

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

UNITED STATES OF AMERICA, *ex*
rel. DAVID L. LEWIS, PH.D., R.A.
McELMURRAY, III, and G. WILLIAM
BOYCE

Plaintiffs,

v.

JOHN WALKER, PH.D., et al.,

Defendants.

CIVIL ACTION FILE
NO. 3:06-cv-16-CDL

**MOTION TO DISMISS BY DEFENDANTS
GASKIN, MILLER, TOLLNER, AND RISSE**

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Defendants Julia Gaskin, William P. Miller, E. William Tollner, and L. Mark Risse, move the Court under Fed. R. Civ. P. 9(b), 12(b)(1), and 12(b)(6) to dismiss Plaintiffs' complaint against them in its entirety on the grounds that it fails to state a claim upon which relief can be granted, it fails to allege fraud with sufficient particularity, and the Court lacks jurisdiction over the subject matter. This motion is based upon the attached supporting brief and the record.

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I. INTRODUCTION

Relator David L. Lewis is a research biologist and Relators R.A. McElmurray III and G. William Boyce are dairy cattle farmers. The Relators allege that Defendants conspired to create false scientific data to support a program of the Environmental Protection Agency (“EPA”) for promoting land application of sewage sludge as safe and beneficial to the environment. (Doc. 5, First Amendment to False Claims Act Complaint and Demand for Jury Trial (“Complaint”) ¶ 20).

The Relators name six individual Defendants, two of whom are employed by

the EPA (Walker and Brobst) and four of whom are employed by the Board of Regents (Gaskin, Miller, Tollner, and Risse). Gaskin was an academic researcher and Miller, Tollner and Risse were all research professors at the University of Georgia (“UGA”). In addition, the Relators name as Defendants the Board of Regents (“Board”) and the University of Georgia Research Foundation (“Foundation”).

The Relators’ sole cause of action against Defendants arises under the False Claims Act (“FCA”), 31 U.S.C. § 3729, et seq. The Relators claim that “Defendants Risse, Gaskin, Miller, and Tollner, knowingly caused to be submitted approximately 10 grant applications . . . knowing that these grant applications contained false and fabricated information and/or with reckless disregard of their falsity, all in violation of the False Claims Act, 31 U.S.C. § 3729(a)(2).” (Complaint ¶ 86). The Relators allege that Defendants have violated the FCA in three ways: “False Statements in the Risse Project Grant Application”; “False and Fabricated Data and Information in the Gaskin Paper”; and “Other Grants Based on False and Fabricated Data and Information.” (Complaint at 13, 19, 37).

As discussed below, the Relators’ claims against Gaskin, Miller, Tollner, and Risse are subject to dismissal because: 1) the Relators’ claims are barred by the applicable statute of limitations; 2) the Relators are not the “original source” for any of their claims, as required under 31 U.S.C. § 3730(e)(4), and therefore the

Court lacks subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1); and 3) the Relators have failed to plead their claims of fraud with particularity as required under Fed. R. Civ. P. 9(b).

II. STATEMENT OF FACTS¹

During 1979-1990 sewage sludge processed by the Messerly Wastewater Treatment Plant (“MWTP”) was distributed as fertilizer to Relator McElmurray’s family farm. During 1986-1997, with the exception of 1995, Relator Boyce’s farm was similarly treated. (Complaint ¶ 19). In 1998 and 2001, respectively, Relators McElmurray and Boyce filed suit against the City of Augusta alleging that the sewage sludge used to treat their land contained hazardous chemical wastes that resulted in the deaths of their dairy cattle. (Complaint ¶ 19).

The Relators filed the instant action under seal on February 17, 2006 and amended their complaint on March 28, 2006. (Docs. 1, 5). Their claims focus on Defendants’ research into the land application of sewage sludge from the City of Augusta, GA wastewater treatment program. The Relators first allege that Defendants Risse Gaskin, and Miller² committed fraud in submitting a grant

¹For purposes of this motion to dismiss, Relators’ alleged facts are taken as true and must be construed in a “light most favorable” to the Relators. Conclusory allegations and unwarranted deductions of fact contained in the Complaint, however, are not taken as true in deciding motions to dismiss. *South Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 409, n. 10 (11th Cir. 1996).

²At the time, Risse, Gaskin, and Miller submitted the grant application, another researcher, Richard McDaniel, was involved in the project. (Complaint at

application to the EPA in approximately June 1999 to conduct what has become known as the “Risse Project.”

The Relators allege that Defendants made false statements in submitting their 1999 grant application. (Complaint ¶¶ 25-34). However, as discussed below, the Relators have failed to state with particularity which Defendant committed fraud as to any part of the application.

