No. 15-___

IN THE

Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL.
CORI RIGSBY; KERRI RIGSBY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Section 3730(b) of the civil False Claims Act ("FCA") permits a private person (a *qui tam* relator) to bring a civil action in the name of the United States Government for violation of section 3729 of the Act. Section 3730(b)(2) requires that a relator's complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2).

A three-way circuit split exists as to the standard for determining whether to dismiss a relator's claim for violation of the FCA's seal requirement. Depending on the circuit, such a violation (i) mandates dismissal of the relator's claim, as the Sixth Circuit has held; (ii) mandates dismissal if the violation incurably frustrates the congressional goals served by the seal requirement, as the Second and Fourth Circuits have held; or (iii) warrants dismissal only if the seal violation caused actual harm to the Government pursuant to the balancing test applied by the Fifth Circuit in this case and the Ninth Circuit.

The first question presented is:

What standard governs the decision whether to dismiss a relator's claim for violation of the FCA's seal requirement, 31 U.S.C. § 3730(b)(2)?

II. The FCA imposes liability only for knowing violations of the Act, which the FCA defines as requiring that the defendant "with respect to information" have "actual knowledge of the information" or act in "delib-

erate ignorance" or "reckless disregard" of "the truth or falsity of the information." *See* 31 U.S.C. § 3729(b)(1)(A)(i)-(iii). The interpretation of the FCA's scienter requirement is the subject of conflicting decisions by the D.C. and Fourth Circuits and by the Fifth Circuit in this case.

The second question presented is:

Whether and under what standard a corporation or other organization may be deemed to have "knowingly" presented a false claim, or used or made a false record, in violation of section 3729(a) of the FCA based on the purported collective knowledge or imputed ill intent of employees other than the employee who made the decision to present the claim or record found to be false, where (i) the employee submitting the claim or record independently made the decision to present the claim or record in good faith after reviewing the available information and (ii) there was no causal nexus between the submission of the false claim or record and the purported collective knowledge or imputed ill intent of those other employees?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner State Farm Fire and Casualty Company ("State Farm") was a defendant/counter-plaintiff in the district court and the appellee/cross-appellant in the court of appeals. State Farm is a wholly-owned subsidiary of State Farm Mutual Automobile Insurance Company. State Farm Mutual Automobile Insurance Company is a mutual company incorporated in the State of Illinois, with its principal place of business in Bloomington, Illinois. There are no publicly traded companies that have any ownership interest in State Farm Mutual Automobile Insurance Company.

Respondents Cori Rigsby and Kerri Rigsby were the relators/counter-defendants in the district court and the appellants/cross-appellees in the court of appeals.

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State Farm respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion (1a-41a) is reported at 794 F.3d 457. The Fifth Circuit's order denying panel rehearing and rehearing *en banc* (42a-43a) is not reported. The relevant opinions and orders of the district court are unpublished and are reproduced at 44a-145a.

STATEMENT OF JURISDICTION

The Fifth Circuit issued its opinion on July 13, 2015. (1a.) The court denied State Farm's petitions for panel rehearing and rehearing *en banc* on August 11, 2015. (42a-43a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the civil False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, are reproduced in the Appendix. (146a-161a.)

INTRODUCTION

The decision below presents two important and recurring questions of law regarding the legal standards and requirements of the FCA. First, the decision exacerbates an acknowledged circuit conflict regarding the consequences for relators who violate the FCA's seal requirement for *qui tam* actions. Second, the decision substantially dilutes what is required to

establish scienter for corporations and other organizations under the FCA, in direct conflict with the decisions of other circuits and contrary to the statutory language. This Court should grant certiorari to resolve the circuit conflicts on both these issues.

The FCA requires, *inter alia*, that a relator's complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2). Five courts of appeals have taken three conflicting positions as to the legal standard for determining when and whether a relator's violation of the seal requirement warrants dismissal of the relator's FCA claims.[1]

The Fifth Circuit in this case adopted and applied the Ninth Circuit's balancing test, under which dismissal is warranted only if a relator's seal violation caused actual harm to the Government. As the Fifth Circuit acknowledged (19a-20a), the Sixth Circuit has rejected the Ninth Circuit's balancing test, holding that the FCA's seal requirements are mandatory and that a violation requires dismissal. Yet a third rule has been adopted by the Second and Fourth Circuits, which mandates dismissal if the violation incurably frustrates the congressional goals served by the seal requirement.

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[1] A *qui tam* relator's violation of the seal requirement – and the potential consequences thereof *to the relator* – would not impair the Government's right to proceed with FCA claims. *See United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 1000 n.6 (2d Cir. 1995).

The United States has acknowledged that this conflict among the circuits "warrants resolution by this Court." Brief for the United States as Amicus Curiae at 7, *United States ex rel. Summers v. LHC Grp., Inc.*, No. 10-827 (U.S. May 2011) ("U.S. *Summers* Br.").[2] This case presents the Court with an optimal vehicle for resolving this conflict. There is no question that relators Cori and Kerri Rigsby and their then-counsel Dickie Scruggs intentionally violated the seal requirement repeatedly and in bad faith. Prior to the lifting of the seal and as part of their litigation strategy, the Rigsbys and their counsel hired a public relations firm and purposefully disclosed the existence of this FCA suit to national news media (ABC, CBS, Associated Press, and the *New York Times*) and to a Mississippi congressman, who made it the subject of remarks in the *Congressional Record*. No reported decision under the FCA reflects seal violations as egregious and calculated as those in this case.

Yet, applying the Ninth Circuit's balancing test, with its requirement of actual harm to the Government, the Fifth Circuit determined that the Rigsbys' repeated, intentional seal violations "d[id] not merit dismissal." (23a.) The Fifth Circuit's decision raises systemic policy concerns. Given the substantial difficulties of showing actual harm to the Government, the rule applied by the Fifth Circuit will undermine the statutory purposes that the seal requirement is intended to serve and will inevitably result in under-

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[2] Although the United States opposed certiorari in *Summers*, it did so because the "case [did] not provide a suitable vehicle" since it "appear[ed] to be subject to dismissal for lack of jurisdiction under a different provision of the FCA." *Id.*

enforcement or uneven enforcement of that requirement. Moreover, the Fifth Circuit's rule is inconsistent both with the mandatory language of the seal requirement and with the special character of a *qui tam* cause of action in which the relator acts not as a private litigant, but as an "assignee" of the Government's claims. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000).

The Fifth and Ninth Circuits' balancing test conflicts not only with the decisions of other circuit courts, but also with the relevant decisions of this Court, which enforce statutory preconditions on suits brought under federal statutes. *See United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914), *McNeil v. United States*, 508 U.S. 106 (1993), *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), and *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645 (2015). Those decisions hold that when a statute "creates a new liability and gives a special remedy for it," "upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself." *McCord*, 233 U.S. at 162. As the Court stated in *Mach Mining*, "[c]ourts routinely enforce such compulsory prerequisites to suit" and will dismiss complaints for failure to comply. 135 S. Ct. at 1651. Accordingly, this Court should grant certiorari to resolve the conflict among the circuits on the FCA seal violation issue and the conflict between the approach adopted by the Fifth Circuit and this Court's consistent enforcement of similar statutory mandates.

Certiorari is also warranted to resolve conflicts among the circuits regarding the FCA's statutory scienter requirement. In *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), this Court recognized the conflict between the D.C. Circuit's decision in *United States v. Science Applications International Corp.*, 626 F.3d 1257 (D.C. Cir. 2010) ("*SAIC*"), and the Fourth Circuit's decision in *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003), on the legal standard for attributing scienter to a corporation through the knowledge and actions of its employees. *Staub*, 562 U.S. at 418. Consistent with the traditional rule, the D.C. Circuit does not permit corporate scienter to be satisfied under the FCA through the collective knowledge of various employees, but holds that at least one employee must know *both* the underlying facts that render an FCA claim false *and* that a false claim is being submitted. *See SAIC*, 626 F.3d at 1276. The Fourth Circuit has held "to the contrary," *Staub*, 562 U.S. at 418, requiring only that a single employee had knowledge of the underlying facts that render a claim false and not that the employee also knew that a claim is being made. *Harrison*, 352 F.3d at 918-19.

The Fifth Circuit's decision substantially departs from the approaches adopted by the D.C. and Fourth Circuits, thus expanding an already-existing conflict. In contrast to those circuits, the Fifth Circuit here found that scienter was met even though there was no showing that *any* State Farm employee, at the time of submission of the claim, knew of facts that rendered the Hurricane Katrina flood insurance claim at issue false. Instead, the Fifth Circuit found that scienter was satisfied based upon the alleged generalized intent

of a group of State Farm employees to perpetrate a scheme of falsely attributing wind damage to flood damage, in order to shift the responsibility for insurance payments to the Government's national flood insurance policies. This alleged generalized scheme was not shown to have affected the decision of the State Farm supervisor who approved the flood claim at issue based upon his independent review of the file and evidence.

The Fifth Circuit has improperly permitted the imposition of corporate liability under the FCA, complete with treble damages and substantial civil penalties, based upon a purported loose collective intent or knowledge unrelated to the actual decision to submit the claim at issue. If allowed to stand, the Fifth Circuit's interpretation of the statutory scienter requirement will drastically expand liability under the FCA in a manner inconsistent with the Act's language, structure, and purpose. This issue is of exceptional importance to the many businesses and organizations that engage in transactions with the Government, and authoritative guidance from this Court is urgently needed to rein in the Fifth Circuit's unwarranted expansion of FCA liability. Certiorari is necessary to resolve the important questions of federal law presented by the Fifth Circuit's decision.

STATEMENT OF THE CASE

A. The False Claims Act

The FCA imposes liability on "any person who ... knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or

"knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)-(B).[3] "Knowingly" is defined to "mean that a person, with respect to information—(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A).

The FCA provides that a private person may bring a civil action for violations of section 3729 "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). Section 3730(b) also sets forth mandatory procedures for such private actions, including that the complaint "shall" be served on the Government, along with a written evidentiary disclosure, and the complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2). One purpose of the seal requirement is to allow the Government an opportunity to investigate the claims and decide whether to bring criminal charges against the defendant or whether to intervene in the civil FCA case. The Government may, for good cause, move the court for extensions of the 60-day period. 31 U.S.C. §

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[3] In 2009, while this case was pending, Congress amended the FCA. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a), May 20, 2009, 123 Stat. 1621. The change to section 3729(a)(1), now section 3729(a)(1)(A), does not affect the issues presented herein. The 2009 version of section 3729(a)(1)(B), formerly section 3729(a)(2), is retroactively applicable to the false record claim in this case. (7a.)

3730(b)(3). The defendant may not be served while the complaint is under seal and, therefore, is not required to respond to the complaint until 20 days after it is unsealed and served upon the defendant. *Id.*

B. The Underlying FCA Claim and Trial

Relators Cori and Kerri Rigsby filed their FCA complaint on April 26, 2006. The Rigsbys are former independent claims adjusters who worked for E.A. Renfroe & Co., which provided claims-adjusting services to State Farm after Hurricane Katrina. The Rigsbys alleged that, following Katrina, State Farm misadjusted federal flood claims in Mississippi by attributing wind damage (covered under State Farm's homeowners insurance) to flood damage (covered by flood policies under the federal government's National Flood Insurance Program). Similar charges were investigated by government officials examining insurance companies' claims practices after Hurricane Katrina. None of these government investigations found any evidence that Write-Your-Own carriers – including State Farm – were intentionally misadjusting flood claims or defrauding the Government.

The trial of this case centered on a single flood claim administered by State Farm for damage to the waterfront house of Thomas and Pamela McIntosh in Biloxi, Mississippi. At trial, State Farm introduced video, photographs and other evidence showing that Katrina inundated the McIntosh house with flood water. The photographs showed extensive, severe damage below the flood line, while, above the flood

line, light fixtures, cabinets and shelves (and even the items on the shelves) were intact and undisturbed. State Farm also presented unrefuted evidence that John Conser, the State Farm supervisor who approved the payment of the McIntosh flood claim, did so in good faith after conducting an independent review of the claim file, photographs and other evidence. Relator Kerri Rigsby was one of the adjusters who inspected the McIntosh house in September 2005 and recommended payment of flood policy limits.

At trial, the Rigsbys relied on expert testimony that the McIntosh house (which was repaired after Katrina) was "wracked" by wind and totally destroyed before the flood waters reached the house. The jury returned a verdict against State Farm, finding that the McIntosh property sustained no flood damage and that State Farm's submission of a claim for the $250,000 flood policy limits was fraudulent. (33a;117a.)

C. The Rigsbys' Intentional Violations of the FCA Seal Requirement

In motions before the district court, State Farm argued that the Rigsbys' repeated intentional violations of the FCA seal requirement warranted dismissal of their lawsuit. The Rigsbys filed their FCA complaint under seal on April 26, 2006, and served a copy on the Government along with an evidentiary disclosure.

After filing their complaint, the Rigsbys and their counsel used their *qui tam* filings to fuel a media campaign designed to demonize and put pressure on State Farm to settle – all in violation of the seal. The

Rigsbys hired one of the nation's most prominent public relations firms to assist them with this all-out campaign, which featured the Rigsbys in media interviews, filming, and photo shoots.

On August 7, 2006, the Rigsbys violated the seal when their counsel emailed the sealed Evidentiary Disclosure to ABC News to use as background for an upcoming *20/20* story.[4] The cover page of the Evidentiary Disclosure stated that it was made pursuant to 31 U.S.C. § 3730 and was filed in camera and under seal, and page one asserted that State Farm had committed fraud on the federal government and referred to "[t]his False Claims Act case." On August 25, 2006, ABC News broadcast its *20/20* story featuring the Rigsbys and the McIntosh claim, airing allegations substantively identical to those in the sealed *qui tam* Complaint and Evidentiary Disclosure.

On August 14, 2006, the Rigsbys' counsel emailed the sealed Evidentiary Disclosure to the Associated Press ("AP"). Shortly thereafter, an AP correspondent interviewed the Rigsbys, and on August 27, 2006, the AP published an article entitled "*Sisters Blew Whistle on Katrina Claims*," which discussed information contained in the sealed Evidentiary Disclosure.

On September 18, 2006, the Rigsbys' counsel emailed the sealed Evidentiary Disclosure to the *New*

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[4] The actions of their counsel are imputed to the Rigsbys. *See Taylor v. Illinois*, 484 U.S. 400, 418 (1988) (a "client must accept the consequences of the lawyer's decision"); *Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 797 n.4 (7th Cir. 2009) ("'[t]he rule is that *all* of the attorney's misconduct ... becomes the problem of the client'" (citation omitted)).

York Times. On March 16, 2007, the *New York Times* published an article entitled "*A Lawyer Like a Hurricane,*" which contained details matching those in the Evidentiary Disclosure. In June 2007, the Rigsbys' counsel emailed a copy of the sealed first amended complaint to CBS News.

The Rigsbys also provided sealed information to U.S. Congressman Gene Taylor. In September 2006, the Rigsbys met with Congressman Taylor. Five days later, Congressman Taylor recounted his meeting with the Rigsbys in the *Congressional Record*, accusing State Farm of having violated the FCA. Repeating the gist of the sealed allegations, Congressman Taylor asserted that State Farm "violated the False Claims Act by manipulating damage assessments to bill the federal government instead of the companies" and "defrauded federal taxpayers by assigning damage to the federal flood program that should have paid [sic] by the insurers' wind policies." In February 2007, Congressman Taylor publicly disclosed that "[t]he Scruggs Law Firm represents the [Rigsby] sisters in a False Claims Act filing against State Farm and Renfroe" – information that Congressman Taylor learned from the Rigsbys or their lawyers in violation of the seal.[5] The district court lifted the seal on August 1, 2007.[6]

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[5] The Rigsbys' First Amended Complaint, which first named Renfroe as a defendant, was not filed until May 2007. Thus, the only way Congressman Taylor could have learned this information was from the Rigsbys or their lawyers.

[6] The Fifth Circuit erroneously declined to consider seal violations that occurred after January 10, 2007, because the seal had been partially lifted by the district court on January 10, 2007,

D. The District Court's Rulings

The district court denied State Farm's motions to dismiss and for judgment as a matter of law based on the Rigsbys' violations of the FCA seal requirement. (44a-71a;72a-77a;109a-145a.) The district court also denied State Farm's motions for judgment as a matter of law on scienter and other issues. (107a-108a;110a-111a;126a-127a;145a.)

E. The Fifth Circuit's Opinion

The Fifth Circuit affirmed the district court's rulings that the Rigsbys' seal violations did not warrant dismissal of their lawsuit. (23a.) The Fifth Circuit concluded that the Rigsbys violated the seal requirement (22a) and acknowledged that a conflict between the circuits exists on the issue of the consequences of such a violation. (19a-20a.) Adopting and applying the Ninth Circuit's balancing test, the Fifth Circuit determined that the Rigsbys' and their attorneys' repeated intentional violations of the seal "d[id] not merit dismissal." (23a.)

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to permit disclosure to Judge William M. Acker, who presided over *E.A. Renfroe & Co. v. Cori Rigsby Moran*, No. 2:06-cv-10752 (N.D. Ala.). (21a.) The disclosure to Judge Acker was not intended to set aside the seal. Indeed, the district court subsequently entered an order on January 19, 2007 extending the seal period. Nor was the seal "effectively mooted" on January 18, 2007, by a public filing in *Renfroe*. (*See* 21a.) That filing merely referenced the "*likelihood* of a qui tam suit brought by the Defendants [the Rigsbys] with Scruggs as their attorney." *E.A. Renfroe*, ECF No. 85 (emphasis added).

The Fifth Circuit also affirmed the jury verdict. (41a.) In particular, the Fifth Circuit found that the FCA's scienter requirement was satisfied. (36a-40a.) In so ruling, the Fifth Circuit did not require a showing that any employee actually knew facts showing that the McIntosh flood claim was false when it was submitted to the Government. Indeed, the decision on the McIntosh flood claim (the only claim at issue in this case) was made independently and in good faith by a State Farm supervisor, John Conser. The Fifth Circuit, however, allowed liability based upon the purported collective, generalized bad intent of other State Farm employees who allegedly were perpetrating a scheme to submit false flood claims for damage actually caused by wind (thereby shifting the cost from State Farm to the federal government's flood insurance program). (3a.) This scheme – which Conser was not shown to be part of – was purportedly carried out by telling adjusters that Katrina (which proved to have the largest storm surge then recorded) was predominantly a water storm, rather than a wind storm, and instructing adjusters going into storm surge areas to expect to see water damage. (4a;38a.)

The Fifth Circuit did not identify any alleged perpetrator of the scheme who was involved in or had knowledge of the McIntosh claim at the time it was submitted. Instead, the court expressly relied upon *after-the-fact*, post-submission knowledge purportedly obtained by mid-level supervisory employee Lecky King (one of the alleged "perpetrators" of the scheme) when she became involved in State Farm's subsequent handling of a *separate* wind damage claim on the McIntosh house. (38a.) The court did not specify what information King learned that showed that the

McIntosh flood claim was false. There was no evidence indicating that King or any other State Farm employee knew or should have known that the house was "wracked" by wind and effectively "completely destroyed" before any flood damage occurred, as the Rigsbys' expert opined at trial. (7a.)

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S RULING ON THE FCA SEAL REQUIREMENT RAISES AN IMPORTANT RECURRING QUESTION OF FEDERAL LAW WARRANTING REVIEW BY THIS COURT.

A. The Fifth Circuit's Decision Exacerbates the Acknowledged Conflict Among the Circuit Courts Regarding the FCA Seal Requirement

This Court should grant certiorari to resolve the significant conflict among the courts of appeals as to the legal standard for determining whether and when a relator's violation of the FCA seal requirement should result in dismissal of the relator's FCA claims. The Fifth Circuit acknowledged the existence of this conflict, stating that "three circuits ha[d] addressed the consequences of an FCA seal violation and come to divergent conclusions." (19a.) The United States has acknowledged that this conflict "warrants resolution by this Court." U.S. *Summers* Br. at 7.

As shown below, the three conflicting rules adopted by the five different circuits reflect fundamental disagreements as to the consequences of a violation of the FCA seal requirement. A national uniform rule is necessary to avoid disparate outcomes and to ensure consistent enforcement of the provision.

1. The Fifth and Ninth Circuits' Three-Factor Balancing Test

The Fifth Circuit in this case adopted the three-factor balancing test articulated by the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995). In *Lujan*, the Ninth Circuit acknowledged that the relator had "clearly violated the seal provision of 31 U.S.C. § 3730(b)(2)," but held that violation of the seal "does not *per se* require dismissal of the *qui tam* complaint." *Lujan*, 67 F.3d at 244-45. Rather, under *Lujan*, district courts must balance the "purpose of *qui tam* actions ... to encourage more private false claims litigation" and the Government's need for "'an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action.'" *Id.* at 245. This balancing test requires district courts "to evaluate three factors in determining whether dismissal was warranted: 1) the harm to the government from the violations; 2) the nature of the violations; and 3) whether the violations were made willfully or in bad faith." (19a-20a.)

The three factors are not afforded equal weight under the *Lujan* test. Rather, actual harm to the

Government is a prerequisite for dismissal. *Lujan*, 67 F.3d at 245-46; (20a). "The mere possibility that the Government *might* have been harmed by disclosure is not alone enough reason to justify dismissal of the entire action." *Lujan*, 67 F.3d at 245.

The Ninth Circuit gave less emphasis to the second and third factors, making clear that "some lesser sanction" might be sufficient even for an intentional bad faith violation of the seal requirement. *Id.* at 246. The court also viewed a post-filing seal violation as "qualitatively different" from and less serious than failure to file under seal. *Id.*

2. The Sixth Circuit's Mandatory Dismissal Rule

In *United States ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287 (6th Cir. 2010), the Sixth Circuit expressly rejected the Ninth Circuit's analysis in *Lujan*. The Sixth Circuit reasoned that compliance with section 3730(b) is a mandatory precondition to suit for *qui tam* relators, stating: "Given that the very existence of the *qui tam* right to bring suit in the name of the Government is created by statute, it is particularly appropriate to have the right exist in a given case only with the preconditions that Congress deemed necessary for the purpose of safeguarding the Government's interests." *Summers*, 623 F.3d at 298. Thus, the Sixth Circuit held that "violations of the procedural requirements imposed on *qui tam* plaintiffs under the False Claims Act preclude such plaintiffs from asserting *qui tam* status." *Id.* at 296. The Sixth Circuit rejected the Ninth Circuit's distinction between noncompliance with the initial statutory filing

requirements and a subsequent violation of the seal, concluding that both require dismissal. *Id.* at 294-95.

The Sixth Circuit deemed the "*Lujan*-style balancing test" a form of "judicial overreach" because Congress had already balanced the various needs and purposes served by the FCA and resolved the tension between them by "decid[ing] that a sixty-day in camera period was the correct length of time required to balance those factors." *Id.* at 296. The Sixth Circuit also observed that the statute allows the Government to shorten or move to extend the sixty-day period, but provides "no such exception ... for situations in which a relator simply fails to abide by the under-seal requirement." *Id.* at 297.

3. The Second and Fourth Circuits' Frustration-of-Congressional-Goals Standard

The Second and Fourth Circuits have adopted an altogether different standard that deepens the conflicts and increases the uncertainty in the law regarding the FCA's seal requirement. In *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995), the Second Circuit held that the relators' failure to file their complaint under seal and serve it on the Government and their subsequent "detailed interview [with] the press concerning ... the complaint's allegations" required dismissal with prejudice of their FCA claims, because the "'failure to comply with the filing and service provisions [of § 3730(b)(2)] irreversibly frustrate[d] the congressional goals underlying those provisions.'" *Id.* at 999-1000 (citation

omitted). The Second Circuit noted that it would not be inclined to require "letter-perfect" compliance with section 3730(b)(2) "'where the object of the provision is fulfilled by alternate means.'" *Id.* at 1000 n.5 (citation omitted).

In contrast to the Ninth Circuit, the Second Circuit made clear that *possible* harm to the Government or to the defendant's reputation is relevant to the analysis of whether the congressional interests underlying the seal provision have been irreversibly frustrated. *See id.* at 999 (considering whether seal "*might*" have interfered with government's investigation, whether "settlement value that *might* have arisen from the complaint's sealed status was eliminated," and whether "any *possibility* of an ameliorating, predisclosure government decision not to pursue the Pilons' claim was aborted by the premature publication of the allegations" (emphasis added)).

More recently, in *Smith v. Clark/Smoot/Russell*, 796 F.3d 424 (4th Cir. 2015), the Fourth Circuit considered the different tests formulated by the Ninth, Sixth and Second Circuits and found the Second Circuit's "rationale to be persuasive." *Id.* at 430. Thus, the Fourth Circuit declined to follow either the Sixth Circuit's mandatory dismissal rule or the Ninth Circuit's "'no harm, no foul' balancing test," and adopted the Second Circuit's frustration-of-congressional-goals standard. *Id.* Moreover, like the Second Circuit and contrary to the Ninth Circuit, the Fourth Circuit held that protection of a defendant's reputation is a relevant consideration in determining the consequences of a seal violation. *Id.*; *accord Pilon*, 60 F.3d at 999 ("Other interests not addressed by the

legislative history are also protected," including a defendant's reputation); *but see Lujan*, 67 F.3d at 247 (protecting a defendant's reputation from attacks "is not one of the statutory purposes of the seal provision" and "not relevant in determining whether a particular seal violation warrants dismissal").

* * *

This Court should grant certiorari to resolve the fundamental conflicts described above in the statutory interpretation of section 3730(b)(2). The frequency with which seal violations are addressed by the federal courts[7] and the disparities in the rules applied and in the outcomes underscore the importance of this issue and demonstrate the need for this Court to provide a uniform rule for determining the consequences of a seal violation.

B. The Fifth and Ninth Circuits' Analysis Is Contrary to this Court's Jurisprudence Regarding Statutory Prerequisites to Suit

Certiorari also should be granted because the balancing test adopted by the Fifth and Ninth Circuits conflicts with this Court's established jurisprudence regarding statutory preconditions to suit. *See* Sup. Ct. R. 10(c). The Fifth Circuit's holding that a violation of the seal provision does not mandate dismissal is contrary to this Court's analysis and conclusions in cases such as *United States ex rel. Texas Portland*

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[7] A list of cases addressing the requirements of the FCA seal provision is at 162a-167a.

Cement Co. v. McCord, 233 U.S. 157 (1914), *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), *McNeil v. United States*, 508 U.S. 106 (1993), and *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645 (2015). In these cases, this Court has held that mandatory preconditions to suit in federal statutes must be enforced in accordance with the statutory language and that non-compliance requires dismissal.

In *McCord*, this Court addressed a statutory right of action in favor of creditors on public contractor bonds. The statute authorized creditors to bring suit in the name of the United States "'if no suit should be brought by the United States within six months from the completion and final settlement of said contract.'" 233 U.S. at 161 (citation omitted). The purpose of the waiting period was "to give the United States the exclusive right to bring suit within six months," thus "giv[ing] the government six months in which to test the work and fully ascertain its character and whether it fulfilled the contract or not." *Id.* at 163. This Court ruled that an action brought prematurely was properly dismissed for noncompliance with the statute, stating that when a statute "creates a new liability and gives a special remedy for it," "upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself." *Id.* at 162.

Similarly, in *Hallstrom*, this Court held that the 60-day notice requirement contained in the citizen suit provision of the Resource Conservation and Recovery Act (RCRA) is a "mandatory, not optional, condition precedent for suit." 493 U.S. at 26. Rejecting a

"flexible or pragmatic construction" of that requirement, the Court refused to permit an alternative measure (a 60-day stay of the suit) that was not found in the statute, as "flatly contradict[ing]" the statutory language. *Id.* The Court stated: "Congress could have excepted parties from complying with the notice or delay requirement," but RCRA "contains no exception applicable to petitioners' situation," and "we are not at liberty to create an exception where Congress has declined to do so." *Id.* at 26-27.

This Court in *Hallstrom* also held that the 60-day notice requirement was not subject to equitable modification, stating that the "equities do not weigh in favor of modifying statutory requirements when the procedural default is caused by petitioners' 'failure to take the minimal steps necessary' to preserve their claims." *Id.* at 27 (citation omitted). The Court noted that its ruling would "further judicial efficiency" because "courts will have no need to make case-by-case determinations of when or whether failure to fulfill the notice requirement is fatal to a party's suit." *Id.* at 32.

In *McNeil*, this Court applied a similar analysis to a provision of the Federal Tort Claims Act ("FTCA") mandating that "'an action shall not be instituted upon a claim against the United States for money damages' unless the claimant has first exhausted his administrative remedies." 508 U.S. at 107. The Court held that "[b]ecause petitioner failed to heed th[e] clear statutory command, the District Court properly dismissed his suit." *Id.* at 113. The Court emphasized that the "interest in orderly administration of this body of litigation is best served by adherence to the

straightforward statutory command," concluding that "'in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" *Id.* (citation omitted). Thus, as this Court stated in *Mach Mining*, "[c]ourts routinely enforce such compulsory prerequisites to suit," and a court will usually dismiss a complaint for failure to comply. 135 S. Ct. at 1651 (enforcing Title VII requirement that the EEOC attempt conciliation of a discrimination charge before filing a lawsuit).

