demonstrate, the McIntosh flood claim – one of the two “specific instances” of allegedly fraudulent flood claims – is not evidence (specific or otherwise) of such fraudulent acts at all. Nor can it be considered “direct and independent” knowledge of NFIP fraud.

In reality, the McIntosh matter concerns a dispute over a claim for wind damage under a homeowners policy. Though the Rigsbys allege that the observations in the two engineer reports

on that property “were completely contrary,” Kerri Rigsby has since testified that whereas both reports addressed wind damage, the second report also included accurate additional details about wind damage as well as accurate conclusions about flood damage. *See id.* at 141:4-142:24. She also admitted that the first report, standing alone, would not have supported the flood insurance payment that she had previously authorized and that she believed was appropriate. *See id.* at 139:9-23. For all the clamor they make about two reports, Kerri Rigsby admitted that State Farm had good reason to be concerned with the first report’s lack of completeness; the second report was more accurate and complete than the first, and the second report is consistent with her own conclusions based on her personal inspection of the McIntosh home. *See id.* at 143:1-9, 139:9-140:8, 141:4-142:24.

b. The Mullins Property Had No Flood Policy or Flood Claim

There are two fundamental infirmities with the Rigsbys’ second and final “specific instance” of alleged fraud upon the federal flood program: the Mullins claim at 6057 Pine Tree Drive, Kiln, MS.

First, it is unlikely that the Rigsbys have any “direct and independent” knowledge of this claim. It was adjusted not by the Rigsbys’ employer, Renfro, but by another adjusting company, Worley. *See* (Ex. 11 to Mtn.) The Rigsbys had nothing to do with the claim for this property. The Rigsbys thus appear to have learned about this claim “second-hand through the efforts of others.” *Reagan*, 384 F.3d at 177.

Second, the Mullins claim is nothing more than one where losses were rejected under a homeowners policy. As the Mullins’s sworn interrogatory responses state, they *never* had NFIP flood insurance on 6057 Pine Tree Drive and they *never* received any benefits under any policy for any Katrina-related damages to that property. *See* Pls.’ Resp. to Interrogs. 9 & 10 in *Mullins*

(Ex. 12 to Mtn.) Whatever else might be said about it, it is simply not an example of a fraudulent federal flood claim because no federal flood claim was made for that property. It, too, is not “direct and independent” knowledge of NFIP fraud.

Despite their reliance on McIntosh and Mullins as their “two specific instances” of fraudulent federal flood claims, those assertions do not withstand scrutiny. “Evidence of an actual false claim is the *sine qua non* of a False Claims Act violation.” *United States ex rel. Karvelas v. Melrose-Wakeville Hosp.*, 360 F.3d 220, 225 (1st Cir. 2004) (citation and internal quotations omitted). The Rigsbys have not produced specific, direct, and independent evidence of fraudulent federal flood claims. Thus, they are not an “original source” of such information, they lack standing, and this Court lacks subject matter jurisdiction over the claims. Consequently, they warrant dismissal.

II. ATTORNEYS’ FEES AND EXPENSES MAY BE ASSESSED AGAINST THE RIGSBYS

The federal government has not elected to intervene in the Rigsbys’ suit. Under such circumstances, section 3730(d)(4) of the FCA provides that “the court may award to the defendant its reasonable attorneys’ fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.” 31 U.S.C. § 3730(d)(4). Where, as here, “plaintiff’s allegations [are] bereft of any objective factual support,” *Mikes v. Straus*, 274 F.3d 687, 705 (2d Cir. 2001), or a plaintiff proceeds against a defendant “without any evidence sufficient to create a genuine issue of material fact,” attorneys fees are justified. *United States ex rel. Minna Ree Winer Children’s Class Trust v. Regions Bank of La.*, 110 F.3d 794, 1997 WL 119971, at *3 (5th Cir. Mar. 13, 1997).

Further, the failure “to satisfy . . . jurisdictional and procedural prerequisites” may also warrant an award of attorneys’ fees. *United States ex rel. Bain v. Georgia Gulf Corp.*, 208 F. App’x 280, 283 (5th Cir. 2006). In fact, “[u]nder the proper circumstances, **a single defect** may merit a ruling on frivolousness or vexatiousness.” *Id.* (emphasis added). The multiple deficiencies inherent in the Rigsbys’ pleadings more than satisfy this standard. State Farm’s attorneys’ fees and expenses are warranted and should thus be awarded.

CONCLUSION

For the foregoing reasons, the within motion should be granted in its entirety, dismissing Counts I, II, III, and IV of the First Amended Complaint, together with an award against the Rigsbys of State Farm’s reasonable attorneys’ fees and expenses. State Farm further prays that this Court will allow its Counterclaim to continue to pend for final adjudication.

This the 8th day of April, 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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