The Relators also allege that “Defendant Gaskin and her co-authors were *intentionally and completely* deceptive from the beginning, when they chose not to disclose the true purpose of the Risse project. Specifically, the Risse project was funded, designed and conducted to assess whether Augusta’s sewage sludge contained hazardous wastes that contaminated forages grown on dairy farms owned by the families of the Relators McElmurray and Boyce and caused death and injury to dairy herds as alleged in the *McElmurray* and *Boyce* lawsuits.” (Complaint ¶ 53) (emphasis original).

As part of their work, Defendants authored a paper summarizing the results of their study.³ On approximately December 19, 2001, Julia Gaskin submitted the final version of that paper to the *Journal of Environmental Quality* (“JEQ”) and it

4 n.1). Tollner later became associated with the project. (Complaint at 5 n.3).

³Julia W. Gaskin, Robert B. Brobst, William P. Miller, E. William Tollner, *Long-term Biosolids Application Effects on Metal Concentrations in Soil and Bermudagrass Forage*, *J. Environ. Qual.*, 32: 146-52 (2003). (See Complaint at 5 n. 3, 19 n.28).

was accepted and published in the January-February 2003 issue (“Gaskin paper”). (Complaint ¶ 35; *see also* p. 19 n.28). The Relators allege that Defendants knew that the data relied upon in the Gaskin paper was unreliable when they submitted the article to the JEQ and that they therefore published a fraudulent article. (Complaint ¶ 38).⁴

The Relators allege further that “[t]he false information in the Gaskin paper served as a springboard for applying for additional [federal] funding.” (Complaint ¶ 63). Without providing any corroborative or particularized detail as required by Fed. R. Civ. P. 9(b), the Relators allege simply that: “Defendants have submitted approximately nine additional applications for federal assistance, using false or fabricated data from the Risse project and Gaskin paper.” (Complaint ¶ 64).

III. STANDARD FOR DECIDING MOTIONS TO DISMISS

Defendants’ motion to dismiss is filed under Fed. R. Civ. P. 12(b)(1), 12(b)(6) and raises this Court’s lack of subject matter jurisdiction and the Relators’ failure to state a claim upon which relief can be granted. “Questions of jurisdiction, of course, should be given priority—since if there is no jurisdiction there is no authority to sit in judgment of anything else. ‘Jurisdiction is power to declare the law and when it ceases to exist, the only function remaining to the court

⁴(*See also* Complaint ¶ 36) (“Defendants knew that these data and, in fact, all of their data, including sludge quality data, documentation of application rates, soil sample analyses, and analyses of forage samples, were unreliable, false, or

is that of announcing the fact and dismissing the cause.’ ” *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000) (cits. omitted).

On a motion to dismiss, the Court “must accept as true all of the factual allegations contained in the complaint.” *Swierkiewicz v. Sorema*, 534 U.S. 506, 508 n.1 (2002); *United States v. Gaubert*, 499 U.S. 315, 327 (1991); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, “[a]s a general rule, conclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss.” *South Fla. Water Mgmt. Dist. v. Montalvo.*, 84 F.3d 402, 409, n. 10 (11th Cir. 1996).

**IV. ALL CLAIMS RELATING TO DEFENDANTS’ 1999
GRANT APPLICATION SHOULD BE DISMISSED AS
BARRED BY THE STATUTE OF LIMITATIONS.**

The Relators’ claim that Defendants violated the FCA by including allegedly false statements in the June 1999 grant application is barred by the applicable six-year statute of limitations. Under the FCA, no cause of action may be brought “more than 6 years after the date on which the violation of section 3729 is committed.” 31 U.S.C. § 3731(b)(1). In this circuit, the limitations period begins to run upon the “filing of the false claim.” *Smith v. United States*, 287 F.2d 299, 304 (5th Cir. 1961); *Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981)

fabricated.”)

(holding that all decisions issued by the Fifth Circuit on or before September 30, 1981 are binding precedent). The Relators admit that Risse, Gaskin, and Miller applied for the grant on approximately June 15, 1999. (*See* Doc. 1, Complaint ¶ 24). Thus, the claims which they filed on February 17, 2006 are time-barred as a matter of law to the extent they are based on the 1999 grant.

V. THE RELATORS WERE NOT “ORIGINAL SOURCES” AS DEFINED UNDER 31 U.S.C. § 3730(e)(4) AND THEREFORE THEIR CLAIMS SHOULD BE DISMISSED UNDER FED. R. CIV. P. 12(b)(1).