Like the statutes addressed in *McCord*, *Hallstrom*, and *McNeil*, the FCA creates a right of action and a special remedy, and at the same time imposes mandatory procedural requirements designed to give the Government time to investigate, and possibly settle, the claim. Both the grant of a private right of action and the seal requirement are found in subsection 3730(b), which is entitled "Actions by private persons."

Because the seal requirement was enacted as part of the grant of a private right of action, it is a "mandatory, not optional condition precedent" to the private right of action. *Cf. Hallstrom*, 493 U.S. at 26 (because RCRA's 60-day notice provision was "expressly incorporated by reference" into the section of RCRA that authorized private actions, "it acts as a specific limitation on a citizen's right to bring suit" and compliance "is a mandatory, not optional, condition precedent for suit").[8] Notably, the seal requirement

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[8] This Court has not required any particular form of language to find that a procedural requirement included in the statutory

was *not* included in section 3731 of the FCA, which is entitled "False claims procedure" and sets forth procedural provisions that are not preconditions to pursuing an FCA claim. *See* 31 U.S.C. § 3731.

The mandatory nature of the seal requirement is also demonstrated by the repeated use of the word "shall": The complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2). As this Court has recognized, such language is "mandatory, not precatory." *Mach Mining*, 135 S. Ct. at 1651 (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (the word "shall" admits of no discretion)); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion").

The Fifth Circuit also erred in reasoning that "a seal violation does not automatically mandate dismissal" because "nothing in the text of § 3730(b)(2)

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grant of a cause of action is a mandatory prerequisite to suit. In *Mach Mining*, the statutory provision that the Commission "'shall endeavor to eliminate [an] alleged unlawful employment practice by informal methods of ... conciliation" was found to be "a necessary precondition" to the EEOC's filing a lawsuit. 135 S. Ct. at 1651 (citation omitted). Here, the legislative history indicates that Congress enacted the seal provision as an alternative to a 60-day notice provision (such as in *Hallstrom*), thus confirming that compliance is a precondition to pursuing a private claim under the FCA. *See S.* Rep. No. 345, 99th Cong. 2nd Sess. 1986, 1986 U.S.C.C.A.N. 5266, 5289 ("The initial 60-day sealing of the allegations [under the FCA] has the same effect as if the *qui tam* relator had brought his information to the Government and notified the Government of his intent to sue.")

'explicitly authorizes dismissal as a sanction for disclosures in violation of the seal requirement.'" (20a (quoting *Lujan*, 67 F.3d at 245). However, the same is true of the various provisions that this Court has held are "mandatory, not optional, condition[s] precedent for suit." These provisions, including the RCRA 60-day notice provision addressed in *Hallstrom*, do not explicitly authorize dismissal as a sanction. Notably, the two dissenting justices in *Hallstrom* argued that when a "statute specifies no sanction, factors extrinsic to statutory language enter into the decision as to what sanction is appropriate." *Hallstrom*, 493 U.S. at 35 (Marshall, J., dissenting). Plainly, the majority in *Hallstrom* rejected that contention.

Indeed, this Court in *Hallstrom* rejected the kind of judicial balancing of statutory goals engaged in by the Fifth Circuit in this case and Ninth Circuit in *Lujan*. *See Lujan*, 67 F.3d at 245 (requiring that courts "balance" the statutory goals of "encourag[ing] more private false claims litigation" and of "allowing the government the opportunity to study and evaluate the relator's information for possible intervention in the *qui tam* action or in relation to an overlapping criminal investigation"). The Court rejected the contention that Congress' intent to "encourage" private enforcement of RCRA would be defeated by a literal interpretation of RCRA 60-day notice provision, explaining that "[n]othing in the legislative history of the citizen suit provision militates against honoring the plain language of the notice requirement." *Hallstrom*, 493 U.S. at 28. Rather, the legislative history of RCRA indicated that Congress had "struck] a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the

federal courts with excessive numbers of citizen suits." *Id.* at 29. Accordingly, "[g]iving full effect to the words of the statute preserves the compromise struck by Congress." *Id.*

As with RCRA, Congress stuck a balance in the FCA between encouraging private actions and giving the Government a period of at least 60 days in which to decide what action to take with respect to a suit brought by a private relator, and nothing in the legislative history indicates that Congress intended to encourage private FCA actions by enforcing the seal only sometimes. As the Sixth Circuit stated, "the procedural requirements imposed by a statute reflect the compromise between competing interests in the manner intended by Congress, and thus condition the plaintiff's cause of action, without regard to factors we might otherwise consider pertinent." *Summers*, 623 F.3d at 298. Further balancing by the courts of the competing interests already balanced by Congress thus "represent[s] a form of judicial overreach." *Id.* at 296.

In short, the Fifth Circuit erred in refusing to enforce compliance with the FCA seal requirement as a limitation on the Rigsbys' right to pursue their *qui tam* action, contrary to this Court's established jurisprudence. The Court should grant certiorari to resolve the conflict between the Fifth Circuit's decision and this Court's interpretation of similar statutory conditions precedent to suit.

C. The Fifth and Ninth Circuits' Balancing Test Contravenes the Statutory Objectives of the FCA Seal Requirement

The three-factor balancing test adopted by the Fifth and Ninth Circuits is contrary to the statutory goals of the FCA seal requirement. The most seriously flawed of the three factors is actual harm to the Government, which the Ninth and Fifth Circuits deem a necessary predicate for dismissal. *See Lujan*, 67 F.3d at 245 ("The mere possibility that the Government *might* have been harmed by disclosure is not alone enough reason to justify dismissal of the entire action."). The substantial difficulties of showing actual harm to the Government inevitably result in under-enforcement or uneven enforcement of the seal requirement, as illustrated by this case, where the Rigsbys engaged in repeated, intentional breaches of the seal with no consequences whatsoever.

In *Lujan*, the Government acknowledged the difficulties of establishing actual harm, stating that while it "ha[d] not claimed ... that it was prejudiced by the public disclosure of the *qui tam* allegations prior to the lifting of the seal, it is not in a position to state[,] as a factual matter, that it was not prejudiced by such disclosure." *Id.* at 246 (quoting Statement of the United States). In any given case, a determination whether the Government was actually harmed may remain impermissibly speculative.

The Sixth Circuit rejected "the argument that '[t]he mere possibility that the Government *might* have been harmed by disclosure is not alone enough reason

to justify dismissal of the entire action.'" *Summers*, 623 F.3d at 297 (quoting *Lujan*, 67 F.3d at 245) (emphasis in original). The Sixth Circuit pointed out, *inter alia*, that "[u]nder such a regime, plaintiffs would be encouraged to make disclosures in circumstances when doing so might particularly strengthen their own position, such as those in which exposing a defendant to immediate and hostile media coverage might provide a plaintiff with the leverage to demand that a defendant come to terms quickly." *Id.* at 298. Indeed, that is exactly the calculation the Rigsbys and their counsel made in this case.

The second *Lujan* factor is the "relative severity" of the seal violation. *Lujan*, 67 F.3d at 246. In applying this factor, the Fifth and Ninth Circuits distinguished between initial failures to file under seal and post-filing violations of the seal, finding that the former are more severe. *See id.*; (22a-23a). But neither court provided a reasoned basis for the categorical pronouncement that such a breach is "considerably less severe." (22a-23a) The Sixth Circuit, in contrast, expressly rejected this artificial distinction, which is not tethered to the statutory text. *Summers*, 623 F.3d at 294-96.

The third *Lujan* factor is "the presence or absence of bad faith or willfulness," *Lujan*, 67 F.3d at 246, a factor that was given little weight by the Fifth Circuit. The Fifth Circuit's willingness to overlook the Rigsbys' egregious and repeated bad faith seal violations is inconsistent with the nature of the FCA cause of action and a relator's privileged role in bringing suit on behalf of the Government. This Court has likened the relationship between the Government and the relator

to that of the assignor of a claim and the assignee. *See Stevens*, 529 U.S. at 773-74. It is thus fair and appropriate that *qui tam* status carry with it an obligation to observe the mandates of the statute. The Fifth Circuit's application of the *Lujan* factors to excuse the intentional seal violations in this case sets an ill-advised and erroneous precedent that warrants review by this Court.

II. THIS COURT SHOULD GRANT REVIEW OF THE FIFTH CIRCUIT'S RULING ON CORPORATE SCIENTER, WHICH CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS AND CONTRAVENES THE FCA'S STATUTORY LANGUAGE

The FCA prohibits "knowingly" submitting a false claim (or a false statement in support of a false claim) to the Government for payment, and the Act defines "knowingly" to include "actual knowledge," "deliberate ignorance," or "reckless disregard." 31 U.S.C. § 3729(b)(1). This statutory standard implements the intention "specifically expressed" by Congress ""'that the [FCA] not punish honest mistakes or incorrect claims submitted through mere negligence.'"" *United States ex rel. Hefner v. Hackensack Univ. Med. Ctr.*, 495 F.3d 103, 109 (3d Cir. 2007) (citations omitted). As this Court has made clear, careful adherence to the statutory language and requirements of the FCA "ensures that 'a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct.'" *Allison Engine Co. v. United Sates ex rel. Sanders*, 553 U.S. 662, 672 (2008) (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 470 (2006)).

In this case, the Fifth Circuit's analysis of corporate scienter drastically expands liability under the FCA and deepens the already significant conflict between the decisions of the Fourth Circuit in *Harrison*, 352 F.3d 908, and the D.C. Circuit in *SAIC*, 626 F.3d 1257 – a conflict that this Court pointed out in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011). Because the standard for corporate scienter is a recurring issue in FCA cases, a resolution of the conflicts between the circuits on the issue is needed to ensure a uniform application of the statute within the bounds intended by Congress.

A. This Court Has Recognized that the Fourth Circuit's and D.C. Circuit's Standards for Corporate Scienter Under the FCA Are in Conflict

As stated by this Court in *Staub*, the D.C. Circuit in *SAIC* applied the rule described in the Restatement (Second) of Agency that "the malicious mental state of one agent cannot generally be combined with the harmful action of another agent to hold the principal liable for a tort that requires both," while the Fourth Circuit's decision in *Harrison* "hold[s] to the contrary." *Staub*, 562 U.S. at 418. Despite this acknowledged difference, the Fourth Circuit and the D.C. Circuit agree in rejecting the use of the "collective knowledge" of multiple employees to prove a corporation's scienter in an FCA case and in requiring that "at least one individual employee had all of the relevant factual information" when the purportedly false claim was submitted. *See Harrison*, 352 F.3d at 918 & n.9 (the "'collective knowledge' doctrine" would improperly "allow a plaintiff to prove scienter by piecing together

scraps of 'innocent' knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds") (citation omitted); *SAIC*, 626 F.3d at 1274 (rejecting use of collective knowledge).

The D.C. Circuit, however, requires at least one employee have knowledge both of the underlying facts that render a claim or certification false and of the fact that a false certification is being made or a false claim submitted. *SAIC*, 626 F.3d at 1276. The Fourth Circuit, on the other hand, requires only that a single employee have knowledge of the underlying facts that render a claim or certification false and does not require that the employee knew that a claim or certification would be made. *Harrison*, 352 F.3d at 918-19. This conflict is significant because the D.C. Circuit's requirement of knowledge of both the underlying facts and the submission of a false claim comports with the wording of the statute, which requires that the "false or fraudulent claim" be "knowingly" presented. § 3729(a)(1)(A). Without at least one employee who has knowledge of both the underlying facts and the submission of the claim, the statutory requirement that the false claim be submitted "knowingly" is not met.

B. The Fifth Circuit's Scienter Analysis Cannot Be Reconciled with the Decisions of the Fourth and D.C. Circuits or the FCA's Statutory Language

The Fifth Circuit's scienter analysis exacerbates the conflict between the Fourth and D.C. Circuits. If allowed to stand, the decision will drastically and improperly expand liability under the FCA, contrary to the plain meaning and intent of the statute.

The FCA's definition of the words "knowing" and "knowingly" requires that that scienter be related to "information." The statute requires that "a person, with respect to *information*" has "actual knowledge of the *information*," "acts in deliberate ignorance of the truth or falsity of the *information*," or "acts in reckless disregard of the truth or falsity of the *information*." 31 U.S.C. § 3729(b)(1) (emphasis added). Despite the significant difference in their standards for scienter, the Fourth and D.C. Circuits both require actual knowledge, deliberate ignorance, or reckless disregard of specific information showing that a claim is false. *See SAIC*, 626 F.3d at 1276; *Harrison*, 352 F.3d at 918-19.

Nowhere in its opinion, however, does the Fifth Circuit specify what underlying information *anyone* at State Farm knew, ignored or disregarded that showed that the McIntosh claim was false. Rather, the Fifth Circuit allowed liability based upon unspecified, collective, amorphous "knowledge" of State Farm employees who were purportedly "perpetrators" of a generalized scheme to mischaracterize wind damage as

water damage, but had no role in or knowledge of the McIntosh flood claim at the time it was submitted. (38a.) The Fifth Circuit's decision expands liability under the FCA far beyond what is allowed by the Fourth and D.C. Circuits and by the statutory language of the FCA, which does not permit liability based upon a free-floating ill intent or scheme, untethered to information regarding the claim at issue.

Relying on the purported scheme, the Fifth Circuit rejected as a matter of law State Farm's argument that scienter was not satisfied because "the three adjusters assigned to the claim – Rigsby, Cody Perry, and John Conser (the State Farm supervisor ... who ultimately made the decision to pay the McIntosh flood claim on October 2, 2005) – all shared a good faith belief at the time the claim was submitted that the McIntosh home suffered $250,000 in flood damage" and "there [wa]s no indication that anyone besides these individuals knew the details of the McIntosh claim before it was paid." (37a.)

According to the Fifth Circuit, the facts regarding Conser's good faith decision to approve the McIntosh flood claim did not defeat scienter, but simply reflected a "constricted theory of FCA liability" that "would enable managers at an organization to concoct a fraudulent scheme – leaving it to their unsuspecting subordinates to carry it out on the ground – without fear of reprisal." (37a.) The Fifth Circuit did not explain how a decision-making supervisor can approve a claim in good faith based upon his independent review of all the information amassed in adjusting the flood claim and yet be unknowingly carrying out a fraudulent scheme.

It is not enough under the FCA to prove that a corporation's employees intended to engage in a scheme to defraud the government. "The False Claims Act ... focuses on the submission of a claim, and does not concern itself with whether or to what extent there exists a menacing underlying scheme." *United States ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 1002 (9th Cir. 2002). The corporate scienter standard adopted by the Fifth Circuit improperly dispenses with proof of a "knowing presentation of what is known to be false." *Mikes v. Straus*, 274 F.3d 687, 703 (2d Cir. 2001); *see also United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1172 (9th Cir. 2006) ("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"). Instead, the Fifth Circuit effectively attaches liability to a purported generalized scheme on the part of persons who did not approve the claim at issue and were not shown to have influenced the decision to approve it.

In support of its "fraudulent scheme" theory of scienter, the Fifth Circuit erroneously relied upon cases rejecting an "innocent certifier" defense, citing the Fourth Circuit's decision in *Harrison*, 352 F.3d at 920 n.12, and the Eleventh Circuit's decision in *Grand Union Co. v. United States*, 696 F.2d 888 (11th Cir. 1983). (37a-38a.) Contrary to the Fifth Circuit's decision, the facts in this case are not analogous to the facts of *Grand Union*, where the head cashier (an "innocent certifier") certified false food stamp claims unaware that some cashiers were knowingly accepting food stamps for ineligible non-food items and thus had the requisite knowledge of the underlying facts. *See Grand Union*, 696 F.2d at 891. Even assuming the

knowledge of the cashiers in *Grand Union* was properly imputed to the corporate defendant, scienter is not satisfied here where, in contrast to *Grand Union* and *Harrison*, neither the certifier nor the purported perpetrators of the scheme nor anybody else was shown to know, or have reason to know, information establishing that the McIntosh flood claim was false. Moreover, although the Fifth Circuit makes the generalized assertion that there was "evidence that adjusters were effectively told to presume flood damage, instead of wind damage" (38a), there was no evidence or testimony that *Conser* "presumed flood damage" in approving submission of the McIntosh flood claim. In fact, the evidence of Conser's thorough and independent review of the file was to the contrary.[9]

In holding that the McIntosh flood claim was false, the Fifth Circuit relied upon the theory of the Rigsbys' expert who opined at trial that the McIntosh house was "wracked" by wind and "was a total loss before the flood waters arrived." (34a-35a.) Accordingly, the relevant information for purposes of scienter was the fact that the house was completely destroyed by wracking. However, the Fifth Circuit identified no State Farm employee who actually knew, deliberately ignored, or recklessly disregarded any facts regarding the wracking of the house – or any other information that showed that the McIntosh claim was false.

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[9] The Rigsbys' false record count fails for the same reasons as their false claim count, as Conser approved the use of the purported false record in good faith. The Fifth Circuit acknowledged that State Farm's challenge to scienter "affect[ed] both counts." (32a.)

Indeed, the notion that the house was "wracked" by wind was developed by the Rigsbys' expert *after* the filing of this case.[10]

C. The Fifth Circuit Improperly Imposed Liability Based on After-the-Fact Knowledge, in Direct Conflict with Other Circuits

The flaws in the Fifth Circuit's analysis are not remedied by its holding that "[e]ven if [the court] were to agree with State Farm that one individual must have knowledge that a claim is false," State Farm supervisor Lecky King "alone, 'acting in reckless disregard of the truth or falsity' of the information, 1) caused a false claim to be presented for payment, and 2) caused a false record to be used." (39a.) As the Fifth Circuit acknowledged, that holding relies on King's actions *after* the McIntosh flood claim had already been approved by Conser and submitted. (38a.)[11] The Fifth Circuit's reliance on King's unspecified after-the-fact knowledge of the McIntosh claim widens the division between the Fifth Circuit and other courts of appeals, including the Third, Fourth, Tenth, and D.C. Circuits, which have rejected

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[10] The Rigsbys' expert testified that 90% of the time, wracking damage is not visible until the structural members of the house are exposed during repairs. The inspection and adjustment of the damage to the McIntosh house occurred well before it was repaired.

[11] King became involved in the handling of the separate McIntosh *wind* claim only *after* the McIntosh flood claim had already been paid. Likewise, the Fifth Circuit acknowledged that King's "alleged manipulation of the McIntosh engineering reports occurred *after* the McIntosh [flood] claim was paid." (38a n.15.)

the use of after-the-fact knowledge to show scienter. *See Hefner*, 495 F.3d at 109 (employee's "after-the-fact interpretation of the situation d[id] not establish that the individuals submitting the claims knew that they were submitting false claims"); *Harrison*, 352 F.3d at 919 ("there was ample evidence for the jury to find that [one employee] knew of facts that made the no-OCI certification false *before* [the company] submitted the no-OCI certification" (emphasis added)); *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 951 (10th Cir. 2008) (comments made after submission of allegedly false claims cannot show scienter); *United States ex rel. Folliard v. Gov't Acquisitions, Inc.*, 764 F.3d 19, 30 (D.C. Cir. 2014) (information received after submission of alleged false claim cannot establish scienter).

Certiorari is warranted to resolve the significant conflicts among the circuits regarding the recurring issue of the standard for corporate scienter under the FCA.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit (July 13, 2015)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-60160

UNITED STATES of America, ex rel., CORI RIGSBY; KERRI RIGSBY,

Plaintiffs–Appellants—Cross–Appellees

v.

STATE FARM FIRE & CASUALTY COMPANY,

Defendant–Appellee—Cross–Appellant.

Appeals from the United States District Court for the Southern District of Mississippi

Before: STEWART, Chief Judge, and SOUTHWICK and COSTA, Circuit Judges.

CARL E. STEWART, Chief Judge:

In April 2006, Plaintiffs Cori and Kerri Rigsby (hereinafter, "the Rigsbys" or "relators") brought this qui tam action under the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA"), claiming that State Farm Fire and Casualty Company ("State Farm") submitted false claims to the United States government for payment on flood policies arising out of damage caused by Hurricane Katrina.[1] At trial, the Rigsbys prevailed on

[1] The FCA allows private parties, referred to as "relators," to bring a suit (called a "qui tam" suit) on behalf of the United

a single bellwether false claim under the FCA. The district court subsequently denied their request to conduct further discovery, and denied State Farm's motions for a new trial and judgment notwithstanding the verdict. Both parties appealed. The Rigsbys primarily challenge the district court's discovery ruling and State Farm principally challenges the jury verdict. We REVERSE in part and AFFIRM in part.

I. BACKGROUND

After Katrina, Gulf Coast residents whose homes were damaged or destroyed looked to their insurance companies for compensation. Many of these homeowners were covered by at least two policies, often provided by the same insurance company: a flood policy excluding wind damage, and a wind policy excluding flood damage. A private insurance company would frequently administer both policies, but wind policy claims were paid out of the company's own pocket while flood policy claims were paid with government funds. This arrangement generates the conflict of interest that drives this case: the private insurer has an incentive to classify hurricane damage as flood-related to limit its economic exposure.

We relate the pertinent facts in the light most favorable to the Rigsbys, as the jury rendered a verdict in their favor. *See Wharf (Holdings) Ltd. v. United Int'l*

States against anyone who has submitted false or fraudulent claims to the government. *See* 31 U.S.C. § 3730(b). A prevailing relator is entitled to a percentage of the recovery. *See id.* § 3730(d).

Holdings, Inc., 532 U.S. 588, 590 (2001). The Rigsbys[2] were certified, experienced claims adjusters employed by a State Farm contractor that provided disaster claims management services and claims representatives. They claimed that State Farm (other defendants have since been dismissed or settled) sought to unlawfully shift its responsibility to pay wind damage claims on homeowner's insurance policies to the government, through the National Flood Insurance Program ("NFIP"), by classifying damage to properties covered by both a homeowner's policy and a flood policy as flood damage instead of wind damage.

The NFIP, administered by the Federal Emergency Management Agency ("FEMA"), provides flood insurance coverage "at or below actuarial rates" in areas where it "is uneconomical for private insurance companies to provide flood insurance." *Gowland v. Aetna*, 143 F.3d 951, 953 (5th Cir. 1998). In 1983, FEMA established the "Write Your Own" Program ("WYO"), which allows participating private property and casualty insurance companies to issue, under their own names, government-backed flood insurance policies with limits of up to $250,000 for flood-based building damage and $100,000 for flood damages to personal property. *See Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 389 (9th Cir. 2000); Nat'l Flood Ins. Program, *Summary of Coverage* 1 (2012). The policies conformed to FEMA's Standard Flood Insurance Policy ("SFIP"), which generally provided coverage for flood damage but excluded coverage for wind damage. *See* 44 C.F.R. pt. 61, app. A(1), arts. I, V(D)(8). WYO

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[2] Whenever used in the singular, "Rigsby" signifies Kerri Rigsby. The Rigsbys are sisters.

insurers take a fee for administering the policy, but when claims are made, they are paid out of the federal treasury. *See Mun. Ass'n of S.C. v. USAA Gen. Indem. Co.*, 709 F.3d 276, 280–81 (4th Cir. 2013).

At all relevant times, State Farm was a participating WYO insurer. State Farm and other WYO insurers often issued, to the same customers, homeowner's policies that provided coverage for wind damage, but excluded coverage for flood damage. To address the inherent incentive to classify ambiguous damage as flood damage, regulations characterize the WYO insurer's relationship to the government as "one of a fiduciary nature." 44 C.F.R. pt. 62, app. A, art. XV.

On August 29, 2005, Hurricane Katrina struck the Gulf Coast. Shortly thereafter, State Farm set up an office in Gulfport, Mississippi, to address claims involving its policies. Alexis "Lecky" King ("King") was one of two primary Gulfport supervisors and a catastrophe coordinator with substantial experience adjusting claims. According to Rigsby's trial testimony, a meeting was convened soon after Katrina during which State Farm trainers, including King, told its adjusters that "[w]hat you will see is, you will see water damage. The wind wasn't that strong. You are not going to see a lot of wind damage. If you see substantial damage, it will be from water."

Prior to Katrina, State Farm's general policy was to conduct line-by-line and item-by-item estimates of home damages using a program called Xactimate. In the wake of Katrina, and because of the immense number of claims, FEMA authorized WYO insurers—through FEMA directive W5054— to use an expedited procedure to pay two particular types of claims: 1)

claims in which a home "had standing water in [it] for an extended period of time" and 2) claims in which the home was "washed off its foundation by flood water." All other claims fell into a third category that required WYO insurers to follow their "normal claim procedures." The Rigsbys presented evidence at trial that State Farm failed to comply with that directive.

After Katrina, State Farm—rather than using Xactimate to generate a line-by-line printout of flood damages to a home—often used a program called Xactotal, which estimates the value of a home based on square footage and construction quality. State Farm told its adjusters that any time damage to a home appeared to exceed the flood policy's limits, the adjuster should use Xactotal. There was also evidence that State Farm officials told adjusters to "manipulate the totals" in Xactotal to ensure that policy limits were reached.

On September 20, 2005, a few weeks after Katrina, Rigsby and Cody Perry, another State Farm adjuster, inspected the home of Thomas and Pamela McIntosh ("the McIntoshes") in Biloxi, Mississippi. The McIntoshes had two insurance policies with State Farm: a SFIP excluding wind damage, and a homeowner's policy excluding flood damage. Using Xactotal, and thereby foregoing a line-by-line estimate, Rigsby and Perry presumed that flooding was the primary cause of damage to their home. On September 29, 2005, State Farm supervisor John Conser ("Conser") approved a maximum payout of $350,000 ($250,000 for the home, $100,000 for personal

property)[3] under the SFIP. Three days later, State Farm sent checks to the McIntoshes.

State Farm later retained an engineering company, Forensic Analysis Engineering Corporation ("Forensic"), to analyze the damage. Forensic engineer Brian Ford ("Ford") concluded that the damage was primarily caused by wind. His report (the "Ford Report") was prepared on October 12, 2005. But the Rigsbys presented evidence that after State Farm received it, the company refused to pay Forensic and withheld the Ford Report from the McIntosh NFIP file. A note on the Ford Report from King read: "Put in Wind [homeowner's policy] file – DO NOT Pay Bill DO NOT discuss." State Farm commissioned a second report, written by another Forensic employee, John Kelly (the "Kelly Report"). The Kelly Report determined that while there had been wind damage, water was the primary cause of damage to the McIntosh home. There was evidence that King pressured Forensic to issue reports finding flood damage at the risk of losing contracts with State Farm. Ford was subsequently fired. These events led the Rigsbys to believe State Farm was wrongfully seeking to maximize its policyholders' flood claims to minimize wind claims.

The Rigsbys brought suit under the FCA on April 26, 2006. They alleged violations of 31 U.S.C. § 3729(a)(1), (a)(2), (a)(3), and (a)(7), but only the claims under § 3729(a)(1) and § 3729(a)(2)—now

[3] The $100,000 that State Farm paid the McIntoshes for flood-related personal property damage is not at issue in this litigation.

codified at § 3729(a)(1)(B)—are at issue in this appeal.[4] The government declined to intervene on January 31, 2008. The district court focused discovery and the subsequent trial on the McIntosh claim, rather than permitting the Rigsbys to seek out and attempt to prove other claims, in order to "protect the interests of both parties." The district court stated that it sought to "strike a balance between the Relators' interest in identifying . . . other allegedly false claims and the defendants' interest in preventing a far ranging and expensive discovery process." The court then explained that, "[i]n the event the Relators prevail on the merits of their allegations concerning the McIntosh claim, I will then consider whether additional discovery and further proceedings are warranted." After a new district judge was assigned to this case, the Rigsbys did prevail at trial. They were aided by expert testimony from Dr. Ralph Sinno that the McIntosh home had been "wracked" by winds that completely destroyed it before the flood waters came.

The jury concluded that the McIntosh residence sustained no compensable flood damage and that the government therefore suffered damages of $250,000 under the FCA as a result of State Farm's submission of false flood claims for payment on the McIntosh property. The jury also found that State Farm

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[4] In 2009, while the Rigsbys' claims were pending, Congress amended the FCA. *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(a), May 20, 2009, 123 Stat. 1621. Most of these changes were not retroactive as applicable here. Thus, the 1994 version of § 3729(a)(1)—now § 3729(a)(1)(A)—governs the Rigsbys' false claim count. However, the 2009 version of § 3729(a)(1)(B), which was formerly § 3729(a)(2), is retroactively applicable to the Rigsbys' false record count.

submitted a false record. The district court denied State Farm's motions for judgment notwithstanding the verdict and for a new trial. The Rigsbys moved after trial for additional discovery to seek out other instances of false claims that were part of the alleged general scheme, but the court denied that motion, concluding that they had failed to plead sufficient facts about any claims unrelated to the McIntosh claim. The court, however, awarded the Rigsbys the maximum possible share under the FCA for relators pursuing claims without the government as a party—30 percent of $758,250 (the court trebled damages on the $250,000 false claim and added a civil penalty of $8,250), or $227,475. *See* § 3730(d). The court also awarded the Rigsbys $2,913,228.69 in attorney's fees and expenses. Both parties appealed.