A. The False Claims Act—The Statutory Scheme

The FCA permits a private individual to file a lawsuit, known as a *qui tam* action, against, and recover damages on behalf of the United States from, any person who “knowingly⁵ makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.” 31 U.S.C. § 3729(a)(2).⁶ The FCA was enacted in 1863 with the principal goal of stopping massive fraud perpetrated by private contractors during the Civil War. “The purpose of the Act, then and now, is to encourage private individuals who are aware of fraud being perpetrated against the government to

⁵“Knowingly” means a person who “(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.” 31 U.S.C. § 3729(b).

⁶Subsection (a)(2) is the only section of the FCA that Relators have alleged that Defendants violated. (Complaint ¶ 86).

bring such information forward.” *USA ex rel. Clausen v. Lab. Corp. of America*, 290 F.3d 1301, 1307 (11th Cir. 2002) (citations and quotations omitted).

The FCA, however, bars claims based upon public disclosures unless the action is brought by a person who qualifies as an “original source”:

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

31 U.S.C. 3730(e)(4)(A) (emphasis added). “Original source” means “an individual who has direct and independent knowledge of the information on which the allegations are based.” 31 U.S.C. § 3730(e)(4)(B).

Congress intended that the FCA reward only those individuals who were either close observers or participants in a fraud who decided to break a “conspiracy of silence.” S. Rep. No. 99-345 (1985), reprinted in 1986 U.S.C.C.A.N. 5266, 5269. *See also United States ex rel. Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3rd Cir. 1991) (“The paradigmatic ‘original source’ is a whistleblowing insider.”); *Wang ex rel. United States v. FMC Corp.*, 975 F. 2d 1412, 1419 (9th Cir. 1992) (same).

B. The Eleventh Circuit’s Standard for Evaluating “Original Source”

The Complaint filed by the Relators in this case cites to voluminous records

in a futile attempt to prop up their claims. (Doc. 5). But the Relators did not file with this Court any of the documents that they have cited in their Complaint.⁷ However, it is clear from the Relators' description of those documents that they constitute "public disclosures" as defined by 31 U.S.C. § 3730(e)(4)(A). In most instances the document description includes a notation of the source of the documents. (*See, e.g.*, Complaint at 4 n.2, 8 n.4, 8 n.5, 10 n.7, 18 n.24, 20 n.29, 31 n.43). The documents described in these footnotes include citations at the end indicating the source of the document, such as "EPD," "UGA," or "SC." Additionally, the Relators refer to documents they obtained from their previous litigation with the City of Augusta. (*See, e.g.*, Complaint at 9 n.6, 20 n.29, 23 n.33, 36 n.48). The 1999 grant Defendants applied for is identified at footnote 1 and the 2003 JEQ article is identified at footnote 3 of the Complaint.

The Eleventh Circuit has adopted a three-part test to determine whether subject matter jurisdiction exists in an FCA claim when that claim is based on publicly disclosed information: "(1) have the allegations made by the plaintiff been publicly disclosed; (2) if so, is the disclosed information the basis of the plaintiff's

⁷The Relators did file the exhibits with their complaint in the companion *qui tam* action they filed in the Northern District. *United States ex rel McElmurray v. Augusta-Richmond Co.*, ___ F. Supp. 2d ___, No. 1:05-cv-1575 ODE, 2006 WL 3469529, at **2 n.2, 16 (N.D. Ga., Nov. 30, 2006). If the Court has any question about the documents cited in the Complaint, Defendants respectfully submit that the Court should order Relators to file all of those exhibits with the Court in order to assist the Court in ruling on Defendants' motion to dismiss.

suit; (3) if yes, is the plaintiff an ‘original source’ of that information.” *USA ex rel. Battle v. Bd. of Regents*, 468 F.3d 755, 762 (2006) (quoting *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 565 n.4 (11th Cir. 1994)). “The FCA is most naturally read to preclude suits based *in any part* on publicly disclosed information.” *Battle*, 468 F.3d at 762 (emphasis original) (quoting *Cooper*, 19 F.3d. at 567).

In *Battle*, the relator was employed by the Office of Financial Aid at Fort Valley State University. Battle observed apparent irregularities in that office, including financial aid to ineligible applicants, excessive awards, and document forgery. Battle complained to her supervisors and ultimately to the president of the university. She alleged that she subsequently received a negative evaluation and ultimately her contract was not renewed. Meanwhile, the Georgia Department of Education (“DOE”) was auditing Fort Valley State’s financial aid office. As a result of that audit Fort Valley State reached a \$2 million settlement in April 2002 with DOE regarding questionable costs identified by the auditors. In June 2004, Battle filed a *qui tam* action. There was no information indicating that Battle had disclosed information to the state auditors or participated in any way in their audits. *Id.* at 763. Under these facts, the Eleventh Circuit held that the district court properly dismissed Battle’s FCA claims for lack of subject matter jurisdiction under Rule 12(b)(1) because her allegations substantially relied on information in

the publicly disclosed state audit reports for which Battle was not the “original source.” *Id.*

Applying the three-part test established in *Battle* to the case at hand it is manifest that the Relators’ claims should be dismissed under Rule 12(b)(1). First, all of the Relators’ allegations are contained in publicly disclosed documents. The Relators simply gathered this publicly disclosed information and filed a *qui tam* complaint. The description of the documents in the footnotes to the Relators’ Complaint show that the Relators’ documents were obtained either through open records requests or through discovery in prior litigation. (*See, e.g.*, Complaint at 20 n.29) (listing exhibits such as a 1998 audit by EPD of the City of Augusta’s Messerly Wastewater Treatment Plant, and prior soil sample analyses performed by UGA at McElmurray’s and Boyce’s dairy farms). All of these records were obtained by the Relators through an Open Records Act request addressed to UGA (note the “Bates” number included in the document descriptions). With the exception of those documents obtained through prior litigation, virtually all of the documents identified in the footnotes to the Complaint include a notation indicating its source, such as “EPD,” “EPA,” or “UGA.”

Moreover, the Relators have not cited in their Complaint to any reports that they allege they produced as their own original work. But they cannot use research and information created and/or gathered by EPD, UGA, and UGA as the basis for a

fraud claim against Defendants. (*See* Complaint at 20 n.29, 41 n.55, 43 n.58). Based on a careful review of the documents cited in the footnotes to the Complaint, as well as the factual allegations contained in the Complaint, it is clear that the Relators' claims are based entirely on publicly disclosed information.

As to the second part of the *Battle* test, it is even doubtful that the publicly disclosed information is the "basis" for the Relators' FCA claim since the Relators have failed to allege specifically how Defendants' research or articles resulted in any fraudulent claims being submitted to the federal government. Nevertheless, the courts have held that "[t]he 'based upon' test [should] be a 'quick trigger to get to the more exacting original source inquiry.'" *Battle*, 19 F.3d at 568, fn. 10 (*quoting Precision*, 971 F.2d 548 at 552).

Thus, the Court must turn to the "focus of the FCA's jurisdictional provision, whether the Relators are 'original source.'" *Cooper*, 19 F.3d at 568, n.10. The Relators do not allege that they conducted any soil studies proving that Defendants' soil studies were fraudulent; they merely cite studies performed by others.⁸ The use of others' publicly disclosed reports and articles is not sufficient to satisfy the requirements for their being an "original source" under Section 3730(e)(4). Even if the Relators could prove that some portion of their allegations was indeed based on their own direct and independent knowledge, their Complaint

⁸(*See, e.g.*, Complaint at 20 n.29, 41 n.55, 43 n.58).

would still be subject to dismissal because the FCA bars suits based “ ‘in any part on public[ly] disclosed information.’ ” *Battle*, 468 F.3d at 762 (quoting *Cooper*, 19 F.3d at 567) (emphasis original).

The Relators should be well aware of their fatal deficiencies as an “original source” since the *qui tam* they filed against the City of Augusta was recently dismissed by the U.S. District Court for the Northern District of Georgia on that basis. *United States ex rel McElmurray v. Augusta-Richmond Co.*, ___ F. Supp. 2d ___, No. 1:05 CV 1575 ODE, 2006 WL 3469529 (N.D. Ga., Nov. 30, 2006). That case is currently pending on appeal to the Eleventh Circuit. *United States ex rel. McElmurray v. Augusta-Richmond Co.*, No. 06-16493-B.

In *McElmurray*, the Relators alleged that the defendant, the consolidated government of Augusta-Richmond County, knowingly misrepresented its compliance with state and local environmental laws in order to receive three federal loans administered by the EPA. The background facts in that case are essentially the same as those here. Prior to filing both cases, Relators McElmurray and Boyce sued the City of Augusta for damage to their dairy cattle as a result of the land application of sewage sludge from MWTP. The Relators then sued Augusta-Richmond County, alleging fraud in its procurement of three federal loans from the EPA to assist in construction of its wastewater treatment facilities.

In *McElmurray*, as in this case, the Relators had obtained voluminous

materials from local, state, and federal governmental agencies and through prior litigation. The Relators used information obtained through these methods as the basis for their fraud claims relating to EPA grants. The Relators never demonstrated, however, that they possessed “independent knowledge” of any alleged fraud. In *McElmurray*, the court ruled:

The fact that Relators’ background knowledge of[,] indeed[,] personal experience with[,] Defendant’s environmental violations enabled them to understand the significance of the information they acquired in their individual lawsuits against Defendant does not mean that they had knowledge independent of the publicly disclosed information.