These cross-appeals present four issues: 1) whether the Rigsbys are entitled to further discovery; 2) whether the Rigsbys' alleged violations of the FCA's seal requirement independently warrant dismissal; 3) whether the district court retained subject matter jurisdiction throughout the litigation; and 4) whether the jury's verdict was supported by sufficient evidence. We will address the applicable standards of review in each section and provide additional relevant background where necessary.

II. DISCUSSION

A. Rule 9(b) and Further Discovery

The Rigsbys seek further discovery into the same alleged scheme they argue produced the McIntosh claim. The district court denied this request, explaining that "[b]eyond the McIntosh claim,

Relators' conclusory allegations in the Amended Complaint as to the existence of other specific FCA violations do not satisfy the particularity requirements of [Federal Rule of Civil Procedure] 9(b), and expanded discovery would lead to an inappropriate fishing expedition for new claims."

We review the district court's decision barring discovery for abuse of discretion. *See Moore v. CITGO Ref. & Chems. Co.*, 735 F.3d 309, 315 (5th Cir. 2013). "A district court has broad discretion in all discovery matters, and such discretion will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse." *Id.* (internal quotation marks and citation omitted). Even if we determine that the district court has abused its discretion, "we will only vacate a court's judgment if it affected the substantial rights of the appellant." *Green v. Life Ins. Co. of N. Am.*, 754 F.3d 324, 329 (5th Cir. 2014) (citation omitted). Notwithstanding "this stated discretion over discovery, the lower court is directed to exercise carefully its authority in light of the intent of the federal litigation process and the federal rules. It must in discovery 'adhere to the liberal spirit of the Rules.'" Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 4.11[4] (4th ed. 2010) (quoting *Burns v. Thiokol Chem. Corp.*, 483 F.2d 300, 305 (5th Cir. 1973)); *see also* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.").

What makes this case unique is the manner in which the district court treated the Rigsbys'

allegations. A limited procedural background is therefore necessary. In addressing State Farm's 9(b) motion filed early in this litigation, the district court recognized that the allegations in the Rigsbys' amended complaint went "well beyond the two specific instances of misconduct specifically identified." But the district court, "[i]n order to protect the interests of both parties," struck a "balance between the Relators' interest in identifying these other allegedly false claims and the defendants' interest in preventing a far ranging and expensive discovery process that relates only to claims that are not, for now, specifically identified." The district court then effectively sent the McIntosh claim to trial, but not before explaining that, should the Rigsbys "prevail on the merits of their allegations concerning the McIntosh claim," it would "then consider whether additional discovery and further proceedings [were] warranted."

The parties and the district court have framed this dispute as one almost entirely dependent on the application of Rule 9(b). True, complaints under the FCA must comply with Rule 9(b), which provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."[5] But Rule 9(b) is a pleading rule that would almost always come into play in pre-trial proceedings (as it did in this case). The *renewed* application of that rule in the post-trial posture here is highly unusual, if not sui generis. Indeed, the parties have not directed

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[5] "Rule 9(b) supplements but does not supplant Rule 8(a)'s notice pleading," *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 186 (5th Cir. 2009), which requires "enough facts [taken as true] to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

us to any decision applying Rule 9(b) to limit discovery after a successful trial on the merits of a "test case" fraud claim.

We do not believe that Rule 9(b) is the appropriate analytical prism through which to view the issues presented by this case. First, a court would generally, in this context, have before it a pending Rule 12(b)(6) motion to dismiss for failure to state a claim or a motion to dismiss for failure to meet the requirements of Rule 9(b). *See* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1300 (3d ed. 2015) [hereinafter Wright & Miller]. Neither were before the district court when the decision to terminate proceedings in this case was made.

Second, even if such a motion had been pending, the posture of this case has generated substantial confusion about precisely what evidence would be relevant to a Rule 9(b) determination. The parties dispute the degree to which the trial proceedings could be taken into account. The district court's decision at its core simply appears to rewind the case to the amended complaint, as though years of proceedings and a two-week trial had not taken place in the interim. But that same amended complaint was already the subject of State Farm's futile Rule 9(b) motion discussed above. Both of these decisions look to the adequacy of the *same* complaint to determine if the case should move forward. *See Frederico v. Home Depot*, 507 F.3d 188, 201 (3d Cir. 2007) ("[W]e do not consider after-the-fact allegations in determining the sufficiency of her complaint under Rule[] 9(b) . . . ."); *Estate of Axelrod v. Flannery*, 476 F. Supp. 2d 188, 198 n.1 (D. Conn. 2007) ("Indeed, the impetus for filing a Rule 9(b) motion to dismiss is to challenge a complaint

on its face."). But the decision about whether this case should move forward *after* the trial cannot be based solely on the way matters stood *before* trial. Applying Rule 9(b) here presents a square peg/round hole problem.

Third, the central purposes of Rule 9(b)—"to provide defendant with fair notice of claim, to safeguard defendant's reputation, and to protect defendant against the institution of strike suits," *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993)—appear inapplicable in this context. State Farm in this case is all too aware of the nature of the Rigsbys' allegations. It has litigated this case for nearly a decade. To the extent that the rule is designed to safeguard the defendant's reputation, that purpose is not served here: a jury already determined that State Farm committed fraud at least with respect to the McIntosh claim. Finally, there is no indication that this is a strike suit— one "based on no valid claim." *ABC Arbitrage Plaintiffs Grp. v. Tchuruk*, 291 F.3d 336, 354 n.84 (5th Cir. 2002) (quoting Black's Law Dictionary 1448 (7th ed. 1999)). "In cases of fraud, Rule 9(b) has long played that screening function, standing as a gatekeeper to discovery, a tool to weed out meritless fraud claims sooner than later." *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 (5th Cir. 2009); *see also* Richard L. Marcus et al., *Civil Procedure: A Modern Approach* 187 (6th ed. 2013) ("[O]ne cannot forget that Rule 9(b) is not meant to supplant discovery." (citation omitted)). Here, the

Rigsbys' claims were quite obviously not entirely "meritless."[6]

Finally, we note that we "have power not only to correct error in the judgment under review but to make such disposition on the case as justice requires." *Patterson v. Alabama*, 294 U.S. 600, 607 (1935); *see also Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 819 (5th Cir. 2004). Consequently, we review the decision below not as a dismissal under Rule 9(b), but instead as a decision limiting discovery after a trial on the merits resulted in a jury verdict in favor of the plaintiffs on two counts of fraud.

Turning, then, to the rules applicable to requests for discovery, we start from the background principle that "the scope of discovery is broad and permits the discovery of 'any nonprivileged matter that is relevant to any party's claim or defense.'" *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258, 262 (5th Cir. 2011) (quoting Fed. R. Civ. P. 26(b)(1)). This principle is also to be understood in light of Rule 1, which directs that

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[6] We hasten to add here that we have recently suggested, in the post-*Grubbs* FCA context, that additional discovery might be employed to permit plaintiffs to cure certain defects in a complaint. *See U.S. v. Bollinger Shipyards Inc.*, 775 F.3d 255, 264 n.29 (5th Cir. 2014). Additionally, at least one other circuit permits discovery on "the entire fraudulent scheme" where a relator "pleads a complex and far-reaching fraudulent scheme with particularity, and provides examples of specific false claims submitted to the government pursuant to that scheme." *U.S. ex rel. Bledsoe v. Cmty. Health Sys. Inc.*, 501 F.3d 493, 510 (6th Cir. 2007); *see also In re Lupron Mktg. & Sales Practices Litig.*, 295 F. Supp. 2d 148, 171 (D. Mass. 2003) (permitting plaintiffs in fraud action to remedy deficiencies in amended complaint after completion of discovery).

the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. We have explained that there "probably is no provision in the federal rules that is more important than this mandate." *Trevino v. Celanese Corp.*, 701 F.2d 397, 405 (5th Cir. 1983) (internal quotation marks and citation omitted). We also are cognizant that the "FCA is remedial in nature and thus we construe its provisions broadly to effectuate its purpose." *Townsend v. Bayer Corp.*, 774 F.3d 446, 459 (8th Cir. 2014) (citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)).

While it is indeed rare for an appellate court to reverse a denial of a request for further discovery, it is far from unprecedented. *See* 8 Wright & Miller § 2006 ("Reversal is more likely, although still unusual, when the trial court has erroneously denied or limited discovery."). And, indeed, we have reversed in circumstances where a district court inappropriately denied a party adequate discovery. *See, e.g.*, *Brown v. Miss. Valley State Univ.*, 311 F.3d 328, 333–34 (5th Cir. 2002) ("The district court did not rule on Brown's request for discovery but granted summary judgment on the grounds that there was insufficient evidence of Abraham's involvement in a conspiracy, precisely the type of evidence sought by Brown."); *Murphy v. Kellar*, 950 F.2d 290, 293 (5th Cir. 1992) (requiring that district court permit additional discovery where it may result in identification of unidentified defendants).

The Rigsbys' allegations and trial evidence—which extend far beyond the realm of the McIntosh claim—entitle them to at least some additional discovery. In

their final pretrial order,[7] the Rigsbys first describe a State Farm planned adjuster meeting they attended shortly after Katrina during which "State Farm trainers told the adjusters that Hurricane Katrina was a 'water storm' and that all major damage to homes was caused by flooding." They explain that State Farm directed its adjusters to pay policy limits under NFIP policies, and allege that "State Farm, through Alexis King and [State Farm principal FEMA contact] Juan Guevara, pushed the NFIP to relax its rules and requirements for adjusting flood claims." Using the Xactotal shortcut software (rather than the Xactimate software, which would have provided a line-by-line, item-by-item adjustment), the Rigsbys allege that "State Farm adjusted multitudes of flood claims under NFIP policies in knowing and direct violation of one of the core NFIP adjusting requirements." The Rigsbys assert that "[f]or the first time in adjusting a major hurricane, State Farm ordered engineers [to examine properties] for virtually all claims that involved flooding." Finally, they allege, "King appropriated the McIntosh engineering reports and all of the other engineering reports coming into the Gulfport office and made sure that they all conformed with State Farm's scheme to categorize all losses as caused by flooding rather than wind." These allegations touch on matters well beyond the McIntosh claim.

But our analysis does not cease with those allegations. We cannot blind ourselves to the verdict in

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[7] In evaluating the Rigsbys' allegations, we look to the final pretrial order, rather than their amended complaint, because the pleadings were amended to conform to that order. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474 (2007); Fed. R. Civ. P. 16(d) & advisory committee note to 1983 amendment.

this case and the associated record developed at trial, at least in this distinctive setting. This case presents something exceptional that most (if not all) plaintiffs in FCA cases are unable to show when seeking discovery: a jury's finding of a false claim *and* a false record. Coupled with the allegations in the final pretrial order, this "amounts to more than probable, nigh likely, circumstantial evidence" that additional false claims might have been submitted. *Grubbs*, 565 F.3d at 192. At a minimum, the trial record supports a high probability that State Farm submitted more than one false claim.

And the jury's verdict—though it referenced only the McIntosh claim— cannot be so easily limited. The jury determined that State Farm "knowingly present[ed], or cause[d] to be presented," a false claim and that the insurer "knowingly ma[de], use[d], or cause[d] to be made or used" a false record material to a false claim. 31 U.S.C. § 3729(a)(1), (a)(1)(B). State Farm contends the jury could have made this determination without finding wrongdoing beyond the McIntosh claim. But that takes too narrow a view of the Rigsbys' evidence. Even in closing argument, as he walked the jury through the verdict form, the Rigsbys' counsel explained that they should render a verdict for Relators on the § 3729(a)(1) claim because of "all the scheme type evidence that we've been putting on" and on the § 3729(a)(1)(B) claim because of the Xactotal form.

With respect to the § 3729(a)(1) claim, the Rigbys presented evidence at trial that State Farm told its adjusters that the post-Katrina damage they would see would be flood damage, that they should "hit the limits" on flood policies, and that they should use

Xactotal in these circumstances rather than FEMA directive W5054's required line-by-line estimate. These general allegations, extending beyond the McIntosh claim, were fervently litigated during the trial.

The verdict on the § 3729(a)(1)(B) claim is perhaps even more suggestive of additional claims. State Farm did not quarrel with whether the Xactotal printout had in fact been placed in the McIntosh NFIP file; witnesses testified to widespread use of Xactotal in adjusting Katrina claims. Its argument was that the document was not a false record within the meaning of § 3729(a)(1)(B) because State Farm had *generalized permission* to deviate from FEMA directive W5054 if the loss appeared to exceed the coverage limit. The jury's verdict necessarily entailed a finding that this was not so.

"In pursuing traditional or test case trials, the judge may conduct a unitary trial, bifurcate liability and damages, or create other helpful trial structures." *Manual for Complex Litigation* § 22.93 (4th ed. 2015). But a "court must identify and minimize any risk of unfairness in requiring litigants to present claims or defenses in a piecemeal fashion." *Id.* The district court appropriately employed its discretion to isolate the McIntosh claim for trial. But in denying the Rigsbys *any* additional discovery after a verdict in their favor, the district court abused its discretion in a manner that affected their substantial rights. *See Green*, 754 F.3d at 329; *see also Burns*, 483 F.2d at 305 (requiring that administration of discovery remain consistent with "the liberal spirit of the Rules"). The Rigsbys' allegations in the final pretrial order and the verdict on the McIntosh claim provide sufficient justification to permit additional limited discovery. While the

typical case might warrant shutting the door to more discovery, the Rigsbys have at least edged the door ajar for some additional, if superintended, discovery.

We emphasize that our decision hinges in large part on the idiosyncratic nature of this case—seldom will a relator in an FCA case present an already rendered jury verdict in her favor while seeking further discovery. We therefore remand to the district court for further proceedings not inconsistent with this opinion, but stress that we make no judgments about the actual existence of other potential false claims or records.[8]

B. Seal Violations

Turning to the cross-appeal, State Farm argues that the Rigsbys' violations of the FCA's seal requirement independently warrant dismissal. The FCA requires that a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the government." 31 U.S.C. § 3730(b)(2). The complaint must be filed in camera and remain under seal until the court orders it served on the defendant. *Id.* Whether a violation of this requirement compels dismissal presents a statutory interpretation question reviewed de novo. *See U.S. ex rel. Summers v. LHC Grp. Inc.*, 623 F.3d 287, 291 (6th Cir. 2010). The requirements of § 3730(b)(2) are procedural, not

[8] We are sympathetic to the district court's fear of unconstrained discovery. To that end, a reasonable place to begin would be to allow the Rigsbys access to a list that State Farm already prepared in response to the district court's request to review in camera certain materials in its August 10, 2009, order.

jurisdictional. *See* Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 11:14 (2d. ed. 2010) [hereinafter Sylvia, *Fraud Against the Government*] (collecting cases).

Although this is an issue of first impression in this court, three circuits have addressed the consequences of an FCA seal violation and come to divergent conclusions. In *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, the plaintiff filed her FCA suit under seal but subsequently disclosed, to a national newspaper, the existence of the suit and the nature of her allegations about a government contractor mischarging for its work on a plane's radar system. 67 F.3d 242, 243–44 (9th Cir. 1995). Two articles were subsequently published revealing that the suit had been filed and relaying the substance of the claims. *Id.* at 244. The district court dismissed the suit because of the seal violations. *Id.* at 243.

The Ninth Circuit reversed. *Id.* at 243, 247. The court determined that no provision in the FCA explicitly authorizes dismissal as a sanction for a seal violation. *Id.* at 245. The court then looked to the legislative history surrounding the passage of the 1986 amendments to the FCA that added the seal provision, and determined that Congress sought to strike a balance between encouraging private FCA actions and allowing the government an adequate opportunity to evaluate whether to join the suit. *Id.* (citing S. Rep. No. 99-345, at 23–25 (1986)). The *Lujan* court concluded that the plaintiff had violated the seal requirement, but remanded with instructions for the district court to evaluate three factors in determining whether dismissal was warranted: 1) the harm to the government from the violations; 2) the nature of the

violations; and 3) whether the violations were made willfully or in bad faith. *Id.* at 245–47. The Second Circuit adopted a similar analysis in *U.S. ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 997, 999–1000 (2d Cir. 1995).

By contrast, the Sixth Circuit held that any violation of the seal requirement, no matter how trivial, requires dismissal. *See Summers*, 623 F.3d at 299. The *Summers* court determined that Congress's choice of a 60-day seal period already reflected legislative balancing of the interests identified by the *Lujan* court. *See id.* at 296. The *Summers* court also feared that a balancing test would encourage "plaintiffs to comply with the FCA's under-seal requirement only to the point the costs of compliance are outweighed by the risk" of dismissal. *Id.* at 298.

While cognizant of the justification for and the merits of a per se rule, we conclude that a seal violation does not automatically mandate dismissal. As the *Lujan* court recognized and the government stated as amicus in this case, nothing in the text of § 3730(b)(2) "explicitly authorizes dismissal as a sanction for disclosures in violation of the seal requirement." 67 F.3d at 245. Perhaps more essentially, though, the 1986 amendments to the FCA were intended to encourage more, not fewer, private FCA actions. *See* S. Rep. No. 99-345, at 1– 8, 23–25. Holding that any violation of the seal requirement mandates dismissal would frustrate that purpose, particularly when the government suffers minimal or no harm from the violation. We therefore embrace the *Lujan* test for addressing violations of § 3730(b)(2) and turn to the relevant facts here. We review the district court's application of the *Lujan* factors, and its election

of a remedy for a seal violation, for abuse of discretion. *See Lujan*, 67 F.3d at 247 ("Imposition of dismissal as a sanction is reviewed for abuse of discretion."); *Pilon*, 60 F.3d at 1000.

The Rigsbys filed their initial complaint under seal on April 26, 2006, and served a copy to the government. State Farm alleges that the Rigsbys' prior counsel then disclosed the existence of the lawsuit to several news outlets by emailing copies of the evidentiary disclosures and engineering reports, sometimes including the case caption. State Farm also alleges that the Rigsbys themselves sat for interviews that culminated in the publication of multiple news stories—including one interview that was the subject of a national broadcast on ABC's 20/20 program—and notified a Mississippi congressman of their FCA action. Most of these events occurred before the seal was partially lifted on January 10, 2007, to allow the Rigsbys to address related litigation in Alabama. The seal was fully lifted on August 1, 2007.

First, we limit the scope of our inquiry to the period between the filing of the complaint and the partial seal lift. Indeed, while neither party appears to have scrutinized the docket in the related litigation, the existence of this qui tam litigation was revealed there in another party's public filings within days of the partial seal lift. *See E.A. Renfroe & Co. v. Cori Rigsby Moran et al.*, No. 2:06-cv-01752 (N.D. Ala. Jan. 18, 2007), ECF No. 85. This effectively mooted the original seal. We also confine our analysis to disclosures of the existence of the suit itself, and do not consider disclosures of the underlying allegations. *See Am. Civil Liberties Union v. Holder*, 673 F.3d 245, 254 (4th Cir. 2011) ("[T]he seal provisions limit the relator

only from publicly discussing the filing of the qui tam complaint. Nothing in the FCA prevents the qui tam relator from disclosing the existence of the fraud.").

Having closely reviewed each of the disclosures offered by State Farm that fall into the aforementioned time period and relate to the existence of the FCA suit,[9] we first conclude that the Rigsbys violated § 3730(b)(2). They conceded as much at oral argument. But we agree with the district court's determination that none of the disclosures appear to have resulted in the publication of the existence of this suit before the seal was partially lifted. Applying the *Lujan* factors, then, we conclude first that the government was not likely harmed. If State Farm was not tipped off about the existence of the suit from the Rigsbys' disclosures, a fundamental purpose of the seal requirement—allowing the government to determine whether to join the suit without tipping off a defendant—was not imperiled. *See Lujan*, 67 F.3d at 245– 46; *U.S. ex rel. Le Blanc v. ITT Indus., Inc.*, 492 F. Supp. 2d 303, 307–08 (S.D.N.Y. 2007); S. Rep. No. 99-345, at 24.

Second, the violations here—unlike those in many other cases that resulted in dismissal, *see e.g.*, *Taitz v. Obama*, 707 F. Supp. 2d 1, 4 (D.D.C. 2010); *Erickson ex rel. U.S. v. Am. Inst. of Biological Scis.*, 716 F. Supp. 908, 911–12 (E.D. Va. 1989)—did not involve a complete failure to file under seal or serve the government, and were therefore considerably less

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[9] We assume, without deciding, that: 1) disclosures by the Rigsbys' prior counsel, who were later disqualified, can be imputed to them; 2) disclosures to a sitting congressman can violate § 3730(b)(2); and 3) State Farm has standing to seek dismissal under § 3730(b)(2).

severe. *See Lujan*, 67 F.3d at 246. We acknowledge that some of the above-mentioned publications revealed that the Rigsbys turned over material to federal and state prosecutors. But each reference to those disclosures is in the context of allegations about State Farm misleading policyholders, not the federal government. The distinction is significant because the revelation of possible private or public enforcement to protect policyholders would not alert State Farm to a pending FCA suit.

With respect to bad faith, the district court determined that "there is nothing in the record to suggest that the disclosures in question . . . were authorized by or made at the suggestion of the Relators," and held that a finding of bad faith or willfulness was unwarranted. There is no indication that the Rigsbys themselves communicated the existence of the suit in the relevant interviews. Were we to impute their former attorneys' disclosures to them, however, we would conclude that they acted in bad faith. Even presuming bad faith, the *Lujan* factors favor the Rigsbys. Although they violated the seal requirement, the Rigsbys' breaches do not merit dismissal.

C. Subject Matter Jurisdiction

State Farm next challenges the district court's determination that it had subject matter jurisdiction over this action. Where the underlying allegations of a suit have been the subject of a "public disclosure," a court lacks subject matter jurisdiction to hear the suit unless the relator is an "original source" of the

information. *See* 31 U.S.C. § 3730(e)(4).[10] Whether § 3730(e)(4) bars a complaint is a question of subject matter jurisdiction. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467 (2007). Assuming *arguendo* that a public disclosure occurred, as the district court did, we conclude that the district court properly retained jurisdiction because the Rigsbys are original sources.

A "challenge under the FCA jurisdictional bar is necessarily intertwined with the merits and is, therefore, properly treated as a motion for summary judgment." *U.S. ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 173 (5th Cir. 2004) (internal quotation marks and citation omitted). "Summary judgment will be granted if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *U.S. ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 326 (5th Cir. 2011) (citations omitted).

In relevant part, § 3730(e)(4)(A) reads: "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions" in a civil hearing or in the news media "unless . . . the person bringing the action is an original source of the information." An "original source" is "an individual who has direct and independent knowledge of the information on which

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[10] This section was substantively amended in 2010, but the new version does not apply to cases, like this one, that were already pending at the time of its enactment. *See Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010).

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." § 3730(e)(4)(B). "Direct" knowledge is "derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others." *U.S. ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 355 (5th Cir. 2003) (citation omitted) *abrogated on other grounds by Rockwell*, 549 U.S. at 472. Knowledge is "independent" when "it is not derived from the public disclosure." *Reagan*, 384 F.3d at 177 (citations omitted).

In evaluating whether a relator has "direct and independent knowledge," we "must look to the factual subtleties of the case before [us] and attempt to strike a balance between those individuals who, with no details regarding its whereabouts, simply stumble upon a seemingly lucrative nugget and those actually involved in the process of unearthing important information about a false or fraudulent claim." *Laird*, 336 F.3d at 356. The relator's contribution must "translate into some additional compelling fact, or must demonstrate a new and undisclosed relationship between disclosed facts, that puts a government agency 'on the trail' of fraud, where that fraud might otherwise go unnoticed." *Reagan*, 384 F.3d at 179 (citations omitted). Significantly here, the court must retain subject matter jurisdiction at all times throughout the litigation. "The court can lose jurisdiction over an otherwise sound action if the relator amends his complaint to remove the basis of the jurisdiction." *See Jamison*, 649 F.3d at 327–28 (citing *Rockwell*, 549 U.S. at 473–74). Conversely, the "amendment process cannot be used to create

jurisdiction retroactively where it did not previously exist." *See id.* at 328 (internal quotation marks and citation omitted).

Turning to the facts, two relevant clusters of disclosures occurred before the Rigsbys filed their initial complaint in April 2006. First, in September 2005, a different set of plaintiffs filed a class action complaint (the "Cox/Comer Complaint") against 100 unnamed insurance companies and seven named ones, including State Farm. That suit alleged that insurers were engaged "in an effort to save money and pass on the costs of the loss to the federal flood insurance program" by misclassifying "storm related activity other than flooding"—including wind damage—as flood-related. The suit focused on the Mississippi Coast. In January 2006, the Cox/Comer plaintiffs filed a second amended complaint, alleging that damages were "caused by the hurricane winds . . . that preceded the arrival of water by a sufficient amount of time that the destruction had already occurred prior to the arrival of floodwaters."

Second, on October 18, 2005, and February 2, 2006, former NFIP administrator J. Robert Hunter testified before a U.S. Senate committee about, among other topics, the conflict of interest WYO insurers adjusting Katrina claims faced in determining whether property damage was caused by wind or water. Hunter explained that "even though a property may have been washed away by the storm surge, it was likely first hit by heavy winds, so that by the time the water wiped out the property, some percentage of the property was already destroyed by wind and rain." Hunter called for the Government Accountability Office to audit the allocations "so that any tendency of the insurers to

diminish their wind losses for their own benefit is stopped quickly." He did not name State Farm.

Assuming *arguendo* that these were public disclosures within the meaning of § 3730(e)(4)(A), we look first to whether the Rigsbys were original sources with direct and independent knowledge of the information in their original complaint. *See Jamison*, 649 F.3d at 327, 332. Although the Cox/Comer Complaint and the Hunter testimony did reveal some of the information coloring the background of this litigation, the Rigsbys' personal, first-hand experiences filled in much of the detail, particularly as it related to the McIntosh claim, and certainly amounted to more than a "seemingly lucrative nugget" that they "simply stumble[d] upon." *Laird*, 336 F.3d at 356. The Rigsbys allege in their original complaint that: 1) they were told to use the "shortcut" Xactotal software even on claims that "sustained moderate flood damage"; 2) they were told to manipulate the information entered into Xactotal if the initial analysis did not result in a full payout under the flood policy; and 3) Rigsby discovered the wind-focused Ford Report as well as King's "DO NOT Pay Bill DO NOT discuss" note attached to that document and the subsequent flood-focused Kelly Report. These allegations were sufficient to confer original source status upon the Rigsbys at the outset of the case.

We next look to whether the Rigsbys' status as original sources was divested by the pursuit of a different theory at trial, as State Farm argues. This is precisely what happened in *Rockwell*. In that case, a relator brought an FCA suit against his former employer, a government contractor operating a nuclear weapons plant, after a toxic waste leak. 549 U.S. at

460–64. His original complaint alleged the leak was rooted in a process for mixing the waste that he had predicted during his employment would fail because of a piping defect. *Id.* at 461. However, the theory the government developed after it intervened in the case (and upon which it was successful at trial) was that—after the relator himself had already left the company—a foreman caused the leak by using an improper waste mixture. *Id.* at 461–65. The Court determined that because the only false claims found by the jury related to the period *after* the relator had left the company, and were rooted not in the relator's predicted piping failure but instead in a foreman's improper mixture, he had no direct and independent knowledge of the defect. *Id.* at 475–76. The district court therefore lacked jurisdiction to enter judgment in the relator's favor. *Id.* at 479.

But the facts here differ substantially from those in *Rockwell*. The *Rockwell* Court looked to the final pretrial order to evaluate jurisdiction and observed that it had become unmoored from the original allegations underlying the complaint. *See id.* at 474–76. But the final pretrial order in this case is replete with allegations about which the Rigsbys had direct and independent knowledge. The Rigsbys allege in the final pretrial order, for example, that: 1) State Farm told adjusters to use Xactotal to "hit the limits" of flood policies; 2) adjuster Cody Perry handed Kerri Rigsby the Ford Report, which contained King's note; and 3) the Rigsbys attended an adjuster meeting convened by State Farm during which the company's trainers told the adjusters that Katrina was a "'water storm' and that all major damage to homes was caused by flooding." These allegations formed the basis of much

of the trial and they do not significantly diverge from the Rigsbys' original allegations.