McElmurray, 20006 WL 3469529, at *19. The court included a detailed discussion and analysis of the supporting documents filed by the Relators in that case. *Id.* at *16-18. After analyzing these documents, the court held that it lacked jurisdiction because the Relators had based their lawsuit on publicly disclosed information in violation of Section 3730(e)(4)(A) and because they were not the original source of that information as required under Section 3730(e)(4)(B). *Id.* at *19.

The only reason that the Relators have any information about the grant instant Defendants received in 1999 is that they made a request for information to UGA under the Open Records Act and to the EPA under the Freedom of Information Act. Because all of the grant documents were obtained from

governmental agencies, the Relators cannot conceivably be the “original source” with respect to any fraud in Defendants’ grant application. Moreover, the Relators have no personal knowledge of any of the facts underlying their vague and conclusory allegations of fraud. As to the research itself, Relators Boyce and McElmurray have no “direct” or “independent” knowledge as to whether any of the research conducted by Defendants or cited in the JEQ article was accurate or in any way fraudulent. 31 U.S.C. § 3730(e)(4)(B). While Relator Lewis certainly has more knowledge and expertise regarding the issue of land application of biosolids, he does not allege that he personally had any “direct” or “independent” knowledge within the meaning of § 3730(e)(4)(B) of any alleged fraud by any of the individual Defendants in connection with their forage gathering, research, the two articles they wrote, or with regard to their 1999 grant application.

C. Second Circuit Decisions on “Original Source”

In reaching its conclusion that the Relators were not the “original source” for any allegations of fraud in *McElmurray*, the Northern District of Georgia relied on the Second Circuit’s decision in *United States ex rel. Kreindler & Kreindler v. United Technologies Corporation.*, 985 F.2d 1148, 1152 (2^d Cir.), *cert. denied*, 508 U.S. 973 (1993). *McElmurray*, 20006 WL 3469529, at *18. In *Kreindler*, the relators filed a *qui tam* action based on information they had obtained through a previous wrongful death action they had filed against United Technologies after

one relator's husband was killed in a Black Hawk helicopter crash. The relators alleged that during the course of the litigation they obtained information showing that United Technologies had presented false or fraudulent payment claims for over 700 Black Hawk helicopters. The court held that the relators were not the original source of this publicly disclosed information because they had no direct knowledge independent of the disclosures made to them by United Technologies. *Kreindler*, 985 F.2d at 1159.

The Second Circuit reached the same result in *United States ex rel. Dhawan & Gowie v. New York Medical College, et al.*, 252 F.3d 118 (2^d Cir. 2001). In that case, the relators alleged that they had repeatedly complained to the defendants' management about the level of services provided relative to the amount billed. They subsequently filed a *qui tam* claim alleging massive Medicare/Medicaid fraud for treatments never even provided. In their complaint, the relators admitted that the "source of the core information" underlying their allegations of fraud was two audit reports by the defendants. *Id.* at 121. The court held that the relators could not therefore establish "direct and independent knowledge," as required under Section 3730(e)(4)(B), and that they therefore had failed sufficiently to allege in their complaint that they were an "original source." *Id.* at 121-22. The Second Circuit affirmed dismissal of the case for lack of subject matter jurisdiction. *Id.* at 122.

D. Tenth Circuit Decisions on “Original Source”

The Tenth Circuit has adopted essentially the same test as the Eleventh Circuit for determining whether a *qui tam* complaint based on public disclosures is subject to dismissal under Section 3730(e)(4)(A). *United States ex rel. Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1042 (10th Cir. 2004), *cert denied*, 545 U.S. 923 (2004).⁹ That circuit has ruled: “A mere compilation of documents or reports already in the public domain will not allow a relator to qualify as an original source.” *Id.* at 1045. *See also United States ex rel. Stone v. Rockwell Int’l. Corp.*, 282 F.3d 787, 799 (10th Cir. 2002), *after remand*, 92 Fed. Appx. 708 (10th Cir. 2004), *cert granted*, 127 S. Ct. 35 (2006). In both *Kennard* and *Rockwell*, the Tenth Circuit held that the relators made a sufficient showing that they were “original sources” of the information upon which they based their *qui tam* complaints. However, in each of those cases, the relators demonstrated the type of “direct” and “independent” knowledge required under Section 3730(e)(4) that is entirely lacking in this case.