State Farm is correct that the Rigsbys relied on Dr. Ralph Sinno's "wracking" theory at trial, but wracking is not a "theory of fraud" about which the Rigsbys could have been whistleblowers. As detailed above, the Rigsbys alleged that State Farm fraudulently misclassified wind damage as flood damage through a variety of means. State Farm sought to refute the Rigsbys' allegations of fraud by arguing that water was in fact the cause of the damage to the McIntosh home. Dr. Sinno's wracking theory countered that defense by explaining how wind actually would have caused the damage first. The wracking theory was part of the proof by which the Rigsbys convinced the jury of the predicate fact that wind caused the damage to the McIntosh home. *See Rockwell*, 549 U.S. at 475 ("[A] *qui tam* relator's misunderstanding of *why* a concealed defect occurred would normally be immaterial . . . ."); Sylvia, *Fraud Against the Government* § 11:63. In any event, the wracking theory was consistent with the allegations of fraud the Rigsbys presented in their complaint and final pretrial order. Indeed, when asked to summarize his theory of how the McIntosh home was destroyed, Dr. Sinno stated: "I agree fully with the first conclusion of the first inspector from State Farm," that is, Ford.

The Rigsbys are the "paradigmatic . . . whistleblowing insider[s]." *U.S. ex rel. Lam v. Tenet Healthcare Corp.*, 287 F. App'x 396, 401 (5th Cir. 2008) (internal quotation marks and citation omitted); *see also* Sylvia, *Fraud Against the Government* § 11:62; John T. Boese, *Civil False Claims and Qui Tam*

Actions § 4.02[D][3][a] (4th ed. 2014) ("[K]knowledge acquired and witnessed during the course of employment or professional work is direct knowledge.").[11] Their direct knowledge surpasses that presented by other would-be relators in our original source case law. *Compare Jamison*, 649 F.3d at 331–32 (holding that relator who "describe[d] a general scheme of fraud and then list[ed] arbitrarily a large group of possible perpetrators" was not an original source); *U.S. ex rel. Fried v. West Indep. Sch. Dist.*, 527 F.3d 439, 440, 443 (5th Cir. 2008) (holding that relator was not an original source where he was a government-waste opponent who sought to infiltrate a school district to root out retiring teachers' alleged social security fraud); *Fed. Recovery Servs., Inc. v. United States*, 72 F.3d 447, 448–49, 451–52 (5th Cir. 1995) (holding that relators who brought suit against a competitor and other defendants were not original sources). The Rigsbys' knowledge was also independent because their contributions put the government "on the trail of fraud" that "might otherwise [have gone] unnoticed." *Reagan*, 384 F.3d at 179. Even the most zealous government investigator would not likely have been able to pinpoint the

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[11] Cori Rigsby's status as an original source in this case is more tenuous because she lacked direct and independent knowledge of the specifics of the McIntosh claim. However, we are satisfied that her contributions to the action permit the court to retain subject matter jurisdiction over her claims. Like her sister, Cori Rigsby was an experienced adjuster working for a State Farm contractor. She was instructed by State Farm that Katrina was a "water storm"; she was told to use Xactotal rather than Xactimate; and she knew about engineers altering their reports. Cori Rigsby, too, was a "paradigmatic . . . whistleblowing insider." *Tenet Healthcare Corp.*, 287 F. App'x at 401 (internal quotation marks and citation omitted).

McIntosh claim—which was the basis of the trial—from the Cox/Comer Complaint and the Hunter testimony. Thus, the Rigsbys are original sources.

It is plausible that § 3730(e)(4) might come into play again as the district court proceeds with this litigation. *See Rockwell*, 549 U.S. at 473, 476 (recognizing that subject matter jurisdiction can be questioned at any time and with respect to any claim). We emphasize that there has been no finding of a public disclosure in this case under § 3730(e)(4)(A). However, even if the district court on remand should find a public disclosure touching on any possible claims, the Rigsbys would not necessarily be barred from pursuing those claims if they remain qualified as original sources under § 3730(e)(4)(B).

D. Jury Verdict

State Farm's cross-appeal in this case lastly aims to unravel the jury's verdict in favor of the Rigsbys on the McIntosh claim. The jury found that State Farm was liable under § 3729(a)(1) (false claim liability) and § 3729(a)(1)(B) (false record liability), and the district court denied State Farm's motions for judgment as a matter of law. We conclude that a reasonable jury could have rendered these verdicts.

"Although we review denial of a motion for judgment as a matter of law de novo . . . our standard of review with respect to a jury verdict is especially deferential." *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 874 (5th Cir. 2013) (internal quotation marks and citation omitted). The district court only errs where "the evidence at trial points so strongly and overwhelmingly in the movant's favor that reasonable

jurors could not reach a contrary conclusion." *Omnitech Int'l, Inc. v. Clorox Co.*, 11 F.3d 1316, 1323 (5th Cir. 1994). While "the court should review all of the evidence in the record," it "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

The Rigsbys' first count is for a violation of § 3729(a)(1), the applicable version of which premises liability on "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." § 3729(a)(1). To succeed on their false record claim, the Rigsbys had to prove that State Farm "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement material to a false or fraudulent claim." § 3729(a)(1)(B).

State Farm argues that no reasonable jury could find: 1) that the McIntosh claim was false; 2) that State Farm had the requisite guilty knowledge; or 3) that there was evidence of a false record or statement. State Farm's first two challenges affect both counts, while its third affects only the false record count. We take each challenge in turn.

i. Falsity of the McIntosh Claims

To prove a violation of both § 3729(a)(1) and § 3729(a)(1)(B), the Rigsbys had to show that the claim presented for payment on the McIntosh's flood policy was false. A claim includes "any request or demand, whether under a contract or otherwise, for money or

property." § 3729(c).[12] And this court has explained that a claim "for money or property to which a defendant is not entitled [is] 'false' for purposes of the False Claims Act," and "whether a claim is valid depends on the contract, regulation, or statute that supposedly warrants it." *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 674–75 (5th Cir. 2003) (en banc). Here, the issue is whether State Farm appropriately determined that the flood insurance contract—derived word-for-word from a federal regulation, and containing an exclusion for wind damage—permitted the full $250,000 payout for flood damage to the McIntosh home.

State Farm primarily contends that evidence of flood damage permeated the case, and that the Rigsbys failed to adequately support their trial theory that the home was rendered a total loss by wind before the flood waters arrived. We conclude a reasonable jury could find that the McIntosh claim was false, and, more specifically, could have believed that the home was destroyed by Katrina's winds before the water arrived.

At the outset, we disagree with State Farm that the Rigsbys were required to present expert valuation evidence. We have already held that evidence of valuation can include—besides expert evidence—adjusters' reports and a plaintiff-insured's deposition testimony. *See Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 360, 363 (5th Cir. 2010); *see also* 17A Couch on Insurance § 255:52 (3d ed. 2014) ("The question of

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[12] The definition has since been amended, but this language is unchanged.

value, for purposes of estimating the loss under [a] policy, is more or less one of expert opinion, but witnesses testifying as to the value of property are not required to be expert or skilled in the strict sense of the term in order to express an opinion on value.").

The Rigsbys' most significant valuation evidence came from Dr. Ralph Sinno, a professor of structural civil engineering.[13] Dr. Sinno, after personally inspecting the property, testified that:

> [T]he McIntosh house was damaged by the hurricane wind way before even the water got into the threshold of the house. The water did not get into the threshold of the house until two hours after the peak wind. After two hours, after all of the damage has been done, the water got to the house.

Dr. Sinno testified in detail about how winds "demolished, twisted, and wracked" the McIntosh home, and he defined wracking as "deform[ing] and mov[ing] [the structure] horizontally due to horizontal forces." Dr. Sinno's testimony aligned with that of Brian Ford (the Forensic employee who concluded in a

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[13] State Farm alleges that the district court abused its discretion by permitting Dr. Sinno to testify under *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993). "District courts enjoy wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge and his or her decision will not be disturbed on appeal unless manifestly erroneous." *Hodges v. Mack Trucks Inc.*, 474 F.3d 188, 194 (5th Cir. 2006) (internal quotation marks and citation omitted). The district court cogently and thoroughly evaluated Dr. Sinno's qualifications, expertise, and opinions in ruling on State Farm's motion in limine. There was no abuse of discretion in permitting the jury to hear his testimony.

report shortly after the storm that the primary cause of damage to the McIntosh home was wind), and it was corroborated by additional expert and witness testimony. While Dr. Sinno is not a valuation expert, as State Farm forcefully argues and Dr. Sinno himself conceded, his expertise in structural engineering qualified him to opine on whether the home was structurally destroyed. *See* 17A Couch on Insurance § 255:52.

State Farm argues that many witnesses—including some of the Rigsbys' own—testified that there had been flood damage to the home. That is certainly true (though much of that damage could have occurred *after* the wind rendered the home a total loss, or it could relate to the contents of the home, for which the McIntoshes were reimbursed an unchallenged $100,000). But, as the district court correctly recognized, "it is the function of the jury as the traditional finder of the facts, and not for the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Roman v. W. Mfg., Inc.*, 691 F.3d 686, 692 (5th Cir. 2012) (internal quotation marks and citation omitted). A reasonable jury could have concluded that the house was a total loss before the flood waters arrived. Certainly the evidence does not point "so strongly and overwhelmingly in [State Farm's] favor that reasonable jurors could not reach a contrary conclusion." *Omnitech*, 11 F.3d at 1323.[14]

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[14] The parties dispute whether State Farm's alleged violation of FEMA directive W5054 can independently support the jury's verdict. State Farm contends that compliance with W5054 was not an express condition or prerequisite for payment of the claim. *See U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268

ii. Scienter

State Farm next argues that the Rigsbys failed to prove the requisite degree of scienter. Violations of both § 3729(a)(1) and § 3729(a)(1)(B) require intent, or scienter. A person must have actual knowledge of the truth or falsity of information, act in deliberate ignorance of the truth or falsity of information, or act in reckless disregard of the truth or falsity of information. *See* § 3729(b). Proof of specific intent is not required, though negligence or gross negligence is insufficient. *See id.*; *U.S. ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 468 (5th Cir. 2009).

State Farm first argues that that the evidence of knowledge was insufficient because the three adjusters assigned to the claim—Rigsby, Cody Perry, and John

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(5th Cir. 2010) ("Not every breach of a federal contract is an FCA problem. We have thus repeatedly upheld the dismissal of false-certification claims (implied or express) when a contractor's compliance with federal statutes, regulations, or contract provisions was not a 'condition' or 'prerequisite' for payment under a contract."). The Rigsbys contend that this is not a false certification case that would require concluding that compliance with W5054 was a prerequisite for payment of a claim. Even were we to agree with State Farm that compliance with W5054 must be a prerequisite for payment in this context, FEMA regulations emphasize that WYO insurers "shall comply with written standards, procedures, and guidance issued by FEMA." 44 C.F.R. pt. 62, app. A, art. II(G)(1); *see also* 44 C.F.R. pt. 62, app. A, art. II(A)(2) ("Companies will also be required to comply with . . . guidance authorized by . . . [FEMA]."). Additionally, directive W5054 itself states that the "NFIP's general adjusters will be involved in closely monitoring the performance and procedures of the WYO carriers utilizing this process," signifying that FEMA took compliance seriously. Finally, FEMA officials testified that line-by-line estimates were in fact a prerequisite to payment under the NFIP.

Conser (the State Farm supervisor and team leader who ultimately made the decision to pay the McIntosh flood claim on October 2, 2005)—all shared a good faith belief at the time the claim was submitted that the McIntosh home suffered $250,000 in flood damage. Further, State Farm argues, there is no indication that anyone besides these individuals knew the details of the McIntosh claim before it was paid.

But State Farm's constricted theory of FCA liability would enable managers at an organization to concoct a fraudulent scheme—leaving it to their unsuspecting subordinates to carry it out on the ground—without fear of reprisal. The FCA is not so limited. First, the statute provides for liability where a defendant knowingly "causes to be presented" a false claim or knowingly "cause[s]" a false record to be made or used. § 3729(a)(1), (a)(1)(B). That is, the statute by its plain text permits liability without a direct falsity. Second, courts have rejected "ignorant certifier" defenses like this one. A textbook example comes from *Grand Union Co. v. United States*, 696 F.2d 888 (11th Cir. 1983). In that case, cashiers at a grocery store allegedly assisted customers in defrauding the federal food stamp program, but the head cashier who actually submitted the false claims knew nothing of the scheme. *Id.* at 889–90. The court reversed a grant of summary judgment for the defendant grocery store on an FCA claim, holding that liability could attach to a corporation under the FCA despite the certifier's good faith belief in the validity of the certification. *Id.* at 891; *see also U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 920 n.12 (4th Cir. 2003) ("[A] corporation can be held liable under the FCA even if the certifying employee was unaware of the wrongful conduct of other employees.").

State Farm contends, however, that *Grand Union* and *Harrison* still require that at least one State Farm employee have knowledge that a claim is false. Because there is no indication that the alleged perpetrators of the scheme knew the details of the McIntosh claim *before* its submission,[15] State Farm argues, it cannot be held liable. The Rigsbys counter that they identified perpetrators of the scheme: Lecky King (the "architect and enforcer"); Juan Guevara (who confirmed in an email that State Farm knew FEMA directive W5054 required line-by-line estimates in circumstances like this one); and Jody Prince (a State Farm trainer who wrote in an email that State Farm adjusters should "manipulate the totals" and "write Policy limits").

In this case, there was evidence that adjusters were effectively told to presume flood damage instead of wind damage. There was also evidence that State Farm knowingly violated W5054, concealed evidence of wind damage, and strong-armed an engineering firm

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[15] Lecky King's alleged manipulation of the McIntosh engineering reports occurred *after* the McIntosh claim was paid. The Rigsbys have abandoned their reverse false claim allegation under § 3729(a)(7), which would sanction recovery for certain actions taken to "conceal, avoid, or decrease an obligation" to the government. § 3729(a)(7). Consequently, State Farm cannot be liable in this suit for any failure to reimburse the government for improperly transmitted funds. However, simply because an action took place after the fraud does not render it wholly irrelevant in determining whether there was sufficient knowledge, before the claim or record was submitted, to impose liability under § 3729(a)(1) or § 3729(a)(1)(B). Circumstantial evidence is appropriate in determining scienter in an FCA case, *see United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007–08 (5th Cir. 1972), and the jury was entitled to use post-payment evidence to evaluate State Farm's pre-payment knowledge.

to change its reports. Even if we were to agree with State Farm that one individual must have knowledge that a claim is false, the jury could have reasonably believed that King alone, "act[ing] in reckless disregard of the truth or falsity" of the information, 1) caused a false claim to be presented for payment, and 2) caused a false record material to a false claim to be made or used. § 3729(a)(1), (a)(1)(B), (b). State Farm's liability—premised on this knowledge—does not make the company "answerable for anything beyond the natural, ordinary and reasonable consequences of [its] conduct." *Allison Engine Co. v. U.S. ex rel. Sanders*, 553 U.S. 662, 672 (2008) (internal quotation marks and citation omitted).

State Farm's final allegation with respect to scienter is that the government's knowledge and approval of its actions—through FEMA and NFIP witnesses who testified to a desire to streamline the flood claim process— precludes a finding of guilty knowledge. Where the government "knows and approves *of the particulars of a claim for payment* before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim." *U.S. ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 491 F.3d 254, 263 (5th Cir. 2007) (emphasis added) (internal quotation marks and citation omitted). State Farm nowhere alleges that any FEMA official had particularized knowledge of the McIntosh claim. There are only general allegations that FEMA was behind State Farm's effort to pay flood claims quickly. But FEMA's desire to have valid claims paid out quickly does not translate into a license to pay invalid claims. We conclude that a reasonable jury could believe that State Farm had the requisite

scienter to support violations of § 3729(a)(1) and § 3729(a)(1)(B).

iii. False Record or Statement

The second relevant count in this case is for a violation of § 3729(a)(1)(B), which requires the knowing submission of a "false record or statement material to a false or fraudulent claim." The term "material" is defined broadly to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." § 3729(b)(4). The Rigsbys argue that the Xactotal printout in the McIntosh flood claim file met this standard because it appeared deceptively to be a line-by-line estimate, when in fact it only estimated the value of the McIntosh home based on its square footage and construction quality. State Farm responds that the Xactotal printout cannot be a false record because it was a true and correct document that was properly a part of the McIntosh file and was not intended to deceive the government.[16]

We agree with the district court that evidence adduced at trial could lead a reasonable jury to believe that State Farm deliberately or recklessly did not comply with FEMA directive W5054. To cite just one example, State Farm's principal FEMA contact, Juan Guevara, wrote in an email shortly after W5054 was circulated that the directive required a line-by-line estimate for a building like the McIntosh home. And

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[16] The Rigsbys also argue that the omission of the Ford Report from the NFIP file triggered liability under § 3729(a)(1)(B). Because we conclude that the submission of the Xactotal printout supports a violation of § 3729(a)(1)(B), we do not reach this issue.

the Xactotal printout for the McIntosh claim so closely resembled a line-by-line estimate that former FEMA adjuster Gerald Waytowich—who testified on behalf of State Farm—confused it for one. The jury could reasonably have believed that the printout was material, and was placed in the file to mislead FEMA in violation of § 3729(a)(1)(B).

III. CONCLUSION

We therefore REVERSE the district court's decision to deny the Rigsbys additional discovery, but AFFIRM that court's decisions with respect to the seal violations, subject matter jurisdiction, and State Farm's motion for judgment as a matter of law. The case is REMANDED for further proceedings not inconsistent with this opinion.

Order Denying State Farm Fire & Casualty Company's Petition for Rehearing and Rehearing En Banc in the United States Court of Appeals for the Fifth Circuit (August 11, 2015)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-60160

UNITED STATES of America, ex rel., CORI RIGSBY; KERRI RIGSBY,

Plaintiffs–Appellants—Cross–Appellees

v.

STATE FARM FIRE & CASUALTY COMPANY,

Defendant–Appellee—Cross–Appellant.

Appeals from the United States District Court for the Southern District of Mississippi

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 7/13/2015 , 5 Cir., _____, _____, F.3d____)

Before: STEWART, Chief Judge, and SOUTHWICK and COSTA, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En

Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Carl E. Stewart
UNITED STATES CIRCUIT JUDGE

*Judge Barksdale did not participate in the consideration of the rehearing en banc.

Memorandum Opinion Concerning State Farm Fire and Casualty Company's Motion to Dismiss for Relators' Violation of Seal Order of the United States District Court for the Southern District of Mississippi Southern Division (January 24, 2011)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION

UNITED STATES OF AMERICA, EX REL., CORI RIGSBY; KERRI RIGSBY,

RELATORS

v.

STATE FARM FIRE & CASUALTY COMPANY,

DEFENDANTS

CIVIL ACTION NO.1:06CV433 LTS-RHW

MEMORANDUM OPINION CONCERNING STATE FARM FIRE AND CASUALTY COMPANY'S MOTION TO DISMISS FOR RELATORS' VIOLATION OF SEAL ORDER

Before: L.T. SENTER JR., Senior District Judge

The Court has before it the motion [739] of State Farm Fire and Casualty Company (State Farm) to dismiss this action on the grounds that the Relators have made public statements and disclosed materials in violation of the seal requirement of the False Claims Act (FCA), 31 U.S.C. §§3729 - 3733.

State Farm has submitted forty-nine exhibits in support of this motion. These exhibits identify the following instances of disclosures alleged to be seal violations:

1. A July 28, 2006, e-mail from Zach Scruggs (then one of the Relators' attorneys) to Joseph E. Ree (Ree), a representative of ABC News. This exhibit contains no substantive statement concerning this action, but the e-mail references prior and apparently on-going communications between the correspondents.

2. An August 7, 2006, e-mail from Beth Jones (Jones) (Executive Assistant to Richard F. Scruggs, one of the Relators' attorneys) to Ree. This exhibit is apparently a cover note for the delivery of engineering reports referenced therein. The e-mail does not identify the reports by referring to any particular property, any particular engineer, or any particular engineering company

3. An August 7, 2006, a thirty-eight page PDF sent by Jones to Ree containing a pleading entitled "Relator's Evidentiary Disclosure Pursuant to 31 U.S.C. §3730."

4. Excerpts taken for a deposition given by Cori Rigsby (CR) on November 19, 2007, in the case styled *McIntosh v. State Farm Fire and Casualty Company*, Civil Action No.1:06CV1080 LTS-RHW (the McIntosh

case). This testimony references three mid-August, 2006, interviews given by CR to a local newspaper, the *Sun Herald*; to "AP" (which I assume is a reference to The Associated Press news organization); and to Brian Ross of the ABC news magazine "20/20." The testimony also makes reference to an interview with *Glamour* on a date not specified.

5. A transcription of the August 25, 2006, ABC news magazine "20/20." The subject of the lead story in this television program was entitled "Blowing in the Wind," and the story dealt with the Relators' allegations that State Farm had deliberately mischaracterized property damage caused by wind as damage caused by storm surge flooding. Both of the Relators appear in this television presentation and discuss the substance of these allegations against State Farm.

6. Excerpts taken from a deposition given by Kerri Rigsby (KR) on April 30 and May 1, 2007, in the McIntosh case. This testimony also makes reference to the August 25, 2006, ABC news magazine "20/20."

7. An August 14, 2006, e-mail from Richard Scruggs to Michael Kunzelman (Kunzelman), an "AP" employee, containing an "SF [State Farm] Disclosure PDF." The attachment appears to be another copy of "Relators

Evidentiary Disclosures Pursuant to 31 U.S.C. §3130" except for the omission of the pages containing the style of the case and the pages containing the table of contents.

8. An August 22, 2006, e-mail from Jones to Kunzelman containing, as a PDF attachment, the engineering report on the McIntosh property prepared by Brian Ford (Ford) for the use of State Farm. This report was prepared while Ford was working for Forensic Engineering (Forensic). This attachment includes a copy of the front page of the report bearing a note "Put in Wind file - Do NOT Pay Bill Do not discuss."

9. The PDF attachment containing the December 16, 2005, engineering report on property belonging to Minh Nguyen prepared by John B. Kelly (Kelly) for the use of State Farm. Kelly was working for Forensic at the time he prepared this report.

10. The PDF attachment containing the October 20, 2005, engineering report on the McIntosh property prepared by Kelly for the use of State Farm. Kelly was working for Forensic at the time he prepared this report.

11. The PDF attachment containing the January 31, 2006, engineering report on the Nguyen property prepared by Kelly

for the use of State Farm. Kelly was working for Forensic at the time he prepared this report.

12. A September 18, 2006, e-mail from Jones to Joseph Treaster (Treaster) of *The New York Times*. This e-mail also contains a PDF attachment of what appears to be another copy of "Relators Evidentiary Disclosures Pursuant to 31 U.S.C. §3130" except for the omission of the pages containing the style of the case and the pages containing the table of contents.

13. A portion of a *New York Times* article entitled "A Lawyer Like a Hurricane." This article appeared on March 16, 2007. The portion of the article State Farm has submitted is about Richard Scruggs's involvement in the litigation of Hurricane Katrina damage claims, and there is no substantive discussion of the substance of the FCA complaint or the allegations contained in the Relators' complaint.

14. A January 22, 2007, e-mail from Jones to Treaster. The one-page e-mail reads, in its entirety: "Dick [Scruggs] asked that I send this to you in confidence. Beth" There is no indication what material was sent along with this e-mail.

15. A June 6, 2007, e-mail from Jones to "rey@cbsnews.com" with a PDF attachment containing a copy of

"Relator's First Amended Complaint for Damages Under the False Claims Act, 31 USC §3729 Et Seq."

16. Excerpts taken from a deposition given by Rex Deloach (Deloach) as the Rule 30(b)(6) representative of SLF, Inc., the successor in interest to the Scruggs Law Firm, on August 4, 2010, in the case at bar. Deloach testified concerning a "Bloomberg article" that described Richard Scruggs's having flown to Bloomington (the town in which State Farm's offices are situated) to pick up a package that may have contained documents related to this litigation. Deloach testified that the package contained no such documents and was in fact sent to Bloomington in order for Richard Scruggs to go there and retrieve it as part of a ruse. Deloach testified that there were no communications by the Scruggs Law firm to United States Representative Gene Taylor concerning this action or specifically concerning the Relators or the claim related to the McIntosh property. According to Deloach, Richard "had cautioned the Rigsby sisters [the Relators] not to talk about the *qui tam* case [the case at bar]." Deloach also testified that his discussions with Zach Scruggs and Charlene Bosarge (Richard Scruggs's secretary) indicated they had never revealed the existence of the case at bar to the media prior to August 1, 2007.

17. A February 28, 2007, Associated Press article by Kunzelman concerning the potential for certification of a class action against State Farm for claims related to Katrina damage. This proposed class action was never approved. The class action was proposed in the wake of the settlement Richard Scruggs reached with State Farm for the individual clients he and the Scruggs Katrina Group represented.

18. Excerpts from a June 28, 2010, deposition given by Richard Scruggs in the case at bar. Richard Scruggs gave no substantive testimony during this deposition, invoking his rights under the Fifth Amendment in response to every question posed by State Farm's counsel.

19. Excerpts from a June 25, 2010, deposition given by CR in the case at bar. CR testified that she did not know whether Jones has sent anything related to the case at bar to Kunzelman, and she testified that she did recall meeting with United States Representative Gene Taylor at the behest of her then attorney Richard Scruggs on one occasion.

20. A four-page document entitled: "Congressional Record – House of Representatives Proceedings and Debates of the 109th Congress, Second Session Thursday, September 21, 2006." The subject of the document is identified

as "*H6903 Bad Faith Actions and Policies of State Farm Insurance in Mississippi." This document, without making a specific reference to the case at bar, does refer to allegations that State Farm had mischaracterized wind damage as flood damage, and Representative Taylor refers to the Relators by name, describing them as "whistleblowers." The document reflects a specific and detailed accusation that State Farm violated the FCA. Representative Taylor calls for an investigation by the inspector general of the Department of Homeland Security.

21. A February 28, 2007, "Statement of U. S. Representative Gene Taylor before the Financial Services Committee Subcommittee on Oversight and Investigations regarding Insurance Claims Payment Process on the Gulf Coast." This document makes an explicit reference to the case at bar: "The Scruggs Law Finn [sic] represents the [Relators] in a False Claims Act filing against State Farm and Renfroe. That federal fraud case is still active." The statement repeats the allegation that State Farm's claims adjusting practices and the claims adjusting practices of Allstate, Nationwide, and USAA violated the FCA.

22. Excerpts from a Privilege Log [739-22] filed by The Rendon Group, a public relations firm.

23. Excerpts from the deposition testimony of John Rendon (Rendon) not submitted because of "issues relating to the Consent Protective Order."

24. Excerpts taken from a deposition given on July 29, 2010, by Sandra Libby, Rule 30(b)(6) designee for The Rendon Group, in the case at bar. In these excerpts, the witness identifies certain documents as business records of The Rendon Group. The documents referred to were apparently produced in the form of a CD-ROM by Rendon in the course of litigation conducted in Washington, D.C. The deposition does not specifically identify any of these documents.

25. A memorandum from Ainsley Perrien (Perrien) to Rendon dated January 24, 2007. This document is mainly concerned with a disagreement between Richard Scruggs and State Farm over "the whistleblowers in the case" (presumably the Relators and presumably the case at bar), but the memorandum makes no specific reference to the case at bar or to the allegations of the Relators' Amended Complaint.

26. A memorandum from Sid Backstrom (Backstrom) to Perrien dated January 25, 2007. Attached to this memorandum is an e-mail exchange among the members of the Scruggs Katrina Group (SKG) concerning the group settlement reached

with State Farm for SKG's individual clients. There is no reference to the case at bar or to the allegations of the Relators' Amended Complaint.

27. An exchange of memoranda (apparently via e-mail) between Perrien and Jill Rosenbaum (apparently with CBS News) dated February 11 and 12, 2007. There is no specific reference to the case at bar or the underlying facts, and the exchange primarily concerns a disagreement between Richard Scruggs and State Farm over the terms of a proposed class action settlement agreement. The disagreement concerns the Relators' relationship with their former employer, Renfroe, and Renfroe's action against the Relators in Alabama.

28. A memorandum from Perrien to Rendon, Bryan Rich, and Robert Pace dated February 15, 2007. Attached is a letter, also dated February 15, 2007, from Richard Scruggs to United States Senator Trent Lott and United States Representative Gene Taylor. This letter suggests that the Relators be invited (or subpoenaed) to testify at Congressional hearings concerning claims handling practices followed by State Farm after Katrina. The letter describes, in general terms, the facts set out in and the legal theory followed in preparing the Relator's Amended Complaint in the case at bar, but the letter does not mention the

pending *qui tam* action, nor does it refer to a potential action under the FCA.

29. A memorandum dated February 16, 2007, from Zach Scruggs to Perrien referring to a request for information from Melba Newsome (Newsome), a writer for *Glamour*.

30. A memorandum dated February 19, 2007, from Perrien to the Relators concerning "the wiki page" and also concerning an interview requested by Newsome.

31. A memorandum dated February 20, 2007, from Perrien to Zach Scruggs concerning a potential television series entitled "Business Crimes" to be broadcast on CNBC and the Relators' potential participation in the preparation of a story for that series. The memorandum refers to a "gag order" and to "a lawsuit," but it is not clear to me whether these references concern the case at bar or the Alabama litigation between E. A. Renfroe and the Relators.

32. A memorandum dated February 15, 2007, from Robert Page (Page) to Perrien concerning "a potential Wiki entry." The material attached to this does not refer specifically to the case at bar, nor does it refer to State Farm's handling of flood insurance claims.

33. A brief (two line) e-mail dated February 17, 2007, from Perrien to the Relators asking for their thoughts on "the wikipedia thing and also about the radio show."

34. A short (four line) e-mail dated February 17, 2007, from KR to Perrien approving the "'wikipedia thing'" and expressing uncertainty about the scope of an order entered by Judge Acker in the Alabama litigation with Renfroe.

35. An e-mail exchange dated February 21, 2007, among Perrien, KR, CR, and Page concerning clarification of certain information to the entry in *Wikipedia* about the Relators.

36. An e-mail exchange dated February 21, 2007, among Perrien, CR, and Page forwarding the revised *Wikipedia* entry.

37. An e-mail exchange dated February 20, 2007 between Perrien and the Relators requesting final approval by the Relators of the revised *Wikipedia* entry.

38. An e-mail dated February 21, 2007, from KR to Perrien approving the revised *Wikipedia* entry.

39. An e-mail exchange dated March 15, 2007, between Perrien and Zach Scruggs concerning an article carried in the March 14, 2007, edition of the *Wall Street*

Journal entitled "Mississippi Justice" and written responses critical of that article.

40. An e-mail exchange dated March 21, 2007, between Perrien and KR concerning a set of photographs, presumably of the Relators.

41. An e-mail exchange dated May 14, 2007, between Zach Scruggs and Perrien concerning "National Whistleblowers Week" and a statement by United States Senator Chuck Grassley in support of that event.

42. A memorandum dated April 13, 2007, between Jay Majors and Anthony DeWitt concerning receipt of unspecified "Supplemental Disclosures."

43. An e-mail exchange dated May 22, 2007, between the SKG and The Rendon Group. Attached to this e-mail are copies of a post by David Rossmiller on his website, Insurancecoverageblog.com, and a copy of the Relators' Amended Complaint

44. An e-mail exchange dated May 22, 2007, from Backstrom to Perrin stating that the seal on the New Orleans *qui tam* case "just got lifted."

45. An e-mail dated May 24, 2007, from Joel Feyerherm to Rendon concerning

investigations of Allstate Insurance Company's claims handling practices following Katrina.

46. An e-mail dated May 29, 2007, from Perrien to Rendon concerning the progress of government investigations of Allstate and Nationwide Insurance Company and concerning the lifting of the seal in the New Orleans *qui tam* suit.

47. An e-mail dated June 5, 2007, from Perrin to Rendon concerning efforts to "reach out to DHS [presumably the Department of Homeland Security] and Justice" in connection with the investigations being conducted by these agencies and concerning related political issues.

48. An e-mail dated August 6, 2007, sent by Backstrom to a number of recipients concerning the lifting of the stay in the case at bar.

49. A 106-page compilation of e-mails concerning media contacts with the SKG.

State Farm contends that the disclosures reflected in these documents constitute such egregious violations of the FCA's seal requirement, 31 U.S.C. §3730(b)(2), that dismissal of this action is justified.

Standards and Factors To Be Taken Into Consideration

I find no case decided by the Fifth Circuit Court of Appeals directly dealing with the issue State Farm has framed, but I do find decisions made by courts of appeal in other federal circuits. In these decisions, certain basic principles have been established:

1. The failure to follow the sealing requirements of 31 U.S.C. §3730(b)(2) is not jurisdictional, and the violation of those requirements does not require dismissal of the *qui tam* complaint in all circumstances. *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir.1995). The Sixth Circuit has established a *per se* rule that failure to follow the sealing requirements of the FCA requires dismissal of the complaint, *U.S. ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287 (6th Cir. 2010), but no other circuit court has adopted this *per se* rule.

2. The failure to file a False Claims Act complaint under seal and a failure to observe the other procedural requirements set out in the Act (service of the complaint on the government with certain written disclosures) may support a district court's exercise of discretion to impose the sanction of dismissal. *U.S. ex rel. Summers v. LHC Group, Inc.,* 2009 WL 1651503 (M.D. Tenn) aff'd 623 F.3d 287 (6th Cir. 2010); *United States ex rel. Pilon v. Martin Marietta Corp.,* 60 F.3d

995 (2d Cir.1995); *U.S. ex rel. Mailly v. Healthsouth Holdings, Inc.*, 2010 WL 149830 (D.N.J.); *Taitz v. Obama*, 707 F.Supp.2d 1 (D.D.C. 2010); *U.S. ex rel. Le Blanc v. ITT Industries, Inc.*, 429 F.Supp.2d 303 (S.D.N.Y. 2007). Where the proper sealing procedure and the other procedural requirements under the FCA have been followed at the time the complaint is filed, dismissal may yet be justified by post-filing disclosures in certain circumstances. *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir.1995).

3. Where the proper filing procedure is followed and the relator thereafter makes post-filing disclosures concerning an FCA action, the rule followed by the majority of the circuits requires the district court to weight three factors to determine the appropriate sanction, if any, that should be imposed:

   a. The harm suffered by the government from post-filing disclosures made by the relators;

   b. The relative severity of the violation of the seal requirement; and

   c. Whether there is evidence of bad faith or willfulness in making the disclosures.

These three factors are discussed at length in *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir.1995). (the *Lujan* case) While Lujan followed the proper statutory procedure when she filed her FCA action, Lujan improperly disclosed the nature and existence of her *qui tam* case in a post-filing interview with a major media outlet during the time the complaint was still under seal. The district court granted the defendant's motion to dismiss. Lujan appealed. The court of appeals found that Lujan's giving this interview was a clear violation of the seal provisions of 31 U.S.C. §3730(b)(2). The district court's order of dismissal was, however, reversed. In reversing, the court of appeals discussed these three factors and remanded the case to the district court for consideration of the merits of the defendant's motion after consideration of these factors.

In the *Lujan* case, by establishing these three factors to guide the discretion of the district court, the court of appeals was attempting to honor the balance Congress struck, in enacting and amending the FCA, between the relator's need to promptly initiate an FCA case and the government's need for adequate time to investigate the facts the relator alleges and to evaluate the merits of the relator's charges. The court of appeals determined that the purpose of the sealing requirement was to afford the government a fair opportunity to conduct its investigation without "tipping off" the FCA defendant that a government investigation is underway.

The cases dealing with this issue only indirectly address the question of exactly what information the sealing requirement is intended to keep confidential. Is the seal intended to insure the confidentiality of the

information underlying an FCA complaint, or is the seal intended only to prevent disclosure of the fact that a government investigation is under way, or both? The answer to this question determines whether a relator's disclosure of the facts underlying the *qui tam* action constitutes a violation of the seal requirement in and of itself, or whether a violation of the seal order occurs only when the disclosure of those facts is accompanied by a disclosure that a *qui tam* complaint has been filed.

In most reported decisions, the *qui tam* relator has inside information sufficient to suggest, at least to the relator's satisfaction, that false or fraudulent claims are being submitted to the government. This information is usually not widely known, nor is this information ordinarily a matter of public interest or public discussion. So the sealing requirement of the FCA normally operates to prevent both the disclosure of the information in the complaint, i.e. of the information that indicates the facts and circumstances in which the false claims are generated, and also the fact that a *qui tam* action has been filed and a potential government investigation triggered.

Since the purpose of the seal is to protect the interest of the government by allowing a period of time for the government to investigate the allegations and facts disclosed by a relator without "tipping off" the defendant, in my view, a disclosure of the facts underlying the *qui tam* action alone, without the disclosure that those allegations had led to the filing of the *qui tam* action, does not necessarily constitute a violation of the seal order. A disclosure that is limited to factual allegations is far less likely to indicate to the defendant that a government investigation is

underway. This is particularly true when the identical wrongful act (mischaracterizing wind damage as flood damage) would be both an FCA violation and a violation of the terms of a private insurance policy. Where the information is already a matter of heated and substantial public discussion before the *qui tam* complaint is filed, the information itself cannot be concealed–nor public discussion curtailed– no matter how strictly the seal provision is enforced and observed.

The Facts and Circumstance of the Case at Bar

State Farm has not alleged that the Relators failed to initially follow the required statutory procedures. State Farm contends that the Relators' post-filing actions violated the seal requirements under the FCA.

The complaint in this action was filed under seal on April 26, 2006. On July 5, 2006, the United States moved the Court, under 31 U.S.C. §3730(b)(3), to extend the 90-day sealing period to afford the government additional time to make its decision whether to intervene in this action. This request was granted, and subsequent orders further extended the sealing period. The seal was partially lifted on January 1, 2007, to allow the Relators to make certain disclosures in judicial proceedings in related but independent litigation in Alabama. The Relators' First Amended Complaint was filed May 22, 2007, and the stay was fully lifted on August 1, 2007.

The first question I must consider is the effect of the partial lifting of the seal on January 1, 2007. At the time Magistrate Judge Walker entered his order

partially lifting the seal, this action had been filed and sealed for some seven months. In partially lifting the seal, the Court authorized the Realtors to make disclosures concerning this action to judicial officers presiding in the Alabama litigation. The order partially lifting the seal does not specify that the judicial disclosures themselves be made under seal, and this order could therefore be reasonably interpreted to authorize these judicial disclosures in pleadings and other documents distributed to the litigants and their attorneys in the Alabama litigation. This type of disclosure would effectively make the original seal of the *qui tam* case moot. In these circumstances, I consider the relevant period of the seal to be from April 26, 2006, (the filing of the original FCA complaint) through January1, 2007 (the partial lifting of the seal).

During this period, the Relators and the attorneys who were then representing them in private litigation against State Farm, (Richard Scruggs, representatives of the Scruggs Law Firm, and the participants in the Scruggs Katrina Group, a joint venture involving a number of Mississippi attorneys) made many public statements accusing State Farm of misconduct in its claims adjusting practices. These attorneys represented a large number of individual property owners who were making claims against State Farm and against other insurers named in the Relators' original *qui tam* complaint for benefits allegedly owed under various homeowners policies.

The adjusting practices these attorneys (and many other litigants and attorneys pressing similar policy claims) alleged included attempts by the insurers (State Farm and others) to avoid payment of

wind damage claims on the grounds that the damage in question was caused by storm surge flooding. Damage from storm surge flooding is excluded from coverage under State Farm's (and other insurers') homeowners policies, while damage done by hurricane winds is included in coverage under these policies. This specific type of alleged misconduct (wrongfully characterizing wind damage as flood damage) would have the effect of reducing the benefits owed for wind damage. The same alleged misconduct would also produce inflated flood damage claims in cases where the claimants were insured under both a homeowners policy and a flood policy.

Indeed, counsel for State Farm, during oral argument of this motion, invited the Court's attention to a complaint filed by other litigants who not only made these allegations (deliberate mischaracterization of damage causation), but also alleged directly that the insurers' conduct created inflated and false flood insurance claims under the National Flood Insurance Program. *Cox, et al. v. National Mutual Ins. Co., et al.* Civil Action No.1:05cv436 LG-RHW. The complaint was not an FCA case, and the complaint was not filed under seal. The pleadings making these allegations were a matter of public record long before the Relators' FCA action was filed.

Some of the public statements made by the Relators and their attorneys were widely broadcast through the new media, perhaps the best example being a segment of the ABC news magazine "20/20" that aired on August 25, 2006. The segment was entitled "Blowing in the Wind." The transcript of this segment (Item 5 above) contains excerpts from interviews with both Relators, and in these interviews

the Relators discuss their contention that State Farm undertook to unfairly characterize wind damage as water damage and thereby avoid paying policyholders' legitimate claims. But neither this program nor most of the other interviews and statements submitted by State Farm in support of this motion specifically discuss or disclose the existence of this FCA suit.

State Farm has identified three instances when the attorneys then representing the Relators disclosed the existence of this FCA action and the underlying fact the Relators alleged in support of this action. These three instances all occurred during the time before the partial lifting of the seal. These are the disclosures of the document entitled "Relators Evidentiary Disclosures Pursuant to 31 U.S.C. §3130" on August 7, 2006, (Item 3 above); on August 14, 2006, (Item 7 above); and on September 18, 2006, (Item 12 above).

The Congressional Record entry (Item 20 above) reflects an allegation made by United States Congressman Gene Taylor that State Farm "stole from the taxpayers" by improperly mischaracterizing wind damage as flood damage. This Congressional Record entry specifically refers to the FCA. But Congressman Taylor's statement does not make specific reference to this FCA action, and I find no evidence in the record that Congressman Taylor reached his conclusions based on information he received from the Relators.

The February 15, 2007, letter from Richard Scruggs to Senator Lott and Congressman Taylor (item 28 above) does refer to this *qui tam* action, and Congressman Taylor's February 28, 2007, statement (item 21 above) could reasonably be inferred to have

been based, at least in part, on information supplied in this letter. But both the letter and the statement occurred several weeks after the partial lifting of the seal. The other disclosures that indicate that a *qui tam* action had been filed, the disclosure of a copy of the Relators' amended complaint on June 6, 2007 (Item 15 above) and on May 22, 2007 (Item 43 above), also occurred after the seal had been partially lifted on January 1, 2007.

The other instances identified by State Farm reflect, to one degree or another, disclosures and discussions of the underlying facts, but they contain no disclosure of the existence of this FCA action. Nor do these other instances reflect allegations that State Farm's actions involve the submission of false claims to the government. These other instances characterize State Farm's alleged misconduct as attempts to avoid paying legitimate wind damage claims and make no reference to claims for reimbursement under the National Flood Insurance Program. This distinction is important, because the purpose of the seal requirement is to protect the interest of the government by allowing a period of time for the government to investigate the FCA allegations and facts disclosed by a relator without "tipping off" the defendant that such an investigation is underway. Absent a disclosure that a government investigation is underway, a discussion of the underlying facts does not necessarily compromise the government's investigation. This is certainly true in the circumstances that existed after Hurricane Katrina, when the question of whether storm damage was attributable to wind or to water permeated much of the public discourse in this area. There were literally thousands of damage claims in which this issue was a

critical factor, and the public discussion of this issue began almost as soon as the flood waters receded and adjustors were deployed to begin assessing the damage done by the storm.

In this case, the government declined to intervene, and since the government has not disclosed its reason for staying out of the case, it is difficult to gauge what damage, if any, the disclosures discussed below may have done to the government's interests. While the pleadings in this case clearly indicate that the government is actively monitoring the progress of the case, the government has filed no pleading the Court could use to determine the extent of the damage, if any, the government believes it has sustained. Likewise, there is nothing in the State Farm submissions to support a finding of fact that the disclosures harmed the government's interests.

I find no evidence that the early disclosures the Relators' attorneys made to media outlets (Items 3, 7, and 12 above) led to a public disclosure in the news media that this action had been filed. Without such a public disclosure, these violations of the seal could not have impaired the government's ability to investigate the Relators' allegations. There would have been nothing to "tip off" State Farm that a government investigation was underway. Thus, despite the violation of the seal order by the Relator's attorneys (Items 3, 7, and 12 above) before the seal was partially lifted on January 1, 2007, I see no evidence in the record that would support a finding that these disclosures hampered the government's investigation or otherwise compromised the government's ability to make its investigation.

The impact of these disclosures (Items 3, 7, and 12 above) was not so severe as that of the disclosure discussed in the *Lujan* case. There the filing of the FCA case was publicly disclosed in a major media outlet at an early point in the litigation.

It is also apparent to me that the Relators' role in making these disclosures was not an active one. While a party is responsible for the actions taken by his attorney, there is nothing in the record to suggest that the disclosures in question (Items 3, 7, and 12 above) were authorized by or made at the suggestion of the Relators. Absent some evidence that would support the inference that the Relators approved, authorized, or initiated these disclosures (Items 3, 7, and 12 above) I find no basis to conclude that the Relators have acted willfully or in bad faith.

It is abundantly clear that Richard Scruggs and the SKG used formidable public relations resources, including use of The Rendon Group, in an effort to control the public perception of the issue at the heart of this *qui tam* action, i.e. whether State Farm deliberately mischaracterized wind damage as flood damage in assessing claims under the insurance policies it was adjusting. As far as the wind damage claims are concerned, these attorneys were acting well within their rights as advocates for their clients who had homeowners policy claims. These attorneys were not free to disclose the existence of this *qui tam* action, and had their improper disclosures (Items 3,7, and 12 above) led to accounts in the public media indicating that such an action was underway, the government's ability to investigate the Relators' allegations might well have been compromised. But that is not the case disclosed in the record before me.

Based on all of these considerations, I do not believe dismissal of this action for violations of the seal provisions of the FCA to be appropriate. I will therefore deny State Farm's motion [739] to dismiss. An appropriate order will be entered.

DECIDED this date, the 24th of January, 2011.

s/ L. T. Senter, Jr.
L. T. SENTER, JR.
SENIOR JUDGE

Order Denying State Farm Fire and Casualty Company's Motion to Dismiss for Relators' Violation of Seal Order of the United States District Court for the Southern District of Mississippi Southern Division (January 24, 2011)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION

UNITED STATES OF AMERICA, EX REL., CORI RIGSBY; KERRI RIGSBY,

RELATORS

v.

STATE FARM FIRE & CASUALTY COMPANY,

DEFENDANTS

CIVIL ACTION NO.1:06CV433 LTS-RHW

ORDER DENYING STATE FARM FIRE AND CASUALTY COMPANY'S MOTION TO DISMISS FOR RELATORS' VIOLATION OF SEAL ORDER

Before: L.T. SENTER JR., Senior District Judge

In accordance with the memorandum opinion I have this day signed, it is hereby

ORDERED

That the motion [739] of State Farm Fire and Casualty Company to dismiss this action for the Relators' violations of the seal order is **DENIED**.

SO ORDERED this 24th day of January, 2011.

s/ L. T. Senter, Jr.
L. T. SENTER, JR.

Memorandum Opinion and Order Denying Defendant State Farm Fire and Casualty Company's Renewed Motion to Dismiss of the United States District Court for the Southern District of Mississippi Southern Division (June 15, 2012)

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF MISSISSIPPI,
SOUTHERN DIVISION

UNITED STATES OF AMERICA, EX REL., CORI RIGSBY; KERRI RIGSBY,

RELATORS/ COUNTER-DEFENDANTS

v.

STATE FARM FIRE & CASUALTY COMPANY,

DEFENDANT/ COUNTER PLAINTIFF

and

HAAG ENGINEERING CO.,

DEFENDANT

CIVIL ACTION NO.1:06CV433 HSO-RHW

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S RENEWED MOTION TO DISMISS

BEFORE THE COURT is the Renewed Motion to Dismiss [911] filed by Defendant State Farm Fire and Casualty Company, in which the remaining Defendant, Haag Engineering Co., has joined [919]. Relators Cori Rigsby and Kerri Rigsby have filed a

Response [929] in opposition to the Motion, and State Farm has filed a Rebuttal [931]. State Farm also filed a Notice [943] of Intervening Authority, to which Relators have filed a Response [946]. After consideration of the Motion, the related pleadings, the record, and the relevant legal authorities, and for the reasons discussed below, the Court finds that the Renewed Motion to Dismiss [911] should be denied.

I. BACKGROUND

Relators Cori Rigsby and Kerri Rigsby initiated this action by filing their Complaint [2] on April 26, 2006, *in camera* and under seal, pursuant to the False Claims Act, 31 U.S.C. §§ 3729, *et seq*. ["FCA"]. A more detailed procedural history of this case can be found in this Court's September 30, 2011, Memorandum Opinion and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment [898].

State Farm contends that Relators' claims should be dismissed for committing certain violations of the seal requirement for FCA cases. State Farm first raised this argument in an earlier Motion to Dismiss [98] filed on April 8, 2008, which the previously assigned judge, United States Senior District Judge L.T. Senter, Jr., denied [343], [344]. State Farm reurged its position in another Motion to Dismiss [739], filed on August 16, 2010, which Judge Senter also denied [871], [872]. On February 7, 2011, State Farm moved [878] for the Court to certify the Memorandum Opinion [871] and Order [872] denying its Motion for interlocutory appeal. The case was subsequently reassigned [892] to the undersigned on April 12, 2011. The Court granted [899] State Farm's

Motion to Certify the Memorandum Opinion and Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The United States Court of Appeals for the Fifth Circuit denied [903] leave to appeal on or about November 10, 2011. State Farm now asks the Court to reconsider the seal violations.

II. DISCUSSION

A. Request for Oral Argument

On the face of its Motion [911], State Farm requests oral argument. Local Uniform Rule 7(b)(6)(A) provides that

> [t]he court will decide motions without a hearing or oral argument unless otherwise ordered by the court on its own motion or, in its discretion, upon written request made by counsel in an easily discernible manner on the face of the motion or response.

L.U. CIV. R. 7(b)(6)(A). The Court does not find that oral argument would be necessary or helpful in resolving this Motion.

B. Legal Standard

State Farm characterizes its Motion [911] as a "Renewed Motion to Dismiss." A plain reading of the document demonstrates that the pleading is actually a request to reconsider Judge Senter's prior rulings [343], [344], [871], [872], denying State Farm's previous Motions to Dismiss [98], [739]. The United

States Court of Appeals for the Fifth Circuit has recently explained that

> [g]enerally, under the law of the case doctrine, courts show deference to decisions already made in the case they are presiding over. The law of the case doctrine, however, "does not operate to prevent a district court from reconsidering prior rulings." *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 171 (5th Cir. 2010). Our precedent establishes that "[a] trial court [is] free to reconsider and reverse [interlocutory orders] for any reason it deems sufficient, even in the absence of new evidence or an intervening change or in clarification of the new law." *Id.* Further, when a successor judge replaces another judge, "[t]he successor judge has the same discretion as the first judge to reconsider [the first judge's] order." *Abshire v. Seacoast Products, Inc.*, 668 F.2d 832, 837–38 (5th Cir. 1982). In exercising this discretion, successor judges should, in accordance with values of comity and predictability, carefully and respectfully consider the conclusions of prior judges before deciding to overturn them. *See, e.g.*, 18B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4478.4 (2002). But a successor judge may overrule a previous judge's order as long as the successor

> judge has a "reason it deems sufficient." *Zarnow*, 614 F.3d at 171.

Stoffels ex rel. SBC Telephone Concession Plan v. SBC Communications, Inc., - - - F.3d - - - -, 2012 WL 1259014, *5 (5th Cir. April 16, 2012) (footnote omitted).

C. Analysis

State Farm seeks dismissal of this action for certain seal violations committed by Relators and/or Relators' former counsel. State Farm posits that the Court should apply a *per se* rule that failure to follow the seal requirements of the FCA should result in dismissal of this case, an approach employed by the Sixth Circuit Court of Appeals. Mem. in Supp. of Mot. [912], at p. 15–18 (citing *United States ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287 (6th Cir. 2010)). Even if the Court were to follow the discretionary standard applied by the Ninth Circuit in such cases, State Farm maintains that dismissal is nevertheless appropriate given the facts here. *Id.* (citing *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995)).

In previously addressing this question, Judge Senter detailed the various approaches taken by courts and, having noted that the Fifth Circuit has not directly spoken to the issue, applied the discretionary standard used by a majority of courts. Mem. Op. [871], at pp. 8–9 (citing, *e.g.*, *Lujan*, 67 F.3d at 242). He carefully reviewed all of the evidence presented, and determined that dismissal of this case was not appropriate. *Id.*, at pp. 8–13. The Fifth Circuit also reviewed State Farm's arguments and denied [903]

leave to appeal from the interlocutory order. Having reviewed the entire record and the relevant legal authorities, the Court is not persuaded that reconsideration of Judge Senter's earlier determination is warranted.

III. CONCLUSION

For the foregoing reasons, the Court finds that State Farm's Renewed Motion to Dismiss should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Renewed Motion to Dismiss [911] filed by Defendant State Farm Fire and Casualty Company, in which the remaining Defendant Haag Engineering Co. has joined [919], is **DENIED**.

SO ORDERED AND ADJUDGED, this the 15th day of June, 2012.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

Memorandum Opinion and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment of the United States District Court for the Southern District of Mississippi (September 30, 2011)

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.

STATE FARM FIRE AND CASUALTY CO.
DEFENDANT/COUNTER-PLAINTIFF

and

HAAG ENGINEERING CO.
DEFENDANT

Civil No. 1:06CV433-HSO-RHW

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is the Motion for Summary Judgment [734] filed by Defendant State Farm Fire and Casualty Company ["State Farm"], in which the

remaining Defendant Haag Engineering Co. ["Haag"] has joined [742]. Relators Cori Rigsby and Kerri Rigsby have filed a Response [767] in opposition to the Motion, and State Farm has filed a Rebuttal [780]. The parties have also filed various Notices [873], [874], [875], [889], of intervening or supplemental authority with respect to the present Motion. State Farm has further filed a Supplemental Memorandum [877-1] in support of this and other Motions, to which Relators have filed a Response [883], and State Farm a Rebuttal [887].

There are other Motions [736], [738], [878], [880], also pending in this cause. However, in its Supplemental Memorandum [877-1] in support of its for Summary Judgment [734], State Farm questions this Court's jurisdiction under the False Claims Act ["FCA"], 31 U.S.C. §§ 3729, *et seq*., asserting that Relators' remaining exemplar property, the property of Thomas and Pamela McIntosh, is not a false claim, such that this Court should dismiss this case for lack of subject matter jurisdiction. Supp. Mem. [877-1], at pp. 2–5. Because the Court is duty bound to examine the basis of its subject matter jurisdiction, the Court must resolve the Motion for Summary Judgment [734] before addressing any of the other pending Motions. After consideration of the Motion for Summary Judgment, the related pleadings, the record, and the relevant legal authorities, and for the reasons discussed below, the Court finds that the Motion for Summary Judgment [734] should be granted in part and denied in part.

I. BACKGROUND

Relators Cori Rigsby and Kerri Rigsby initiated this action by filing their Complaint [2] on April 26, 2006, *in camera* and under seal, pursuant to the FCA. Relators asserted that Defendants violated §§ 3729(a)(1), (a)(2), (a)(3), and (a)(7) of the Act.[1] They identified State Farm,[2] Nationwide Insurance

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[1] In 2009, Congress amended 31 U.S.C. § 3729 in the Fraud Enforcement and Recovery Act of 2009 ["FERA"]. Pub.L. 111-21, § 4(a), May 20, 2009, 123 Stat. 1621. Subsections 3729(a)(1),(a)(2), (a)(3), and (a)(7) were redesignated as subsections 3729(a)(1)(A), (B), (C), and (G), respectively. Most of these amended subsections apply only to conduct occurring on or after the date of enactment, which was May 20, 2009. *See* Pub.L. 111-21, § 4(f), May 20, 2009, 123 Stat. 1625. However, subsection 3729(a)(1)(B), formerly subsection 3729(a)(2), applies retroactively to all claims pending on or after June 7, 2008. *Id.*; *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 n.1 (5th Cir. 2010). Relators filed this action in 2006, and the First Amended Complaint [16] was pending on June 7, 2008. The Court will therefore apply the current, 2009 version of § 3729(a)(1)(B), *in lieu* of the earlier version contained in § 3729(a)(2). *See Steury*, 625 F.3d at 267 n.1. However, because the conduct involved here occurred before the 2009 revisions to the statute, the Court will apply the earlier versions of §§ 3729(a)(1), (a)(3), and (a)(7) to Relators' other claims. *See id.*; *see also, e.g., United States v. Caremark, Inc.*, 634 F.3d 808, 814–15 (5th Cir. 2011) (applying pre-2009 version of § 3729(a)(7) to conduct prior to 2009). Relators allege that State Farm's failure to reimburse the National Flood Insurance Program, which is the subject of their reverse FCA claim under § 3729(a)(7), is ongoing, such that the conduct should be deemed to have occurred after the date of the amendment. Relators' Resp. [767], at p. 35. However, whichever version of this subsection the Court applies, the result as to this particular claim would be the same.

[2] The Complaint and First Amended Complaint named State Farm Mutual Insurance Company as a Defendant. The Court entered an Agreed Order [516] on May 18, 2010, correcting a clerical error as to State Farm's proper name. All references to "State Farm Mutual Insurance Company" were changed to "State Farm Fire and Casualty Company." Agreed Order [516], at p. 2.

Company, Allstate Insurance Company, USAA Insurance Company, Forensic Analysis Engineering Corporation, Exponent, Inc.,[3] Haag Engineering Co., Jade Engineering, Rimkus Consulting Group, Inc., and Structures Group, as Defendants.