In the *Kennard* case, the relators did not merely compile and cite public documents. They also performed their own research and investigation. *Id.* at

⁹In *Kennard*, the test is stated as having four-parts: “(1) whether the alleged ‘public disclosure’ contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made ‘public’ within the meaning of the False Claims Act; (3) whether the relator’s complaint is ‘based upon’ this public disclosure; and, if so, (4) whether the relator qualifies as an

1046. The relators sorted through public documents, as well as their own personal royalty records, to identify and corroborate with specificity the underpayment by defendants of royalties to the government on federal oil and gas leases. “It is important to note that none of the public documents disclosed the fraud. It was only through independent investigation, deduction, and effort that Relators discovered the alleged fraud.” *Id.*

In *Rockwell*, the relator was an employee of the defendant who had detailed knowledge that Rockwell's designs for manufacturing pondcrete blocks would result in the release of toxic waste, and the relator provided the court with a detailed affidavit outlining his knowledge of that subject. *Id.* at 800-01. In his affidavit, the relator also stated that Rockwell had forbidden him from discussing any environmental problems with the Department of Energy. Based on those facts, the court held that the relator had made a sufficient showing that he was an “original source” of the information upon which the *qui tam* complaint was based. *Id.* at 803. The *Rockwell* case was subsequently appealed and is currently pending before the U.S. Supreme Court.

In contrast to *Kennard* and *Rockwell*, none of the Relators in this case has demonstrated that he has either “direct” or “independent” knowledge of any allegedly false claims related to the 1999 grant, the study conducted based on that

‘original source.’ ” 363 F.3d at 1042.

grant, or either of the papers written as a result (the JEQ article or the paper submitted to the EPA). (*See* Complaint at 5 n.3, 27 n.41). The Relators rely upon studies conducted by EPA, EPD, and UGA. (*See* Complaint at 10 n.29 (EPA 1998 audit, UGA soil analyses from McElmurray and Boyce farms, A&L Laboratories soil sample data from McElmurray farm); Complaint at 41 n.55 (OMI, Augusta, Georgia Sludge Management Program, Dewatered Sludge Amendment (November 16, 2000) (EPD)); Complaint at 43 n.58 (EPA Office of Inspector General, Land Application of Biosolids Status Report (2002))). The Relators have demonstrated neither that they had any “direct” or “independent” knowledge nor that they did any investigation prompted by their analysis of these documents and reports.

“[D]irect knowledge is knowledge gained by the relator's own efforts and not acquired from the labors of others,” while independent knowledge means that “the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original sources.” *Rockwell*, 282 F.3d at 799 (*quoting United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006-07 (10th Cir. 1996). Although Dr. Lewis may have enough expertise on the topic of land application of sewage sludge to interpret the meaning of some of the reports gathered by the Relators, that fact standing alone is insufficient to make him an “original source.” *See United States ex rel. O’Keefe v. Sverdup Corp.*, 131 F. Supp. 2d 87, 96 (D. Mass. 2001) (“Although Relator argues that his particular

interdisciplinary expertise and background allow him to understand the significance of publicly disclosed information, that is not enough to qualify him as an original source.”)

It should be emphasized that, because the issue of “original source” involves subject matter jurisdiction, the Relators bear the burden of alleging facts in their complaint sufficient to show jurisdiction. *Rockwell*, 282 F.3d at 797 (citing *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999)). But the Relators have failed to allege any facts in their Complaint to support a finding that they are the “original source” of the information upon which their FCA claims are based. Applying the standards established by the Second and Tenth Circuits, as well as the Eleventh Circuit in its recent *Battle* decision, it is clear that this Court lacks subject matter jurisdiction. None of the three Relators can establish that he was an “original source” under Section 3730(e)(4).¹⁰

¹⁰Defendants do not mean to suggest that their discussion of cases regarding “original source” is exhaustive. In addition to discussing controlling Eleventh Circuit authority, Defendants focused on the Tenth Circuit because the *Rockwell* case is currently pending in the Supreme Court. Defendants cited to Second Circuit case of *Kreindler* because other circuits, as well as Judge Evans in *McElmurray*, have relied on that case in applying the “original source” standard. See, e.g., *O’Keefe*, 131 F. Supp. 2d at 96.

VI. THE RELATORS' CLAIMS UNDER 31 U.S.C. § 3729(a)(2) SHOULD BE DISMISSED FOR FAILURE TO PLEAD ALLEGATIONS OF FRAUD WITH PARTICULARITY AS REQUIRED BY FED. R. CIV. P. 9(b).

A complaint that alleges violations of the FCA must comply with Fed. R. Civ. P. Rule 9(b). *United States ex rel. Clausen v. Lab. Corp. of America, Inc.*, 290 F.3d 1301, 1309 (11th Cir. 2002); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1012 (11th Cir. 2005). Rule 9(b) provides, “In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.” And failure to satisfy Rule 9(b) is a sufficient ground for dismissal of the complaint. *Corsello*, 428 F.3d at 1012.