Relators were employees of E.A. Renfroe, Inc., with which State Farm contracted to assist in the adjustment of insurance claims following Hurricane Katrina. Relators' Am. Compl., at pp. 4, 7–8, 16. Relators allege that Defendants conspired to illegally shift their responsibility to pay claims for wind damage on homeowner's insurance policies to the government, through the National Flood Insurance Program ["NFIP"], by classifying wind damage to properties covered by both a homeowner's policy and a flood policy as storm surge damage, thereby shifting insurers' potential wind losses to the government under the NFIP. In short, Relators assert that Defendants knowingly submitted false flood claims to the government which were in fact wind claims.

Relators filed their First Amended Complaint [16] on May 22, 2007, also *in camera* and under seal, identifying as Defendants those named in the original Complaint [2], and adding E.A. Renfroe, Inc., Jana Renfroe, Gene Renfroe, and Alexis King as Defendants. In addition to the four counts contained in their original Complaint, Relators asserted a fifth count for retaliation, pursuant to 31 U.S.C. § 3730(h), against

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[3] The Complaint and First Amended Complaint named Exponent Failure Analysis as a Defendant. The Court entered an Order [81] on March 27, 2008, granting Relators' Motion to Amend to change the name of Exponent Failure Analysis to Exponent, Inc. Order [81], at p. 1.

Defendants State Farm and E.A. Renfroe, Inc. In a Memorandum Opinion [343] and Order [344], entered on August 10, 2009, Senior United States District Judge L.T. Senter, Jr., granted summary judgment on this claim, leaving only the four claims raised in the original Complaint.

On January 10, 2007, Magistrate Judge Robert H. Walker entered an Order [8] partially lifting the seal. At Relators' request, the Court granted permission to disclose the existence of this case to any judicial or court officers who were assigned to a specific, related case pending in the United States District Court for the Northern District of Alabama. Order [8], at p. 1. On August 1, 2007, the Court granted a second Motion to Unseal filed by Relators, and directed the Clerk of Court to unseal this case in its entirety. Order [25], at p. 1.

On January 31, 2008, the United States of America filed a Notice [56] that it would not be intervening in the case at that time. Pursuant to 31 U.S.C. § 3730(c)(3), it stated that it retained "the right to intervene in this case at any time 'upon a showing of good cause,'" and that its "investigation of and attention to this case will continue." Notice [56], at p. 1. To date, the United States has not intervened.

Relators later sought dismissal of their claims against certain Defendants, to which the United States consented [63], [257], [313]. Accordingly, Judge Senter dismissed Relators' claims against Defendants Nationwide Insurance Company, USAA Insurance Company, and Allstate Insurance Company by Order [192] dated June 20, 2008; against Defendants Rimkus

Consulting Group, Inc., Jade Engineering, Exponent, Inc., and Structures Group, by Order [260] dated January 5, 2009; and against Defendants E.A. Renfroe, Inc., Gene Renfroe, and Jana Renfroe, by Order [319] dated May 18, 2009. The Court subsequently granted Defendant Forensic Analysis Engineering Corporation's unopposed Motion to Dismiss [693], based upon Forensic's settlement with Relators, in an Order [713] dated July 29, 2010. However, the United States filed a Notice [798] of its rejection of the proposed settlement, and submitted its own Motion to Dismiss Forensic, without prejudice as to the United States. The Court granted the United States' Motion, and dismissed the claims against Forensic without prejudice in an Order [835] entered on November 29, 2010.

As for Defendant Alexis King, she filed a Motion to Dismiss [732] on August 16, 2010, pursuant to Federal Rule of Civil Procedure 12(b)(5), for failure to timely serve process as required by Rule 4(m). Relators did not oppose her Motion. *See* Relators' Notice [761]. Judge Senter granted King's Motion by Order [825] entered November 23, 2010. The only Defendants now remaining before the Court are Haag and State Farm, who filed the present Motion [734] on August 16, 2010, seeking summary judgment. On April 12, 2011, this matter was reassigned to the undersigned for all further proceedings.

II. DISCUSSION

A. Standard of Review

Federal Rule of Civil Procedure 56(a) provides, in relevant part, that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Meyers v. M/V Eugenio C.*, 842 F.2d 815, 816 (5th Cir. 1988).

To rebut a properly supported motion for summary judgment, the opposing party must show, with "significant probative evidence," that there exists a genuine issue of material fact. *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (citing *Conkling v. Turner*, 18 F.3d 1285, 1295 (5th Cir. 1994)). If the evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "However, mere conclusory allegations are not competent summary judgment evidence, and such allegations are insufficient, therefore, to defeat a motion for summary judgment." *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996) (citing *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1991)).

The existence of a factual dispute does not preclude summary judgment if the dispute is neither material nor genuine. *Lyle v. Dedeaux*, 39 F.3d 320, 1994 WL 612506, *2 (5th Cir. 1994) (citing *Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 222 (5th Cir. 1986)). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law. An issue

is 'genuine' if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Hamilton*, 232 F.3d at 477 (citing *Anderson*, 477 U.S. at 248). In deciding whether summary judgment is appropriate, the Court views facts and inferences in the light most favorable to the nonmoving party. *Lyle*, 1994 WL 612506, at *2.

B. Analysis

Judge Senter has previously determined that "[t]he sole remaining specifically-identified instance offered in support of the allegations of the amended complaint involves the claim of Thomas and Pamela McIntosh (the McIntoshes)." Mem. Op. [343], at pp. 2–3. Defendants now contend that Relators cannot prevail on their direct FCA claims, on grounds that they cannot offer any evidence which would raise a genuine issue of material fact that the McIntoshes' flood claim was false, or that Defendants knew that the McIntoshes' flood claim was false at the time Defendants submitted it. State Farm's Mem. [735] in Supp. of Mot., at p. 7. Defendants also argue that Relators' reverse FCA claim, brought under § 3729(a)(7), fails, because the McIntosh claim cannot be both a false claim and a reverse false claim, *id.* at p. 40, and because Relators have confessed this claim, *id.* at p. 41.

1. Direct FCA Claims

The United States Court of Appeals for the Fifth Circuit has stated that, to prove a direct violation of the FCA, a plaintiff must establish "(1) . . . a false statement or fraudulent course of conduct; (2) made or

carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim)." *United States ex rel. Longhi v. United States*, 575 F.3d 458, 467 (5th Cir. 2009) (quotation omitted). Defendants challenge Relators' ability to prove the first two elements of their direct FCA claim.

a. Defendants' Argument That the Claim Was Not False

The parties do not dispute that State Farm paid the McIntoshes their flood policy limits of $250,000.00 on the building coverage under their flood policy. Relators maintain that the actual flood damages to the McIntoshes' home were less than $250,000.00, such that State Farm's reimbursement claim submitted to the NFIP on the McIntosh property was false. Defendants contend that Relators cannot point to any competent summary judgment evidence to support this overpayment allegation. State Farm's Mem. [735] in Supp. of Mot., at p. 12.

Relators respond that, according to their insurance claims adjustment and repair cost expert, David Favre, the McIntoshes were, at best, entitled to approximately $130,000.00 under the flood policy, thereby creating a material fact question on the falsity of State Farm's claim for reimbursement submitted to the government. Relators' Resp. [767], at p. 19. While Defendants argue that Favre's report is inadmissible and his estimate irrelevant, State Farm's Mem. [735] in Supp. of Mot., at pp. 12–15, the Court previously addressed these issues, granting in part and denying

in part State Farm's earlier Motions to exclude Favre, Mem. Op. [821], at pp. 1–4; Order [822], at p. 1.

Specifically, Judge Senter granted State Farm's Motions in part as to Favre's opinion that State Farm was operating under a conflict of interest in adjusting the McIntoshes' flood claim, but denied its Motions in all other respects. Mem. Op. [821], at pp. 1–4; Order [822], at p. 1. Judge Senter also found unpersuasive State Farm's position that, because the McIntoshes' property has been repaired, any estimate of the repair cost is now irrelevant. Mem. Op. [821], at p. 3. Favre's testimony is therefore properly before the Court as summary judgment evidence. Defendants themselves have presented countervailing expert testimony. If the jury were to believe Favre's flood damage estimates, it could find that State Farm's request for reimbursement for the McIntosh flood claim was false. Based on the present record, Relators have submitted sufficient summary judgment evidence to create a genuine question of material fact as to this issue, and Defendants' request for summary judgment must be denied as to Relators' direct FCA claim.

b. Defendants' Argument That the Claim Was Not Knowingly False When Made

Defendants next argue that Relators cannot show the claim was knowingly false when it was made. State Farm's Mem. [735] in Supp. of Mot., at p. 18. Defendants maintain that the testimony

> demonstrates that the procedures State Farm used for handling Katrina-related flood claims were: (i) developed with

> FEMA; (ii) approved by FEMA; (iii) implemented in accordance with FEMA guidelines; and (iv) fully consistent with FEMA claims-handling practices.

Id. at p. 19.

According to Defendants, the Federal Emergency Management Agency's ["FEMA"] knowledge of State Farm's adjusting practices precludes a finding that Defendants acted with the requisite scienter, or intent, and State Farm representatives believed in good faith that the McIntosh claim was not false. *Id.* at pp. 23–27.

Relators counter that State Farm's adjustment of the McIntoshes' flood claim did not comply with FEMA regulations. Relators' Resp. [767], at pp. 24–29. They maintain that FEMA's alleged knowledge of State Farm's adjustment practices does not automatically preclude a showing of the requisite scienter, since they claim that State Farm was not completely candid with FEMA. *Id.* at pp. 23–33. Relators add that Defendants' good faith argument is unavailing in light of Kerri Rigsby's testimony that State Farm instructed adjusters that Hurricane Katrina was a "water storm," which created an "incorrect presumption" by Cody Perry, the individual who adjusted the McIntoshes' flood claim with Kerri Rigsby, that "the damage the home sustained was caused by flood." Relators' Resp. [767], at pp. 3–5.

To prove that Defendants acted with the intent sufficient to violate the FCA, Relators "must demonstrate the Defendants had (1) actual knowledge

of falsity, (2) acted with deliberate ignorance of the truth or falsity of the information provided, or (3) acted with reckless disregard of the truth or falsity of the information provided . . . ." *Longhi*, 575 F.3d at 468. In the context of FCA cases, the Fifth Circuit "hesistate[s] to grant summary judgment when a case turns on a state of mind determination." *United States ex rel. Taylor-Vick v. Smith*, 513 F.3d 228, 231 (5th Cir. 2008) (citing *International Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1265 (5th Cir. 1991)). At this juncture, the Court is persuaded that Relators have adduced sufficient evidence to create a material fact question as to whether Defendants possessed the requisite state of mind to violate the FCA.

Among other things, at issue here is the use of certain adjusting tools referred to as "Xactimate" and "XactTotal." State Farm's corporate representative, Michael Ferrier, explained at a hearing Judge Senter held in this matter on May 20 through 22, 2009, that Xactimate and XactTotal are both part of the overall Xactimate program. Hr'g Tr., at p. 51. The Xactimate estimate provides what is commonly known as a "line-by-line" or "stick built" estimate of damage to a structure, both of which are item-by-item estimates. *Id.* at pp. 51, 115. XactTotal, by contrast, does not provide a "stick built," or item-by-item, estimate. *Id.* at pp. 116, 127. "It's just a technique to estimate the value or the damages to a building that isn't as time-consuming as going line by line by line." *Id.* The XactTotal result can be converted into an estimate format, so that the user can look room by room and line by line at the estimate, *id.* at pp. 51, 122, but it is not a program which is designed to give the user an item-by-item analysis of the flood damage to a home,

id. at p. 124. Ferrier explained that XactTotal gives the user a "very similar valuation of a very similar home with the same type of items" to the home the user is adjusting. *Id.* at p. 126. Relator Kerri Rigsby stated that "it's strictly you put in a square foot price and it spits out an estimate." *Id.* at p. 210. Ferrier testified that XactTotal is used in all flood claims to determine the value of a particular structure, for the purpose of ensuring that it is insured for 80% of its value. *Id.* at pp. 119–120.

According to Ferrier, Xactimate is an "estimating platform," which State Farm also uses on every single flood claim. *Id.* at p. 120. However, he agreed that, when an adjuster observes a constructive total loss, an adjuster uses XactTotal to document any payment in the file. *Id.* at pp. 181–182. XactTotal gives the adjuster an idea as to the total value of the building, and from that, he "can surmise that this would have been a policy limit loss." *Id.* at p. 182.

In this case, State Farm used XactTotal to adjust the McIntoshes' claim. *Id.* at p. 119–20. The parties apparently do not dispute that State Farm did not follow the Xactimate, or "line-by-line" or "stick build" procedure, in adjusting the McIntosh flood claim. Ferrier testified that, "[b]ecause of the extent of the damage and the photographic evidence, it was so clearly and obviously a policy limit loss that the decision was made to do XactTotal." *Id.* at p. 138.

According to Relator Kerri Rigsby, at a State Farm meeting held after Hurricane Katrina, she and other adjusters and team managers were told to expedite the claims handling process by utilizing

XactTotal. *Id.* at p. 210. She testified that they were told "to use XactTotal if the house was a slab, popsicle stick, or cabana." *Id.* She explained that

> a slab would mean the house was gone and there was nothing left but a foundation. And then a popsicle stick was considered pilings. Then the cabana, there would still be a roof. Majority of the home would be gone, but maybe there would still be a roof.

Id. at p. 211.

Kerri Rigsby further testified that, if a property was severely damaged, but did not fall into one of these three categories, the adjuster could employ XactTotal if he obtained permission from his State Farm team manager. *Id.* at pp. 211–212.

Because the McIntosh home was not a "slab," a "popsicle stick," or a "cabana," the adjuster on the claim, Cody Perry, received permission from his State Farm team manager to use the XactTotal program to calculate the value of the McIntoshes' dwelling. *Id.*, at p. 228. He then separately calculated an estimate of wind damage using Xactimate. Perry then subtracted this figure along with nonrecoverable depreciation from the XactTotal valuation figure, and converted the resulting number to an XactTotal estimate. The result was a line-by-line breakdown of a theoretical house similar to the McIntoshes' home, as opposed to a line-by-line estimate of the McIntoshes' actual home. *See, e.g.,* Hr'g Tr., at pp. 59–60, 73–75, 80–81, 100, 114, 125, 128, 131–132. Kerri Rigsby explained that she

and Perry could "manipulate [the XactTotal estimate] some if you want to, but we didn't. Like I said, the McIntosh estimate is showing a five-bedroom house with a garage. That's not what his house was." *Id.* at p. 210. Ferrier testified that, had the XactTotal estimate of the McIntoshes' home produced an estimate which was less than $250,000, the adjuster "would have stick built the estimate or [sic] a line-by-line estimate." *Id.* at p. 182.

Of relevance here, the parties dispute the propriety of State Farm's use of XactTotal in a loss situation like that of the McIntosh property. Relators point to a Memorandum from FEMA Director David Maurstad, "FEMA Directive W-5054" [709-5], to "Write Your Own Principal Coordinators and the NFIP Servicing Agent," dated September 21, 2005, which Relators contend provides the only expedited claims handling procedures which were permitted after Hurricane Katrina. Relators' Resp. [767], at p. 13. FEMA Directive W-5054 outlined three processes, developed by FEMA, which could be utilized for expedited handling of claims which met certain criteria. FEMA Directive W-5054 [709-5], at p. 2. The Directive explained that

> Process # 1 should be used to expedite the claims handling of structures that have or have had standing water in them for an extended period of time. In order for your company to participate in this process, you must be able to acquire a reliable square foot measurement so that an accurate value can be developed. Some companies have a

> homeowner policy base that largely matches the flood policy base and may develop the square foot measurement from that information.
>
> Process # 2 is to be used when it has been determined that the structure has been washed off its foundation by flood water and the square foot measurements are known. The company should use the same settlement procedures as in process # 1. All other claims require a site visit and will be handled using the company's normal claim procedures (process # 3).

Id.

Relators' position is that this memorandum was in force at the time Cody Perry adjusted the McIntosh claim. Because it is undisputed that the McIntoshes' damage did not satisfy the criteria of either Process #1 or Process #2, Relators maintain that State Farm was required to use its normal claim handling procedures, under Process #3. According to Relators, this would not permit use of programs like XactTotal. Relators' Resp. [767], at p. 13. Relators cite the testimony of Juan Guevara, State Farm's principal contact with FEMA, who testified that on September 13, 2005, prior to the issuance of FEMA Directive W-5054, he had proposed to FEMA the use of a different expedited claims handling process. Dep. Of Juan Lopez Guevara, Jr. [767-8], at pp. 69–70, attached as Ex. "8" to Relators' Resp. Guevara asserted that he received approval from FEMA to use this different process, and that such

approval survived after the issuance of FEMA Directive W-5054. *Id.* at p. 70. Guevara proposed to use a method like XactTotal "[w]here a site visit was completed and [the losses] appeared to exceed policy limits." *Id.* at p. 85. Ferrier testified at the May 20 through 22, 2009, hearing that whether or not it actually had to, State Farm did comply with FEMA's Process #3 in handling the McIntosh claim, because State Farm used its "normal estimating practices." Hr'g Tr., at pp. 148–150. However, Ferrier acknowledged that "a lot" of justification for adjusting the McIntosh flood loss through the XactTotal software came through "verbals" from FEMA. *Id.* at p. 158. Ferrier also stated that "there are references within [FEMA Directive] 5054 that XactTotal is an accepted method. . . ." *Id.*

Relators counter that, because State Farm's proposal was not adopted in the later issued FEMA Directive governing expedited claims handling procedures, State Farm was not permitted to use XactTotal, except in the two situations specified by FEMA, which were delineated as Process #1 and Process #2. Relators' Resp. [767], at p. 13. Relators also point to a September 22, 2005, email from Guevara to FEMA employee Jim Shortley, in which Guevara stated as follows:

> The attached is the proposal that we agreed to for handling Hurricane Katrina flood files. Compared to the FEMA bulletin W-5054 there are a number of changes or point [sic] that are not clear.

> These are the issues that need to be cleared up.
>
> * * *
>
> • If a file is referred to the field as per attachment A of the bulletin it states "If a claim requires a site visit it will be handled using the company's normal claim procedures". I read this as having to write a complete line by line estimate even if the repairs will exceed the policy limits. In our process for a field inspection, we agreed if the building was damaged beyond repair that we could use our evaluation tool instead of writing a line by line estimate. It would not make sense to approve the use of evaluation total for an In-Office handled claim then require a line by line estimate if a field inspection is done on a loss that is above policy limits.
>
> * * *
>
> I would appreciate your response as soon as possible because this is having an impact on the current handling process.

Sept. 22, 2005, email from Guevara to Shortley [738-14], at pp. 1–2.

One week later, on September 29, 2005, Guevara sent another email to Shortley inquiring whether Shortley "had a chance to review and give [Guevara] a response to these questions?" Sept. 29, 2005, email from Guevara to Shortley [738-14], at p. 1.

In his deposition, Guevara testified that he did not recall any specifics, but that Shortley indicated to him in a telephone conversation that FEMA Directive W-5054 did not change anything State Farm had been doing prior to the date of the Directive's issuance. Dep. of Juan Lopez Guevara, Jr. [767-8], at pp. 93–94, attached as Ex. "8" to Relators' Resp. Guevara further testified that had there been a change, he would have transmitted a communication to the field about the change, something he did not do. *Id.*

Shortley testified that he could not recall whether he agreed that State Farm could use XactTotal to adjust such claims, but that he would not have objected to it. Dep. of James S.P. Shortley [767-17], at pp. 178–179, attached as Ex. "17" to Relators' Resp. He also stated, however, that, an adjuster would be required to perform a line-by-line estimate of damages at least until the adjuster reached the flood policy limits. *Id.* at p. 128.

Relators contend that Guevara's unanswered emails to Shortley, along with Guevara's and Shortley's lack of memory on the subject, indicate that State Farm sought, but did not receive, permission to use XactTotal in situations like the McIntoshes' claim. Relators' Resp. [767], at p. 26. Even assuming such approval did exist, Relators further fault State Farm for not requiring a line-by-line estimate, at least up to the $250,000.00 flood policy limits on the McIntoshes' home, as Shortley indicated was required. *Id.* at p. 32. Relators maintain that "State Farm's broader use of XactTotal enabled its adjusters to quickly pay the limits of flood claims, like the McIntosh claim, without

actually assessing the damage caused by flood." *Id.* at p. 13. Defendants insist that State Farm was not required to use the "line-by-line" method in cases where the flood damage clearly exceeded policy limits. Rebuttal [780], at p. 7.

The record is less than clear on the question of whether the XactTotal adjusting procedure was appropriate or otherwise permitted by FEMA in cases like the McIntoshes', at least in initially determining flood damage up to the $250,000.00 flood policy limit. Particularly given the verbal nature of a number of the alleged approvals and their centrality to this dispute, the Court cannot say that Defendants have carried their burden of demonstrating that there is no genuine issue of material fact as to whether they had FEMA approval to employ XactTotal on the McIntosh claim.

Even accepting as true Defendants' contention that State Farm was allowed to use XactTotal on the McIntoshes' property, genuine issues of material fact nevertheless remain for trial on the question of scienter, or intent. At the hearing Judge Senter conducted on May 20 through 22, 2009, on various pending Motions to Dismiss, Relator Kerri Rigsby testified, in relevant part, as follows:

> Q. Did the procedures at State Farm change at all for adjusting flood claims after Hurricane Katrina?
> A. Yes.
>
> Q. After Hurricane Katrina hit, just so we're clear, during Hurricane Katrina adjusting? Sorry about that.

A. Yes.

Q. Okay.
A. It did.

Q. How did you learn that State Farm's procedures for adjusting claims, flood claims changed after Hurricane Katrina hit?
A. I first knew that by a meeting that we had shortly after we were over in the Gulfport office. We had a large group meeting with the -- all the adjusters, and it was in the main building in the large room, and I can remember the building wasn't repaired yet. There was no furniture in there. We had to bring in chairs and kind of sat in a big circle. And we were told at that time by two State Farm employees how this storm would be handled as far as flood.

Q. And how many people do you think were in the room?
A. I would say over a hundred. It was a large group. It was one of the only times, if not the only time, we were all in there, you know, packed together.

Q. What did you learn from that meeting about how the procedures for adjusting flood claims were going to change for Hurricane Katrina?
A. Well, again, there were two State Farm trainers guiding the meeting. One was named Dave Runge, and one was named Jodi Prince, who are normally State Farm

trainers. Jodi Prince at this storm was promoted to a team manager position for that --for this storm. Anyway, we were told that this was a water storm and we were going to be expediting the claim procedure, and that we were to go out and hit the limits.

Q. Okay. You said a few things in there, and I'm going to break it down. What do you mean this was a water storm, or what were you told it meant that Hurricane Katrina was a water storm at the time?

A. Well, we were advised that the damage at Katrina was caused by water or tidal surge, floodwater or tidal surge. They stated that there was no question -- this was, like I said, maybe a couple of weeks after the storm hit and we all were in Gulfport. They said there was no question that this was a water storm, and we were to get money to the policyholders as quick as we could through the flood policy, and that we were to hit limits when we got out there, if the home was severely damaged.

Q. Okay. And as to Hurricane Katrina being a water storm, did you get any reports or papers or data or anything at that meeting you're talking about?

A. No. They didn't provide us with anything. They just said they – it was a water storm.

Q. Did you ever get anything in writing that talked about what the weather was like in Katrina from State Farm?

A. Later on, several weeks later, we received a Haag report.

Q. What was that?
A. It was a -- it was an engineering report that gave examples of things along the Coast, and it stated that Katrina had -- you know, what kind of damage was caused by Katrina, that the water came I believe it said about 12 hours before the wind, and that the damage along the Coast was caused by water, so it's –

* * *

A. So anyway, we received the -- later we received the report, and it -- again, it said that the water came about 12 hours before the wind, that it -- high tidal surge. So we received that later and were advised to use that in processing claims. Every team manager had one on their desk, and we were given a PowerPoint presentation saying, *This is what happened*, you know, *If you're told it happened any other way, it didn't. This is how it happened*. So once we were given that report, you know, that's what we, of course, used, but before that, we were just told it's water.

Q. Okay. So the report was consistent or inconsistent with what you were told in the first meeting that you described[?]
A. Oh, no, it was -- it was exactly what we were told in the first meeting.

> Q. Okay. And another thing you said, and I haven't asked you about it yet, but you said that State Farm said it was a water storm and told you to hit limits. What does that mean? I got the water storm part. Move on to the hit limits.
> A. They said to hit limits, meaning hit policy limits. They said these policyholders were misplaced, they didn't have a home, they didn't have anywhere to go, get out there and pay them limits.
>
> Q. Meaning the limits of the flood policy?
> A. Yes, the limits of the flood policy. And they gave us a tool. They said, *Okay. And to do this, you're going to need to use XactTotal, an expedited claims handling procedure.*

Hr'g Tr., at pp. 204–208 (emphasis in original).

Based on these alleged instructions she received from State Farm, Kerri Rigsby testified that she and the adjuster, Cody Perry, made no independent determination as to the cause of loss to the McIntoshes' property. *Id.* at pp. 285–286. According to Rigsby, the reason "the McIntosh claim was falsely adjusted was because we were told it was water damage." *Id.* at pp. 298–299.

Even assuming the adjusting method employed by State Farm was an appropriate one to use under the circumstances, as Defendants claim, Relators have presented evidence that the underlying data which the adjuster utilized was intentionally skewed at the outset in favor of finding flood damage, as a result of

allegedly erroneous and fraudulent information and instructions given by State Farm, and later buttressed by the Haag report. If the Court accepts Relators' version of the facts as true, as it must at the summary judgment stage, there remain genuine disputes of material fact for trial on the question of whether Defendants possessed the requisite state of mind to violate the FCA. Construing all facts in Relators' favor, a jury could conclude that State Farm and Haag conspired to provide erroneous or false information to Cody Perry, who then employed that information in adjusting the loss on the McIntosh property, in an effort to shift State Farm's potential losses on wind claims to the NFIP.

By allegedly instructing adjusters, such as Cody Perry and Kerri Rigsby in this case, that Hurricane Katrina caused predominantly flood damage, and by requiring adjusters to proceed from that premise in adjusting flood claims, a jury could find that a false flood claim was knowingly submitted to the government in the McIntoshes' case, even if adjusters were using an appropriate or approved damage estimation method. In other words, Relators have adduced evidence that adjusters proceeded from a false presumption of flood damage, which was allegedly intentionally interjected into State Farm's Hurricane Katrina claims adjustment by Defendants, and which prompted adjusters to initially determine that flood policy limits were exceeded, thereby justifying use of the XactTotal method under State Farm's expedited claims handling process.

In sum, considering the record as a whole, and reviewing the evidence presented in the light most

favorable to Relators and resolving all doubt in their favor, as the Court must at this stage, there remain genuine issues of material fact on Relators' direct FCA claims. These questions include, but are not limited to, whether the McIntosh flood claim was false and whether Defendants possessed the requisite scienter. Summary judgment in Defendants' favor on these claims will be denied.

2. Reverse FCA Claim

Defendants maintain that Relators have confessed that dismissal of this claim, contained in Count IV of the First Amended Complaint, is either unopposed or appropriate. State Farm's Mem. [735] in Supp. of Mot., at p. 35. Relators disagree and assert that this Count remains pending. Relator's Resp. [767], at pp. 29–30.

The Fifth Circuit has explained that

> [c]laims under 31 U.S.C. § 3729(a)(7) require proof that the defendant "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). This is known as a reverse false claim because the effect of the defendant's knowingly false statement is a failure to pay the Government when payment is required. A direct claim, on the other hand, occurs when a false claim for payment is

> submitted to the Government. *United States ex rel. Bain v. Ga. Gulf Corp.*, 386 F.3d 648, 652 (5th Cir. 2004).

United States v. Caremark, Inc., 634 F.3d 808, 814–15 (5th Cir. 2011) (footnote omitted).

> The Fifth Circuit has held that § 3729(a)(7)
>
> > does not extend to the potential or contingent obligations to pay the government fines or penalties which have not been levied or assessed (and as to which no formal proceedings to do so have been instituted) and which do not arise out of an economic relationship between the government and the defendant (such as a lease or a contract or the like) under which the government provides some benefit to the defendant wholly or partially in exchange for an agreed or expected payment or transfer of property by (or on behalf of) the defendant to (or for the economic benefit of) the government.

United States ex rel. Marcy v. Rowan Companies, Inc., 520 F.3d 384, 391 (5th Cir. 2008) (quoting *United States ex rel. Bain v. Georgia Gulf Corp.*, 386 F.3d 648, (5th Cir. 2004)).

As Defendants point out, Relators' Consolidated Pre-Hearing Response [264] to all dispositive Motions stated that they did not oppose dismissal of Count IV

as to State Farm and Haag. Relator's Consolidated Resp. [264], at p. 4. At the hearing Judge Senter held in this case on May 20 through 22, 2009, Relators' counsel stated as follows:

> 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.*

Hr'g Tr., at pp. 237–238 (emphasis added).

The only reasonable interpretation of this argument is that Relators have no reverse FCA claim, and dismissal is therefore warranted.

Defendants alternatively submit that summary judgment is appropriate on the reverse FCA claim

because, under 31 U.S.C. § 3729(a)(7), the McIntosh claim cannot constitute both a false claim and a reverse false claim. State Farm's Mem. [735] in Supp. of Mot., at p. 34. Relators respond that, because there remain genuine issues of material fact as to whether the McIntosh claim was false, there are also genuine issues of material fact as to whether State Farm is "improperly avoiding an obligation to pay money to the government, and thus, whether State Farm is liable under the reverse false claims provisions of the FCA." *Id.* at p. 29. However, even assuming State Farm would be required to reimburse the government for any overpayment on the McIntoshes' flood claim,[4] Relators have not demonstrated that the repayment obligation or the nature of State Farm's relationship with the government would constitute a separate and independent reverse FCA claim, as opposed to an obligation to reimburse overpayment on a direct claim.

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[4] The Court has not been directed to any statutory or regulatory provision detailing the reimbursement required in such a situation. Relators do point to FEMA Memo W-3029, which provides options for Write Your Own insurance carriers to resolve overpayments when the reported amount paid for a loss exceeds the reported policy limit for the policy. Memo W-3029 [432-3], at pp. 2–3. The Court is not persuaded this memorandum is controlling here. The parties do not seem to dispute that the government could have a putative reimbursement claim in the event of an overpayment on a flood policy claim. The Court assumes, without deciding, that the reimbursement claim would be against State Farm, rather than against the McIntoshes. *But cf. United States v. Fowler*, 913 F.2d 1382, 1384–86 (9th Cir. 1990) (holding that government could not be estopped from seeking reimbursement, and could not have waived its right to reimbursement, of a flood claim from defendant insureds who were erroneously paid on a flood insurance policy which was improperly issued by their insurance carrier, because defendant insureds were not eligible for National Flood Insurance Program).

In its Rebuttal [780], State Farm cites *United States ex rel. Branch Consultants, LLC v. Allstate Ins. Co.*, 668 F. Supp. 2d 780 (E.D. La. 2009), for the proposition that Relators cannot state a claim against Defendants under the reverse FCA provision because there was no obligation to pay money to the government at the time the claim was made. Rebuttal [780], at p. 19. In *Branch Consultants*, under similar facts and with substantially similar allegations as those presented here, the district court held that the relator could not maintain a reverse FCA cause of action for an insurer's alleged failure to reimburse the government. *Branch Consultants*, 668 F. Supp. 2d at 811–12. The Court finds *Branch Consultants* persuasive on this point. In addition to essentially acknowledging that this case does not present a reverse FCA scenario, Relators have not shown that, as a matter of law, they can pursue such a claim under the facts alleged in this case. Summary judgment on this claim is appropriate. *See* FED. R. CIV. P. 56(a).

III. CONCLUSION

For the reasons stated herein, the Court finds that Defendants' Motion for Summary Judgment should be granted in part and denied in part.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, for the reasons stated herein, the Motion for Summary Judgment [734] filed by Defendant State Farm Fire and Casualty Company on August 16, 2010, in which remaining Defendant Haag Engineering Co., has joined [742], is **GRANTED IN PART**, to the extent it seeks dismissal of Relators'

reverse FCA claim, pursuant to 31 U.S.C. § 3729(a)(7), contained in Count IV of the First Amended Complaint, and is **DENIED IN PART** in all other respects.

IT IS, FURTHER, ORDERED AND ADJUDGED that, Relators' reverse FCA claim, pursuant to 31 U.S.C. § 3729(a)(7), contained in Count IV of the First Amended Complaint, is **DISMISSED WITH PREJUDICE**. Relators' other claims remain pending for resolution at trial.

SO ORDERED AND ADJUDGED, this the 30th day of September, 2011.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

Order Granting in Part and Denying in Part Defendant State Farm Fire and Casualty Company's *Ore Tenus* Motion for Judgment as a Matter of Law of the United States District Court for the Southern District of Mississippi (April 5, 2013)

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.

STATE FARM FIRE AND CASUALTY CO. DEFENDANT/COUNTER-PLAINTIFF

Civil No. 1:06CV433-HSO-RHW

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S *ORE TENUS* MOTION FOR JUDGMENT AS A MATTER OF LAW

BEFORE THE COURT is Defendant State Farm Fire and Casualty Company's *Ore Tenus* Motion for Judgment as a Matter of Law, pursuant to Federal Rule of Civil Procedure 50, made during the jury trial of his matter at the close of Relators' case-in-chief and again at the close of all evidence. State Farm seeks

judgment on Relators' three remaining claims asserted against it for violations of 31 U.S.C. § 3729(a)(1) (1994), as contained in Count I of the Amended Complaint [16]; 31 U.S.C. § 3729(a)(1)(B) (2009), as contained in Count II of the Amended Complaint [16]; and 31 U.S.C. § 3729(a)(3) (1994), as contained in Count III of the Amended Complaint [16].

The Court has heard from the parties on the record, and the parties have filed trial briefs [1082], [1083], [1086], on issues related to the Motion. After carefully considering the arguments of counsel, the pleadings on file, the record evidence, and relevant legal authorities, and for the reasons more fully stated on the record during the trial of this matter, the Court finds that State Farm's Motion should be granted in part and denied in part. Because Relators have presented insufficient evidence from which a reasonable jury could conclude that State Farm's alleged co-conspirators shared a specific intent to defraud the Government, the Motion will be granted in part as to Relators' conspiracy claim under 31 U.S.C. § 3729(a)(3) (1994). This claim will be dismissed. The remainder of State Farm's Motion will be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, for the reasons stated on the record, Defendant State Farm Fire and Casualty Company's *Ore Tenus* Motion for Judgment as a Matter of Law, pursuant to Federal Rule of Civil Procedure 50, is **GRANTED IN PART AND DENIED IN PART**.

IT IS, FURTHER, ORDERED AND ADJUDGED that, Relators' conspiracy claim under

31 U.S.C. § 3729(a)(3) (1994), as contained in Count III of the Amended Complaint [16], is **DISMISSED WITH PREJUDICE**.

SO ORDERED this the 5th day of April, 2013.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

Memorandum Opinion and Order Denying Defendant State Farm Fire and Casualty Company's Motion for Judgment as a Matter of Law and Denying Defendant State Farm Fire and Casualty Company's Motion for a New Trial of the United States District Court for the Southern District of Mississippi (February 21, 2014)

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

v.

STATE FARM FIRE AND CASUALTY CO., *et al.*
DEFENDANTS

Civil No. 1:06CV433-HSO-RHW

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S MOTION FOR JUDGMENT AS A MATTER OF LAW AND DENYING DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S MOTION FOR A NEW TRIAL

BEFORE THE COURT are the Motions for Judgment as a Matter of Law [1101] and for a New Trial [1102], filed by Defendant State Farm Fire and Casualty Company ["State Farm"]. Both Motions [1101], [1102], are fully briefed. After consideration of the Motions, the related pleadings, the record in this case, and relevant legal authorities, the Court finds that Defendant's Motion for Judgment as a Matter of Law [1101] and Motion for a New Trial [1102] should both be denied.

I. BACKGROUND

At issue in the present Motions are the claims of Relators Cori Rigsby and Kerri Rigsby against Defendant State Farm pursuant to the False Claims Act ["FCA"], 31 U.S.C. §§ 3729, *et seq*. The thrust of Relators' claims against State Farm is that following Hurricane Katrina, State Farm fraudulently shifted its responsibility to pay claims for wind damage to residential properties under State Farm homeowner's insurance policies to the United States Government. Specifically, State Farm allegedly classified such wind damage as flood damage, triggering payment of those claims by the National Flood Insurance Program ["NFIP"], a federal program established by the National Flood Insurance Act of 1968, as amended, 42 U.S.C. § 4001, *et seq.* [the "NFIA"].

> Congress established the National Flood Insurance Program (NFIP) in 1968 in order to reduce the burden on the public fisc after flood disasters. 42 U.S.C. § 4001. The program created a unified national system of flood

> insurance coverage, which is administered by the Federal Emergency Management Agency (FEMA). *Id.* § 4011. Under this program, FEMA promulgated the Standard Flood Insurance Policy (SFIP). 44 C.F.R. § 61.13; 44 C.F.R. pt. 61, app. A(1). FEMA regulations authorize private insurance companies, referred to as "Write Your Own" (WYO) insurers, to issue these flood policies. 42 U.S.C. § 4071(a)(1); 44 C.F.R. § 62.23; 44 C.F.R. pt. 62, app. B. As "fiscal agent [s] of the Federal Government," WYO insurers deposit SFIP premiums in the United States Treasury and pay SFIP claims and litigation costs with federal money. 42 U.S.C. §§ 4017(a), (d); 44 C.F.R. §§ 62.23(g), (i)(6), (i)(9). WYO insurers have no authority to alter, waive, or amend the terms of the SFIP without express written consent from the federal insurance administrator. 44 C.F.R. §§ 61.4(b), 61.13(d)-(e).

Dickson v. American Bankers Ins. Co. of Fl., 739 F.3d 397, 398 (8th Cir. 2014).

Relators maintain that State Farm improperly shifted its responsibility to pay for Hurricane Katrina wind damage by classifying wind damage sustained at properties covered by both a State Farm issued homeowner's policy and a State Farm issued flood policy as storm surge damage, thereby recasting insureds' wind losses as flood losses which the

Government would then be responsible to pay under the NFIP.

The property which became the subject of this case was that of Thomas and Pamela McIntosh located in Biloxi, Mississippi. *See* Mem. Op. [343], at pp. 2–3. The McIntosh property was insured by a NFIP Standard Flood Insurance Policy ["SFIP"] issued by State Farm. In relevant part, Coverage A of the McIntoshes' SFIP covered "Building Property," in this case the McIntosh dwelling itself. *See* Trial Ex. DS-2.0006 – DS-2.0007. The policy limit for flood damage to the dwelling under Coverage A was $250,000.00. *See* Trial Ex. DS-2.0002. After their home was damaged during Hurricane Katrina, the McIntoshes submitted claims under both their homeowners' and flood policies, both of which were serviced by State Farm.

Relator Kerri Rigsby and Cody Perry were E.A. Renfroe & Company ["Renfroe"] contract adjusters who were assigned to adjust claims for State Farm. They adjusted the McIntosh flood claim. The McIntoshes were ultimately paid $250,000.00, the policy limits under Coverage A of their SFIP. *Id.*; Trial Ex. DS-3.0004. Relators maintain that the McIntosh property actually received no compensable flood damage under the SFIP and that State Farm's submission of the flood claim for payment of the $250,000.00 policy limits constituted a false claim.

This case came on for trial before a jury on March 25, 2013, through April 8, 2013. The claims against State Farm remaining for trial were for alleged violations of 31 U.S.C. § 3729(a)(1) (1994) (knowingly presenting, or causing to be presented, to an officer or

employee of the United States Government a false or fraudulent claim for payment or approval), as contained in Count I of the Amended Complaint [16]; 31 U.S.C. § 3729(a)(1)(B) (2009) (knowingly making, using, or causing to be made or used, a false record or statement material to a false claim), as contained in Count II of the Amended Complaint [16]; and 31 U.S.C. § 3729(a)(3) (1994) (conspiring to defraud the Government by getting a false or fraudulent claim allowed or paid), as contained in Count III of the Amended Complaint [16].[1]

At the close of Relators' case-in-chief, State Farm raised an *ore tenus* Motion for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50. Tr. at 771. State Farm renewed its Rule 50 Motion at the close of its case, Tr. at 1714, and at the close of all evidence, Tr. at 1737. On April 5, 2013, the Court granted State Farm's Motion in part and denied it in part, and dismissed Relators' conspiracy claim under 31 U.S.C. § 3729(a)(3) (1994). Order [1087] at 2; Tr. 793–794. The claims for knowingly

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[1] The original Complaint asserted claims under subsections 3729(a)(1),(a)(2), and (a)(3), which were redesignated as subsections 3729(a)(1)(A), (B), and (C), in 2009, when Congress amended 31 U.S.C. § 3729 in the Fraud Enforcement and Recovery Act of 2009 ["FERA"]. Pub.L. 111-21, § 4(a), May 20, 2009, 123 Stat. 1621. Subsection 3729(a)(1) and (a)(3) apply only to conduct occurring on or after the date of enactment, which was May 20, 2009. *See* Pub. L. 111-21, § 4(f), May 20, 2009, 123 Stat. 1625. However, subsection 3729(a)(1)(B), formerly subsection 3729(a)(2), applies retroactively to Relators' claims in this case. *See id.*; *see also, e.g., United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 n.1 (5th Cir. 2010). The parties agreed at trial that these were the relevant subsections which applied to Relators' claims, Tr. at 813–16, and the jury was instructed accordingly.

presenting, or causing to be presented, a false or fraudulent claim for payment to the United States in connection with the McIntosh flood claim under 31 U.S.C. § 3729(a)(1) (1994), and for knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim in connection with the McIntosh flood claim under 31 U.S.C. § 3729(a)(1)(B) (2009), were submitted to the jury.

On April 8, 2013, the jury returned a unanimous verdict finding that (1) State Farm knowingly presented, or caused to be presented, to an officer or employee of the United States Government, a false or fraudulent claim for payment or approval in connection with the McIntosh flood claim, and (2) that State Farm knowingly made, used, or caused to be made or used, a false record or statement material to a false or fraudulent claim in connection with the McIntosh flood claim. Special Verdict Form [1092] at 2–3. Specifically, the jury concluded that the McIntosh residence sustained $0 in covered flood damage under its SFIP during Hurricane Katrina, and that the Government suffered damages of $250,000.00 under the False Claims Act as a result of State Farm submitting a false flood claim for payment of flood policy limits on the McIntosh property. *Id.* at 2–3. State Farm has renewed its Motion for Judgment as a Matter of Law and asks that the Court dismiss Relators' claims with prejudice pursuant to Federal Rule of Civil Procedure 50. In the alternative, State Farm asks the Court to conditionally grant a new trial pursuant to Rules 50(c)(1) and 59.

II. DISCUSSION

A. Applicable Legal Standards

"A motion for judgment as a matter of law (previously, motion for directed verdict or J.N.O.V.) in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." *Allstate Ins. Co. v. Receivable Finance Co., L.L.C.*, 501 F.3d 398, 405 (5th Cir. 2007) (citing *Hiltgen v. Sumrall*, 47 F.3d 695, 699 (5th Cir. 1995)). Such a motion should be granted if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue . . . ." Fed. R. Civ. P. 50(a)(1). "A district court must deny a motion for judgment as a matter of law unless the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion." *Baisden v. I'm Ready Productions, Inc.*, 693 F.3d 491, 498 (5th Cir. 2012) (quotations omitted). A court must "consider all of the evidence, drawing all reasonable inferences and resolving all credibility determinations in the light most favorable to the non-moving party." *Id.*

"A new trial may be appropriate if the verdict is against the weight of the evidence, the amount awarded is excessive, or the trial was unfair or marred by prejudicial error." *Scott v. Monsanto Co.*, 868 F.2d 786, 789 (5th Cir. 1989). "If the new trial is granted on evidentiary grounds, the jury's verdict must be 'against the great–not merely the greater–weight of the evidence.'" *Id.* (quoting *Conway v. Chem. Leaman Tank Lines, Inc.*, 610 F.2d 360, 362 (5th Cir. 1980)). If asserted prejudice is the basis of the motion, "[c]ourts do not grant new trials unless it is reasonably clear

that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial." *Sibley v. Lemarie*, 184 F.3d 481, 487 (5th Cir. 1999) (quoting *Del Rio Distributing, Inc. v. Adolph Coors Co.,* 589 F.2d 176, 179 n.3 (5th Cir. 1979)).

B. Governing Substantive Law

In order to demonstrate a violation of 31 U.S.C. § 3729(a)(1) (1994), as alleged in Count I of the Amended Complaint [16], Relators had to prove each of the following by a preponderance of the evidence: (1) that State Farm knowingly presented, or caused to be presented, to an officer or employee of the United States Government; (2) a false or fraudulent claim for payment or approval; (3) knowing that the claim was false or fraudulent at the time it was made. 31 U.S.C. § 3729(a)(1) (1994); *United States v. Southland Mgmt. Corp.*, 288 F.3d 665, 675 (5th Cir. 2002).

To prevail on the claim that State Farm violated 31 U.S.C. § 3729(a)(1)(B) (2009), as asserted in Count II of the Amended Complaint [16], Relators had to prove each of the following by a preponderance of the evidence: (1) that State Farm knowingly made, used, or caused to be made or used; (2) a false record or statement; (3) that was material; (4) to a false or fraudulent claim in connection with the McIntosh flood claim. 31 U.S.C. § 3729(a)(1)(B) (2009); *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 (5th Cir. 2010).

At bottom, the dispute in this case turns on whether the McIntosh flood claim submitted to the NFIP was false. Central to this question is what amount of covered flood losses, if any, the McIntosh home sustained during Hurricane Katrina that would be compensable under Coverage A of the McIntoshes' SFIP. *See* Trial Ex. DS-2.0006 – DS-2.0007. The SFIP "and all disputes arising from the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001, et seq.), and Federal common law." 44 CFR Pt. 61, App. A(1), art. IX; *see also* Trial Ex. DS-2.0021. "[T]he reference to federal common law in the SFIP directs courts to employ standard insurance principles when deciding *coverage* issues under the policy." *Wright v. Allstate Ins. Co.*, 500 F.3d 390, 394 (5th Cir. 2007) (emphasis in original) (citing *Hanover Bldg. Materials, Inc. v. Guiffrida*, 748 F.2d 1011, 1013 (5th Cir. 1984)). Based on the foregoing, federal statutory, regulatory, and common law governed the issues at trial.

C. State Farm's Motion for Judgment as a Matter of Law [1101]

State Farm contends that Relators presented insufficient evidence to permit a reasonable jury to find (1) that the McIntosh flood claim was false; (2) that even if the McIntosh claim was false, that the claim was "knowingly" false; (3) that State Farm submitted a "false record or statement"; or (4) that State Farm "presented" the McIntosh flood claim to the Government or that the Government paid the claim. State Farm's Mem. in Supp. of Mots. [1103] at

8–28. Relators have responded to each of these arguments. Relators' Mem. in Supp. of Resp. [1111] *passim*.

1. The Falsity of the McIntosh Flood Claim

Relators' theory at trial was that wind rendered the McIntosh dwelling a total loss by the time any floodwater arrived, such that no flood damage compensable under Coverage A of the SFIP occurred at the McIntosh property during Hurricane Katrina. The jury apparently accepted this premise and found in favor of Relators. State Farm challenges the jury's finding that the McIntosh home sustained $0 in covered flood damage under the McIntoshes' SFIP. Special Verdict Form [1092] at 2. State Farm maintains that the evidence presented at trial "overwhelmingly demonstrates that the McIntosh home suffered at least ***some*** compensable flood damage during Katrina," such that State Farm did not submit a false flood damage claim to the NFIP. State Farm's Mem. in Supp. of Mots. [1103] at 8 (emphasis in original). State Farm contends that Relators failed to present any evidence that would allow the jury to calculate or quantify the amount of covered flood damage and did not offer a valuation expert to support their "total loss" by wind theory. *Id.* at 8–14. State Farm submits that for this reason, Relators failed to prove the McIntosh flood claim was false within the meaning of the FCA. *Id.* at 14.

Relators respond that the SFIP does not cover losses caused by wind and that they proved at trial that wind rendered the McIntosh home a total loss before floodwaters arrived, such that "the Government

was not liable to pay a penny." Relators' Mem. in Supp. of Resp. [1111] at 11. According to Relators, "once wind rendered the McIntosh house a total loss, any subsequent damage by flood to the remaining carcass of the house was irrelevant for purposes of insurance liability because State Farm already had become solely liable for the full value of the house." *Id.* at 12. "[F]lood could not have caused compensable loss to the McIntosh home after wind, a peril that only State Farm covered, already had rendered the house a total loss." *Id.* at 15.

One insurance treatise has explained that

> [w]here the harm sustained by the insured is the result of two or more causes or risks, some of which are not covered, it is of course manifest that the insurer is only liable for so much of the total harm as was caused by the risk covered by the policy.
>
> * * *
>
> [A]n interpretation as to the sufficiency of evidence of causation where multiple causes are involved cannot be such as to render the policy useless because of the impossibility of such proofs.
>
> Consequently, where harm is caused by a non-covered risk which is then followed by harm caused by covered [risk], the [covered risk] insurer is only liable with respect to the latter, and then, only to the extent of the value of

> the property insured after the damage by the non-covered risk.

12 Couch on Ins. § 175:9 (citations omitted).

At trial, the Court instructed the jury as to which items were covered and which were excluded from coverage under the SFIP's Coverage A - Building Property coverage. *See* Tr. at 1831–1832; *see also* Trial Ex. DS-2.0006 – DS-2.0007. The parties presented photographic evidence of the damage sustained by the McIntosh property during Hurricane Katrina, *see, e.g.,* Trial Exs. P-8; P-9; & DS-7, along with documentary and testimonial evidence supporting their respective positions and interpreting these photographs.

Relators' expert Dr. Ralph Sinno testified about many of the photographs and offered his opinions about the cause of the damage. *See generally* Tr. 547–554, 557–559, 566–567. According to Dr. Sinno, "the McIntosh house was damaged by the hurricane wind way before even the water [sic] got into the threshold of the house . . . . [A]fter all of the damage has been done, the water got to the house." *Id.* at 553. Dr. Sinno opined that by the time floodwater or storm surge reached the McIntosh house, the house had already been structurally wracked by high velocity winds. *Id.* at 562–63, 568. Dr. Sinno took the position that the floodwaters caused no structural damage to the McIntosh home. *Id.* at 585. State Farm presented countervailing evidence and testimony on this point. *See, e.g.,* Tr. at 1639–1667 (testimony of State Farm's expert Mark Watson critiquing Dr. Sinno's opinions and opining as to how storm surge and the debris carried by it impacted the McIntosh house). The

verdict indicates that the jury accepted Dr. Sinno's view.

The respect afforded a jury verdict is "especially deferential." *E.E.O.C. v. Boh Bros. Const. Co.*, 731 F.3d 444, 451 (5th Cir. 2013). "[I]t is the function of the jury as the traditional finder of the facts, and not for the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Id.* at 452. "The jury is free to choose among reasonable constructions of the evidence." *Id.* (quotation omitted). State Farm's argument that Relators presented no evidence from a valuation expert that the McIntosh home was worthless by the time floodwater arrived carries some persuasive force, as Dr. Sinno himself acknowledged that he was not an expert in reconstruction costs. Tr. at 587. However, construing all evidence in the light most favorable to Relators and drawing all factual inferences in their favor, as the Court must on a Rule 50 motion, *Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 474 (5th Cir. 2012), the Court cannot say that the evidence points so "strongly and overwhelmingly" in State Farm's favor that a reasonable jury lacked a legally sufficient evidentiary basis to find as it did, *see Baisden*, 693 F.3d at 498.

A reasonable jury could have determined that the McIntosh house experienced damage during Hurricane Katrina caused by wind, a non-covered risk under the SFIP, and was subsequently damaged by water, a covered risk under the SFIP. There was also a legally sufficient evidentiary basis for the jury to find that the McIntosh house sustained $0 in covered flood damage under the SFIP, because there was evidence

adduced at trial that the home was a total loss after the wind damage occurred. *See* 12 Couch on Ins. § 175:9; *see also* Tr. 660 (Dr. Sinno testifying that the house was effectively destroyed from a structural standpoint by wind prior to the time the waters entered the McIntosh home). State Farm's Motion cannot be sustained on this point.

2. Whether State Farm Possessed the Requisite *Scienter* Such That the McIntosh Claim was "Knowingly" False When State Farm Submitted the Claim to NFIP

State Farm argues that "there was no reasonable basis for the jury to find that State Farm submitted a knowingly false claim." State Farm's Mem. in Supp. of Mots. [1103] at 14. State Farm maintains that the three adjusters assigned to the McIntosh claim, including Relator Kerri Rigsby, shared a good faith belief that the McIntosh home suffered more than $250,000.00 in flood damage, and that the testimony of Relators' own experts supports the adjusters' good faith belief in this regard. *Id.* at 16. State Farm also employs a "government knowledge" defense and asserts that the trial testimony given by former FEMA employees that State Farm's conduct was "either affirmatively encouraged by or known to, FEMA" precludes a finding by the jury of knowing falsehood on the part of State Farm. *Id.* at 17–21. According to State Farm, any putative regulatory violations, breaches of "industry standards," and any evidence of the engineering report of Brian Ford, or its rejection by State Farm, were not sufficient evidence to support a finding of guilty knowledge. *Id.* at 21–23.

Relators respond that ample evidence was submitted to the jury of State Farm's intent to commit fraud in order to shift its liability for wind damage to the Government. At a minimum, Relators maintain the evidence was at least sufficient to demonstrate that State Farm acted with "reckless disregard" or "in deliberate ignorance" of the truth or falsity of the McIntosh flood claim. Relators' Mem. In Supp. of Resp. [1111] at 22 (quoting 31 U.S.C. § 3729(b)(1)(A)). Relators posit that the evidence presented at trial undermines State Farm's government knowledge defense because the Government did not know of the particulars of the claim before the claim was presented, and because the Government did not direct State Farm to submit the otherwise false claim. *Id.* at 35–37.

To prove that State Farm acted with the intent, or *scienter*, sufficient to violate the FCA, Relators had to demonstrate that State Farm (1) had actual knowledge of the falsity of the claim, (2) acted with deliberate ignorance of the truth or falsity of the claim, or (3) acted in reckless disregard of the truth or falsity of the information provided. 31 U.S.C. § 3729(b) (1994); *see also United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 468 (5th Cir. 2009). No proof of specific intent to defraud is required. 31 U.S.C. § 3729(b) (1994). However, mere negligence or even gross negligence does not satisfy the intent requirement. *Longhi*, 575 F.3d at 468 (quoting *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 338 (5th Cir. 2008)).

Kerri Rigsby testified at trial that following Hurricane Katrina, State Farm held a meeting with

adjusters. At this meeting, Alexis ("Lecky") King, a catastrophe team manager for State Farm, instructed the adjusters that Hurricane Katrina "was a water storm" and that the damage they would see would be water damage. Tr. at 212. The adjusters were told that "[i]f you see substantial damage, it will be from water." *Id.*

Kerri Rigsby also testified that when adjusters working for State Farm were tasked to prepare damage estimates for storms, the Xactimate estimation program was normally used on every type of claim. Tr. at 215–16, 218–19. Xactimate produced a "line-by-line" estimate of the damages sustained by a structure. *Id.* at 218. The adjuster would enter room, roof, or exterior dimensions, as well as an item-by-item and measurement-by-measurement list of what was damaged. *Id.* at 219. Xactimate would then calculate an estimate for needed repairs. *Id.* Consistent with this policy, Kerri Rigsby testified that Xactimate was used to estimate the wind damage to the roof of the McIntosh home. *Id.*

However, Kerri Rigsby testified that she and other adjusters were instructed by State Farm at a post-Katrina meeting to use a different program, Xactotal, in order to facilitate expedited handling of Katrina flood claims and to "hit the limits" of the SFIP using this program. Tr. at 213. The Xactotal program supplied a "ball park value of the property" by inputting the square footage of the home, so the adjuster could compare the value of the home to the policy limits. *Id.* at 214. The result was the value of a "spec house," not the actual home itself. *Id.* at 274. Under the Xactotal program, if the policy limits were reached, the adjuster could pay the claim. If the policy

limits were not reached, the adjuster was told to rerun the program changing the construction quality in order to get a higher value in order to pay the flood claim. *Id.* at 214. The adjusters were also told that FEMA had approved this "shortcut process." *Id.* at 220.

Kerri Rigsby and Cody Perry followed these instructions and utilized Xactotal to adjust the flood claim on the McIntosh home. The result was the estimated value of the home, not a line-by-line estimate of damages to the home caused by flood. *Id.* at 220, 275, 334. Relators' expert Louis G. Fey ["Fey"] testified that when a person looks at an Xactotal estimate, "it looks like a line by line, and it's hard to discern that it is not actually the house you are looking at . . . ." *Id.* at 692. Kerri Rigsby explained that the McIntosh Xactotal estimate reflected a house with a garage and a garage door, which was not an accurate description of the McIntosh home. *Id.* Cody Perry agreed that the "long form" of Xactotal contained in the McIntosh flood claim file, and admitted into evidence as DS-3.0225 to DS-3.0238, resembled a line-by-line Xactimate estimate, but that it was not in fact an Xactimate estimate as one was not performed on the McIntosh flood claim. Tr. at 1069–71. Former FEMA adjuster Gerald Brian Waytowich, whom State Farm called at trial as an expert witness on damages, testified by video deposition. He examined the McIntosh flood claim file but mistook the Xactotal long form generated by Cody Perry for an Xactimate line-by-line estimate. Trial Ex. P-796 at 58:11–59:12; 61:03–62:06; 63:10–64:17; 69:16–70:04 (video deposition transcript marked for identification purposes only).