At a minimum, a Complaint under the FCA must set forth the following to comply with Rule 9(b):

1. precisely what statements were made in what documents or oral representations or what omissions were made, and
2. the time and place of each such statement and the person responsible for making (or in the case of omission, not making) same, and
3. the content of such statements and the manner in which they misled the plaintiff, and
4. what the defendants obtained as a consequence of the fraud.

Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1371 (11th Cir. 1999) (cits. omitted). Stated differently, Rule 9(b) requires that a *qui tam* relator allege “facts as to time, place, and substance of the defendant’s alleged fraud, and the details of the defendant[’s] allegedly fraudulent act, when they occurred, and

who engaged in them.” *Corsello*, 428 F.3d at 1012 (*quoting Clausen*, 290 F.3d at 1310) (cits. omitted).

Rule 9(b) is designed to “alert[] defendants to the precise misconduct with which they are charged and protect[] defendants against spurious charges of immoral and fraudulent behavior.” *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1359 (11th Cir. 2006) (cits. omitted). It also prevents a plaintiff from “needlessly harm[ing] a defendant’s goodwill and reputation by bringing a suit that is, at best, missing some of its core underpinning, and, at worst, . . . baseless allegations used to extract settlements.” *Id.* (*quoting Clausen*, 290 F.3d at 1314, n.24). The stringent standards for pleading with particularity under Rule 9(b) should not be relaxed to allow *qui tam* relators a “ticket to the discovery process without identifying a single claim.” *Id.* (cit. omitted).

The Relators’ complaint should be dismissed because it fails to meet the minimum requirements of Rule 9(b) for pleading with particularity. All three sets of allegations listed in the complaint suffer from this fatal flaw.

A. Risse Project Grant Application

Again, the Relators argue that the Defendants have violated the FCA in three ways. First, the Relators allege that the Defendants made “False Statements in the Risse Project Grant Application.” (Complaint at 13). In support of this allegation,

the Relators list a number of allegedly false statements:¹¹

To circumvent the requirements of the [Federal Grants and Cooperative Agreement Act of 1977 (“FGCA Act”)], Defendants falsely claimed that the Risse project would not directly benefit EPA, and that EPA did not solicit the work. [Complaint ¶ 29].

Defendants also submitted false statements to circumvent portions of the FGCA Act requiring that the Risse project be openly competed. . . . Specifically, the Defendants claimed, falsely, that Defendant Risse was the Principal Investigator and (in collaboration with Defendant Brobst) claimed that Defendant Risse was uniquely qualified to do the work. [Complaint ¶ 30].

Defendants also submitted false statements to circumvent portions of the FGCA Act requiring that the project include a formal Quality Assurance/Quality Control (“QA/QC”) Plan containing rigorous QA/QC measures for all environmental data. Defendants, in collaboration with Defendant Brobst and Mr. Gross, falsely claimed that the duration of the project was too short for QA/QC measures to be necessary. Also, Defendants represented in the QA/QC section of their application for federal assistance that no forage samples would be collected under drought conditions, because the drought would cause the uptake rates of heavy metals to appear misleadingly low. . . . Defendants, in fact, collected all of their forage samples during severe drought conditions, while never amending and gaining approval of their QA/QC commitments and/or requirements. [Complaint ¶ 31].

Defendants also submitted false statements to circumvent

¹¹Defendants do not contend that this is a complete recitation of every allegation in the Complaint. However, this recital should be sufficient to show the nature of Relators’ allegations and to demonstrate that the allegations are not pled with sufficient particularity to satisfy Rule 9(b).

portions of the FGCA Act requiring that Principal Investigators and all other key personnel regarding the Risse project disclose all financial conflicts of interest and anything that may give the appearance of a conflict of interest. Specifically, Defendant Miller failed to disclose that the Messerly Wastewater Treatment Plant had previously paid UGA for him to analyze soil samples from the Relator McElmurray's family's dairy farm in 1994. Defendant Gaskin also failed to identify her previous sources of funding in her curriculum vitae, which was included in her grant application, such that any conflicts could be properly determined. Also, Defendant Gaskin was closely associated with the UGA's programs that promoted land application of sewage sludge as safe and beneficial. Defendant Gaskin failed to disclose that she had initiated the proposed project at the request of Defendant Walker of EPA, the chief advocate of the safety of sewage sludge within the EPA. [Complaint ¶ 32].