Another Renfroe adjuster who was called as a witness by State Farm, Jayme Woody ["Woody"], testified that normally an adjuster would use Xactotal "in the event there was no home to look at . . . ." Tr. at 865. Woody stated that he had not adjusted a loss using Xactotal prior to Hurricane Katrina and that the only time he had used Xactotal prior to Hurricane Katrina was to determine the replacement cost of a building in order to ascertain whether it was insured to at least 80% of its value under an SFIP. *Id.* at 866, 906, 931–32. Woody testified that, for Hurricane Katrina losses, the guidelines he received stated "in the event a house was completely gone or in the event that it was still standing but the water had reached a level above the ceilings, we were given the go ahead to use Xactotal." *Id.* at 869. Woody stated that under special circumstances, such as where the value of a home on the coastline greatly exceeded the maximum coverage of $250,000.00 under the SFIP, the adjusters could, with management approval, "streamline" the adjustment and use Xactotal rather than write a "stick-build," line-by-line estimate. *Id.* at 870, 932.

The parties introduced evidence at trial that State Farm sought FEMA's approval to utilize an expedited claims handling process before FEMA issued bulletin W-5054, which set forth guidelines to insurance companies for adjusting NFIP flood claims. FEMA issued bulletin W-5054 on September 21, 2005.[2]

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[2] State Farm argued at trial and in briefing the present Motions that the adjustment of the McIntosh flood claim occurred prior to the issuance of W-5054. Record evidence in the flood claim file supports the conclusion that Kerri Rigsby and Cody Perry adjusted the McIntosh flood damage claim on September 24, 2005, and that State Farm paid the McIntosh flood claim on October 2, 2005, all after the date FEMA issued W-5054. *See, e.g.*,

See, e.g., Trial Ex. DS-305 (e-mail from Juan Guevera to David Maurstad and Jim Shortley at FEMA with State Farm's claims handling proposal); *see also* Trial Ex. DS-609 (bulletin W-5054). FEMA bulletin W-5054 approved three procedures "for handling claims with specific characteristics." Trial Ex. DS-609.0001. Relators presented evidence that the McIntosh home fit within the third category of claims
contained in W-5054, described as "all other claims." Trial Ex. DS-609.0006. For building coverage claims in this category, W-5054 provided that "[i]f the claim requires a site visit it will be handled using the company's normal claim procedures." *Id.*

The evidence at trial conflicted as to whether FEMA ever approved the use of Xactotal for adjusting losses like the one at the McIntosh property and, even if use of Xactotal was approved, whether such approval survived after FEMA issued bulletin W-5054. *See, e.g.,* Trial Ex. P-296 at 1–2. Relators submitted evidence indicating that State Farm recognized that homes falling into W-5054's third category of homes, such as the McIntosh home, required performance of line-by-line estimates. *Id.* On September 22, 2005, Guevara sent an e-mail to Jim Shortley at FEMA, which noted that FEMA bulletin W-5054 reflected "a number of changes" from an earlier State Farm proposal to FEMA for adjusting flood claims. *Id.* at 1. With regard to those claims in the third category of W-5054 which required a site visit and which were to be handled

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Trial Ex. DS-3.0004 (check to Thomas McIntosh for $250,000.00 dated October 2, 2005); Trial Exs. DS-3.0086, DS-3.0106, DS-3.0124, DS-3.0216, DS-3.0220, DS-3.0023, & DS-3.0024 (all stating that the flood claim was adjusted on September 24, 2005).

using the company's normal claim procedures, Guevara stated that

> *I read this as having to write a complete line by line estimate even if the repairs will exceed the policy limits*. In our process for a field inspection, we agreed if the building was damaged beyond repair that we could use our evaluation tool instead of writing a line by line estimate. It would not make sense to approve the use of evaluation tool for an in-Office handled claim then require a line by line estimate if a field inspection is done on a loss that is above policy limits.

Id. at 2 (emphasis added).

There is no evidence indicating that FEMA ever gave State Farm written approval to deviate from W-5054, and it is undisputed that no line-by-line estimate was prepared for the flood loss at the McIntosh home. Rather, Kerri Rigsby testified that she and Cody Perry were directed to facilitate expedited claims handling and to "hit the limits" using the Xactotal program. Tr. at 213; *see also Dickson v. American Bankers Ins. Co. of Fl.*, 739 F.3d 397, 398 (8th Cir. 2014) ("WYO insurers have no authority to alter, waive, or amend the terms of the SFIP without express written consent from the federal insurance administrator" (citing 44 C.F.R. §§ 61.4(b), 61.13(d)-(e))). The foregoing evidence constituted a legally sufficient basis for the jury to conclude that State Farm possessed the requisite intent to support a violation of the FCA.

To support its argument that FEMA was aware and approved of its conduct, State Farm relies upon the concurring opinion in *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682 (5th Cir. 2003) (en banc), and upon *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 491 F.3d 254, 263 (5th Cir. 2007). State Farm's Mem. in Supp. of Mots. [1103] at 21. The concurrence in *Southland* explained that

> [m]ost of our sister circuits have held that under some circumstances, the government's knowledge of the falsity of a statement or claim can defeat FCA liability on the ground that the claimant did not act "knowingly", because the claimant knew that the government knew of the falsity of the statement and was willing to pay anyway. "If the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim."

Southland Mgmt. Corp., 326 F.3d at 682 (Jones, J., concurring) (quoting *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 (7th Cir.1999)).

In *Laird*, a panel of the Fifth Circuit considered this defense and held that Lockheed Martin could not have knowingly presented a false claim because of an agreement it had reached with the Deputy Director of

NASA prior to submission of the claim. *Laird*, 491 F.3d at 262–63.

The evidence presented at trial in this case does not support the conclusion that, with respect to the McIntosh flood claim, State Farm "knew that the government knew of the falsity of the statement and was willing to pay it anyway." *Southland Mgmt. Corp.*, 326 F.3d at 682. The Court is not persuaded that the testimony elicited from FEMA employees at trial conclusively established that FEMA knew of the particulars of the McIntosh claim or its falsity before it was presented. *Id.* Based on the evidence adduced at trial, the "government knowledge" defense does not negate the jury's determination that State Farm possessed the requisite *scienter* when it presented the McIntosh flood claim.

Based upon the foregoing, as well as upon the other evidence introduced at trial, the Court is of the view that there was sufficient record evidence for a reasonable jury to conclude that State Farm acted with actual knowledge of the falsity of the McIntosh flood claim, or with deliberate ignorance or reckless disregard of the truth or falsity of the claim. *See* 31 U.S.C. § 3729(b) (1994). State Farm is not entitled to relief based on this argument.

3. Whether State Farm Submitted a "False Record or Statement" in Connection with the McIntosh Flood Claim

Relators rely upon two documents to support their theory that State Farm submitted a false record or statement in connection with the McIntosh claim, in

violation of 31 U.S.C. § 3729(a)(1)(B) (2009). Specifically, Relators contend that the omission of the original Brian Ford engineering report from the McIntosh flood file and the inclusion of the long-form Xactotal printout in the flood file constituted false records or statements. State Farm argues that neither of these records supports a jury finding of liability under § 3729(a)(1)(B), contending that an omission cannot constitute a "record or statement," and that the Xactotal printout was actually true and exactly what it purported to be. State Farm's Mem. in Supp. of Mots. [1103] at 24–25. State Farm also argues in its Rebuttal Memorandum that neither the absence of the Ford report nor the portions of the Xactotal printout Relators maintain are false were material to the payment of the McIntosh flood claim. State Farm's Rebuttal Mem. [1113] at 14.

With respect to State Farm's omission of the Ford report and other evidence of wind damage to the McIntosh home from the flood claim file, Relators respond that the omission of a material fact can render a statement or report false for purposes of 31 U.S.C. § 3729(a)(1)(B). Relators' Mem. in Supp. of Resp. [1111] at 43 (citing *United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 464 (5th Cir. 2009)). In addition, even though State Farm was required to perform an actual line-by-line adjustment of flood damage to the McIntosh home, it nevertheless used Xactotal, "a computer program to generate a fake line-by-line estimate, and submitted that fake estimate to the Government." *Id.* at 44.

As the Court has discussed in the previous section of this Opinion addressing whether State Farm

possessed the requisite intent to support a jury finding of liability, evidence was adduced at trial which permitted a reasonable jury to conclude that State Farm deliberately or recklessly did not comply with FEMA requirements. Rather than employing the normal claims handling procedure of
using Xactimate or another line-by-line estimate for the McIntosh flood claim, State Farm employed Xactotal, which simply estimated the value of a house similar to the McIntosh home. The Xactotal long form, which Relators maintained at trial was confusingly similar to a line-by-line estimate, was then placed into the flood claim file.

As Relators' counsel phrased it at trial, based upon the evidence presented a reasonable jury could have found that

> State Farm put a record in the file that looked like its normal claim handling procedures and that it did a line-by-line estimate that was not that at all. That line-by-line estimate was not even the McIntosh house. So, that's a false deceptive piece of documentation in support of their file.

Tr. at 799. A sufficient evidentiary basis existed for a reasonable jury to infer that the presence of the Xactotal printout in the McIntosh flood claim file was designed to mislead FEMA, such that the document constituted a "false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B); *see also* Fed. R. Civ. P. 50(a). Based on this determination, the Court need not resolve whether the

omission of the Ford report from the McIntosh flood claim file also constituted a "false record or statement" under § 3729(a)(1)(B). *See, e.g., Griffin v. United States*, 502 U.S. 46, 59–60 (1991); *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 126 (5th Cir.), *reh'g denied*, 977 F.2d 161 (5th Cir. 1992) (citing *Griffin*, 502 U.S. at 46).

4. Whether State Farm Presented a False Claim to the Government

State Farm next asserts that Relators have not offered any proof of the presentment of a false claim, as required under 31 U.S.C. § 3729(a)(1) and 31 U.S.C. § 3729(a)(1)(B). State Farm's Mem. in Supp. of Mots. [1103] at 26–27. State Farm also maintains that there is no evidence that the Government ever paid the McIntosh flood claim or reimbursed State Farm for it. *Id.* at 27–28.

Relators counter that presentment is only relevant for purposes of their claim under 31 U.S.C. § 3729(a)(1), because submission of a false record or statement pursuant to § 3729(a)(1)(B) does not require presentment. Relators' Mem. in Supp. of Resp. [1111] at 44 (citing *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 671 (2008)). Relators contend that they have presented sufficient evidence from which the jury could "legitimately infer" that presentment of a false claim occurred. *Id.* at 45, 47–48 (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000); *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 189–90 (5th Cir. 2009)). Relators also argue that State Farm's opening statement at trial included an admission of counsel as to presentment which obviated the need for evidence

on the point, *id.* at 45–47 (citations omitted), and that the manner in which the flood claim was presented and paid is a matter of law as set forth in the Code of Federal Regulations, *id.* at 47 (citing 44 C.F.R. Pt. 62 App. A, art. III(D)(1)).

"[P]resentment of a false claim is *sin qua non* of a False Claims Act violation without which 'there is simply no actionable damage to the public fisc.'" *Grubbs*, 565 F.3d at 186 (quoting *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002)). The Court has previously determined, and the parties agreed on the record at trial, that 31 U.S.C. § 3729(a)(1)(B) applies retroactively while § 3729(a)(1) does not. Tr. at 813–16. While 31 U.S.C. § 3729(a)(1)(B) does not contain the terms "presents" or "presented," as § 3729(a)(1) does, § 3729(a)(1)(B) does require "a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). The FCA defines "claim" as incorporating a presentment requirement. 31 U.S.C. § 3729(b)(2)(A) (the term claim "means any request or demand . . . for money or other property . . . that . . . is presented to an officer, employee, or agent of the United States"). State Farm's argument that there was insufficient evidence for a jury to find that any claim was presented to the Government with respect to the McIntosh flood policy is thus relevant to Relators' claims under both §§ 3729(a)(1) and 3729(a)(1)(B).

There is no dispute that at all times relevant to this case, State Farm was acting as a "Write-Your-Own Program" insurer "whereby participating private insurance companies act in a fiduciary capacity utilizing Federal funds to sell and administer the

Standard Flood Insurance policies . . . ." 44 C.F.R. Pt. 62 App. A, art. I. FEMA regulations provide that

> [l]oss payments under policies of flood insurance shall be made by the Company from Federal funds retained in the bank account(s) established under Article III, Section E and, if such funds are depleted, from Federal funds derived by drawing against the Letter of Credit established pursuant to Article IV.

44 C.F.R. Pt. 62 App. A, art. III(D)(1). In essence, "[t]he federal government pays flood insurance claims . . . ." *Grissom v. Liberty Mut. Fire Ins. Co.*, 678 F.3d 397, 402 (5th Cir. 2012). "All flood loss claims presented under the NFIP are paid directly with U.S. Treasury funds, regardless of whether the policy was issued by the government directly or by a Write-Your-Own (WYO) program carrier." *Dupuy v. Fidelity Nat. Prop. & Cas. Ins. Co.*, No. 07-4661, 2009 WL 82555, at *2 (E.D. La. Jan. 12, 2009) (citing 44 C.F.R. Pt. 62, App. A, art. III(D)(1); *Gowland v. Aetna*, 143 F.3d 951 (5th Cir. 1998)). Evidence that a flood claim was paid thus appears to be sufficient to permit a jury to infer that the claim was presented to the Government and then paid using federal funds.

The evidence adduced at trial confirms that State Farm paid the McIntosh flood claim under the McIntoshes' SFIP. *See, e.g.,* Trial Ex. DS-3.004. State Farm essentially satisfied the McIntoshes' SFIP claim by writing a check drawn on Government funds. *See* 44 C.F.R. Pt. 62 App. A, art. III(D)(1); *Grissom*, 678 F.3d

at 402. Sufficient evidence was therefore introduced at trial for a reasonable jury to conclude that State Farm presented the false McIntosh claim to the Government, and that the claim was paid. *See id*. at 189–90.

In sum, the Court has considered all of State Farm's arguments in support of its Motion for Judgment as a Matter of Law [1101] and concludes that none justify such relief. State Farm's Motion [1101] will be denied.

D. State Farm's Alternative Motion for a New Trial [1102]

State Farm alternatively seeks a new trial pursuant to Federal Rules of Civil Procedure 50(c)(1) and 59. State Farm's theory is that Relators misled the jury in various ways during their closing argument and that the "jury plainly misapplied the instructions as given to the evidence." State Farm's Mem. in Supp. of Mots. [1103] at 28. "A district court may order a new trial if improper closing argument irreparably prejudices a jury verdict or if a jury fails to follow instructions." *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 619 (5th Cir. 1988).

1. Relators' Closing Argument

While State Farm raises general complaints that Relators' counsel misled the jury during his closing argument, State Farm cites to no specific portions of the record in support of this position. In its Memorandum [1103], State Farm broadly alleges that Relators

> wholly misled the jury in closing about (a) State Farm's ability to rely on the directions that FEMA gave State Farm prior to and during Katrina about how to adjust and handle claims; (b) whether the difference of opinion about the source of wracking is evidence of guilty knowledge; and (c) the absence of evidence by State Farm about the pressure or physical force of the flood water having the capacity to damage the McIntosh home.

State Farm's Mem. in Supp. of Mots. [1103] at 28. Relators' closing argument comprises some forty pages of the trial transcript, through which State Farm apparently asks this Court to sift to locate those portions which support State Farm's position. State Farm's general arguments are insufficient to warrant granting a new trial. Nor is the Court persuaded that these portions of Relators' closing argument justify granting a new trial.

In its Rebuttal Memorandum [1113], State Farm does quote three specific comments made by Relators' counsel during his rebuttal argument. These comments were as follows:

> "Think of all the people who are getting up on the stand for State Farm. How many people can they bully or pay to say the things they want them to say?" (Tr. at 1916:24-1917:2.)

> "The McIntoshes have a contractor, Bob McVadon. Did State Farm call him in as a mutual witness and ask what happened? No, they bought him." (Tr. at 1917:2-4.)
>
> "How about those adjusters that Mr. Beers likes talking about, Jayme Woody, Cody Perry, Rachel Fisher? . . . They need State Farm to pay them. And they put them up on the stand, and they asked them, *Did State Farm do anything wrong?* Well, they have 20 lawyers over there for State Farm and the highest ranking executive for State Farm in the state of Mississippi staring at them. What were they supposed to say?" (Tr. at 1917:18-1918:1.)

State Farm's Rebuttal Mem. [1113] at 18–19 n.7. State Farm's references to these statements in its Rebuttal Memorandum [1113] are the first time State Farm has raised any objection to them. Relators point this out, responding that "State Farm waived any objection to Relators' argument at closing by failing to object contemporaneously." Relators' Mem. in Supp. of Resp. [1111] at 50 (citations omitted).

A court must "examine the propriety of closing argument by reviewing the entire argument within the context of the court's rulings on objections, the jury charge, and any corrective measures applied by the court." *Nissho-Iwai Co.*, 848 F.2d at 619 (quotation omitted). A party may waive any objection to the impropriety of an opposing party's closing argument by

failing to object to opposing counsel's tactics either at the time of the argument or at a sidebar conference immediately thereafter, by failing to move for a mistrial before the case is submitted to the jury, and by waiting until after the jury has returned its verdict to urge the improper arguments as grounds for a new trial. *Id.*

State Farm did not contemporaneously object to any of the comments of which it now complains. Nor did it raise them at sidebar or seek a mistrial. State Farm did raise an objection to two other statements made by Relators' counsel in closing; however, it did not do so until after the jury had retired to deliberate. Tr. at 1920–21. Specifically, State Farm raised a late objection to Relators' counsel's quote from an e-mail and a comment regarding "scorched earth" litigation. *Id.* at 1921–22. The Court considered State Farm's objections at trial and overruled them. *Id.* The Court inquired of State Farm's counsel whether State Farm sought a mistrial, to which counsel responded, "[n]o, sir." *Id.* The Court then informed State Farm's counsel that "[i]f you would like me to consider some type of limiting instruction, I would be happy to do that, but otherwise, we will move on." *Id.* State Farm requested no such instruction, and it has not reurged its objections to these two statements in the present Motions. Instead, State Farm waited until the present post-trial Motions to advance additional objections to Relators' closing argument. State Farm now raises objections that it did not raise at any time during trial. State Farm chose to submit the case to the jury without making any of these objections or seeking a mistrial. State Farm is precluded from urging Relators'

counsel's improper argument as grounds for a new trial at this point. *Nissho-Iwai Co.*, 848 F.2d at 619; *see also Baisden v. I'm Ready Productions, Inc.*, 693 F.3d 491, 509 (5th Cir. 2012).

Even if State Farm had not waived its objections, the Court would nevertheless conclude that a new trial is not appropriate. Considering the propriety of closing argument by reviewing the entire argument within the context of the Court's rulings on objections, the jury charge, and any corrective measures applied, the Court finds that it properly focused the jury's attention on the questions in the Special Verdict Form. The Court instructed the jury on the law to be applied and informed the jury that it was their duty to follow the law as given to them. Tr. at 1822. The Court directed the jury that statements and arguments of the attorneys were not evidence and were not instructions on the law. *Id.* The Court also instructed the jury that bias, prejudice, and sympathy were not to play any part in deliberations. *Id.* at 1828.

After carefully reviewing the trial transcript, and having observed the demeanor of the jury during the trial, the Court is of the opinion that the jury was not improperly influenced by Relators' closing argument or by any bias, prejudice, or passion, and it is not "reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done . . . ." *Sibley v. Lemarie*, 184 F.3d 481, 487 (5th Cir. 1999). None of the statements by Relators' counsel rise to the level of severity that would require a new trial in order to avoid a miscarriage of justice. *See Baisden*, 693 F.3d at 509 n.17.

2. Jury's Application of the Instructions

State Farm asserts that "the jury plainly misapplied the instructions as given to the evidence," but it has not developed this argument. State Farm's Mem. In Supp. of Mots. [1103] at 28. In its Rebuttal Memorandum [1113], State Farm references generally "the numerous insufficiencies in the Rigsbys' evidence." State Farm's Rebuttal Mem. [1113] at 19. The Court has already addressed the sufficiency of the evidence in deciding State Farm's Motion for Judgment as a Matter of Law.

Assuming that State Farm's incorporation by reference into its Rebuttal of its earlier arguments about the sufficiency of the evidence is enough to permit State Farm to also raise this argument in support of its Motion for a New Trial, the Court finds that a new trial is not warranted. A district court may order a new trial "if a jury fails to follow instructions." *Nissho-Iwai Co.*, 848 F.2d at 619. A new trial may also be appropriate "if the verdict is against the weight of the evidence, [or] the amount awarded is excessive . . . ." *Scott v. Monsanto Co.*, 868 F.2d 786, 789 (5th Cir. 1989). "If the new trial is granted on evidentiary grounds, the jury's verdict must be 'against the great–not merely the greater–weight of the evidence.'" *Id.* (quoting *Conway v. Chem. Leaman Tank Lines, Inc.*, 610 F.2d 360, 362 (5th Cir. 1980)).

The jury's verdict in this case was not against the great weight of evidence. *See id.* State Farm has not carried its burden of demonstrating that the conduct of the trial "indicate[s] anything other than a reasonable process of arriving at a proper verdict."

Nissho-Iwai Co., 848 F.2d at 620. Having considered the parties' arguments and the record, a new trial on Relators' claims that State Farm violated the FCA is not warranted. State Farm's Motion for a New Trial [1102] will be denied.

III. CONCLUSION

For the foregoing reasons, the Court concludes that State Farm's Motions [1101], [1102] should be denied. To the extent the Court has not addressed any of the parties' arguments, it has considered them and determined that they would not alter the result.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, Defendant State Farm Fire and Casualty Company's Motion for Judgment as a Matter of Law [1101] is **DENIED**, and Defendant State Farm Fire and Casualty Company's Motion for a New Trial [1102] is **DENIED**.

SO ORDERED AND ADJUDGED this 21st day of February, 2014.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

RELEVANT STATUTES

31 U.S.C. § 3729

False Claims

(a) Liability for certain acts.--

(1) In general.--Subject to paragraph (2), any person who--

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an

officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages.--If the court finds that-

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.--A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions.--For purposes of this section--

(1) the terms "knowing" and "knowingly" --

(A) mean that a person, with respect to information--

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"--

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that--

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government--

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar

relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption from disclosure.--Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

[(e) Redesignated (d)]

31 U.S.C. § 3730

Civil actions for false claims

(a) Responsibilities of the Attorney General.--The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.--(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not

be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

> **(A)** proceed with the action, in which case the action shall be conducted by the Government; or
>
> **(B)** notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.--(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of

law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff.–(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to 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, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus

reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, 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.

(e) Certain actions barred.--(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if

substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) 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.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) Government not liable for certain expenses.--
The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant.--
In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Relief from retaliatory actions.--

(1) In general.--Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) Relief.--Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) Limitation on bringing civil action.--A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

31 U.S.C. § 3731

False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought--

> **(1)** more than 6 years after the date on which the violation of section 3729 is committed, or
>
> **(2)** more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b),[1] the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences

set forth, or attempted to be set forth, in the prior complaint of that person.

(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(e) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

Federal Court Opinions Addressing the Requirements of the FCA Seal Provision (31 U.S.C. § 3730(b)(2))[1]

Smith v. Clark/Smoot/Russell, 796 F.3d 424, 430 (4th Cir. 2015)

United States ex rel. Rigsby v. State Farm Fire & Casualty Co., 794 F.3d 457, 470-72 (5th Cir. 2015) (18a-23a)

United States ex rel. Summers v. LHC Grp., Inc., 623 F.3d 287, 296 (6th Cir. 2010)

Foster v. Savannah Communication, 140 Fed. App'x 905, 908 (11th Cir. 2005)

United States ex rel. Stevens v. State of Vermont Agency of Natural Resources, 162 F.3d 195, 200 (2d Cir. 1998), *rev'd on other grounds*, 529 U.S. 765 (2000)

United States ex rel. Pilon v. Martin Marietta Corp., 60 F.3d 995, 999-1000 (2d Cir. 1995)

United States ex rel. Lujan v. Hughes Aircraft Co., 67 F.3d 242, 245 (9th Cir. 1995)

In re Darvocet, No. 12-270-DCR, 2015 WL 2451208, at *6 (E.D. Ky. May 21, 2015)

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[1] Given that many decisions are unpublished, this list likely understates the actual number of cases in which an alleged FCA seal violation has been at issue.

United States ex rel. Bibby v. Wells Fargo Bank, N.A., 76 F. Supp. 3d, 1399, 1406-11 (N.D. Ga. 2015)

Segelstrom v. Citibank, N.A., 76 F. Supp. 3d 1, 14 (D.D.C. 2014), *aff'd*, No. 14-7208, --- F. App'x. ----, 2015 WL 5926925 (D.C. Cir. Sept. 18, 2015)

Nasuti v. Savage Farms, Inc., No. 12-30121-GAO, 2014 U.S. Dist. LEXIS 40939, at *44-45 (D. Mass. Mar. 7, 2014), *adopted*, No. 12-30121-GAO, 2014 WL 1327015 (D. Mass. Mar. 27, 2014)

United States ex rel. Surdovel v. Digirad Imaging Solutions, No. 07-0458, 2013 WL 6178987, at *3-6 (E.D. Pa. Nov. 25, 2013)

United States ex rel. Gunn v. Shelton, No. 13-163-RGA, 2013 WL 5980633, at *2-3 (D. Del. Nov. 12, 2013), *aff'd*, *Gunn v. Credit Suisse Group AG*, 610 F. App'x 155 (3d Cir. 2015)

Carter v. G & S Food Shop, No. 13-14017, 2013 WL 6421833, at *3 (E.D. Mich. Oct. 10, 2013), *adopted*, 2013 WL 5874564 (E.D. Mich. Oct. 30, 2013)

Walker v. Community Education Centers, Inc., No. CV-12-02582-PHX-JAT, 2013 WL 4774778, at *1-2 (D. Ariz. Sept. 5, 2013)

United States ex rel. Gale v. Omnicare, Inc., No. 1:10-cv-127, 2013 WL 2476853, at *2-5 (N.D. Ohio June 7, 2013)

Gray v. United States, No. 11-cv-02024-WYD-MEH, 2012 WL 4359280, at *5-6 (D. Colo. Sept. 24, 2012)

United States ex rel. Kurt v. Lakeshore Spine & Pain, P.C., No. 11-cv-1051, 2012 U.S. Dist. LEXIS 125350, at *2 (W.D. Mich. Sept. 5, 2012)

Lariviere v. Lariviere, No. 11-40065-FDS, 2012 WL 1853833, at *1-2 (D. Mass. May 18, 2012)

Burke v. Westcare Foundation, Inc., No. 11-cv-5078, 2011 U.S. Dist. LEXIS 100668, at *3-4 (N.D. Ill. Sept. 6, 2011)

Carter v. Subway Store # 6319, No. 11-cv-15158, 2012 WL 666838, at *3-4 (E.D. Mich. Feb. 29, 2012)

Daggett v. Neufelder, No. 11-C-0100, 2011 WL 334531, at *1 (E.D. Wis. Feb. 1, 2011)

United States ex rel. Davis v. Prince, 766 F. Supp. 2d 679, 682-83 (E.D. Va. 2011)

United States ex rel. Stewart v. *Altech Services, Inc.*, No. 07-cv-0213-LRS, 2010 WL 4806829, at *2 (E.D. Wash. Nov. 18, 2010)

Taitz v. *Obama*, 707 F. Supp. 2d 1, 4 (D.D.C. 2010)

United States ex rel. Mailly v. *Healthsouth Holdings, Inc.*, Nos., 07-cv-2981, 09-cv-483, 2010 WL 149830, at *3 (D.N.J. Jan. 15, 2010)

United States ex rel. Branch Consultants, L.L.C. v. *Allstate Ins. Co.*, 668 F. Supp. 2d 780, 803 (E.D. La. 2009)

United States ex rel. Ubl v. IIIF Data Solutions, No. 06-cv-641, 2009 WL 1254704, at *1-4 (E.D. Va. May 5, 2009)

United States ex rel. Fellhoelter v. *Valley Milk Prods., L.L.C.*, 617 F. Supp. 2d 723, 727-28 (E.D. Tenn. 2008)

Lady Deborah's, Inc. v. VT Griffin Services, Inc., No. 07-cv-079, 2007 WL 4468672, at *4-5 (S.D. Ga. Oct. 26, 2007)

United States ex rel. Le Blanc v. ITT Industries, 492 F. Supp. 2d 303, 304-08 (S.D.N.Y. 2007)

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