While these allegations may appear at first glance to provide some helpful details, they fail to meet the particularized pleading requirements of Rule 9(b) because they lump together all "Defendants" without specifying with the required level of particularity which defendant committed each allegedly fraudulent act. Such vague pleadings have been held by the Eleventh Circuit to "fall short" of the Rule 9(b) standard. *Brooks*, 116 F.3d at 1381. As the court explained in *Brooks*, "Plaintiffs have simply 'lumped together' all of the Defendants in their allegations of fraud." *Id.* "[I]n a case involving multiple defendants . . . the complaint should inform each defendant of the nature of his alleged participation in the fraud. . . . Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged

fraudulent statements to ‘defendants.’” *Id.* (cits. omitted). Since the complaint in the *Brooks* case was “devoid of specific allegations with respect to the separate Defendants,” it was “subject to dismissal . . . under Rule 9(b).” *Id.*

The complaint in this case should be dismissed for the same reason. The Relators have simply lumped together all of the Defendants in each of their fraud allegations. In fact, throughout this section of their complaint (¶¶ 25- 34), the word “Defendants” is used 16 times without indicating which Defendant is meant. While paragraph 32 does specifically reference three of the individual Defendants, it ignores the other five. Because the Relators’ claims concerning false statements in the grant application fail to “inform each defendant of the nature of his alleged participation in the fraud,” they fail to satisfy the particularized pleading requirements of Rule 9(b) and should be dismissed.

B. The “Gaskin” Paper

The Relators allege next that the Defendants violated the FCA by using “False and Fabricated Data and Information in the Gaskin Paper.” (Complaint at 19). Again, the Relators set forth a number of allegedly false statements in this section of their complaint, apparently hoping to satisfy Rule 9(b). In addition to their continued failure to differentiate among the various Defendants (*see, e.g.*, Complaint ¶¶ 36-44), the Relators also fail to link any of the alleged false statements to any “claim for payment.”

The FCA “attaches liability, not to the underlying fraudulent activity or to the government’s wrongful payment, but to the ‘*claim for payment.*’” *Clausen*, 290 F.3d at 1311 (*quoting United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995)) (emphasis original). Allegations that a defendant made false or fraudulent records do not, in and of themselves, establish liability under the FCA. Rather, a relators’ FCA complaint must explain how the falsity is connected to a wrongful “claim for payment.” *Clausen*, 290 F.3d at 1311. As the Eleventh Circuit has explained, the submission of a fraudulent claim is the “*sine qua non* of a False Claims Act violation.” *Id.*

Importantly, Rule 9(b) mandates that “some *indicia of reliability* . . . be given in the complaint to support the allegation of an *actual false claim* for payment being made to the Government.” *Clausen*, 290 F.3d 1311 (first emphasis added). “Because it is the submission of a fraudulent claim that gives rise to liability under the False Claims Act, that submission must be pleaded with particularity and not inferred from the circumstances.” *Corsello*, 428 F.3d at 1014. Therefore, a FCA complaint is inadequate if it merely alleges “improper practices” by the defendant. *Id.* To meet the heightened standard of Rule 9(b), the complaint must link allegations of improper conduct with “allegations that a specific fraudulent claim was in fact submitted to the government.” *Id.*

In *Clausen*, the relator failed to meet the pleading requirement of Rule 9(b)

because the complaint did not “allege with any specificity if—or when—any actual improper claims were submitted to the Government.” *Clausen*, 290 F.3d at 1312. Despite attaching “dozens of pages of exhibits” to the complaint to support detailed allegations of a scheme to defraud, the relator in *Clausen* failed to allege or provide documentation of a particular claim submitted to the government for reimbursement. *Id.*; see also *Atkins*, 470 F.3d 1350 (11th Cir. 2006) (“the complaint fails rule 9(b) for want of sufficient indicia of reliability to support the assertion that the defendants submitted false claims” because the plaintiff failed to prove that the “defendants *actually submitted* reimbursement claims”) (emphasis original).

Similarly, in *Corsello*, the Eleventh Circuit rejected a relator’s argument that the court should infer submission of a claim merely because the complaint alleged a pattern of improper conduct. 428 F.3d at 1013. Dismissing the complaint, the court refused “to make inferences about the submission of fraudulent claims because such an assumption would ‘strip[] all meaning from Rule 9(b)’s requirements of specificity.’ ” *Id.* (quoting *Clausen*, 290 F.3d at 1312 n. 21). The court explained that the relator had “provided the ‘who,’ ‘what,’ ‘where,’ ‘when,’ and ‘how’ of improper practices, but he failed to allege the ‘who,’ ‘what,’ ‘where,’ ‘when,’ and ‘how’ of fraudulent submissions to the government.” *Id.* at 1014.

In the instant case, the Relators have not sufficiently linked the alleged false

statements in the Gaskin Paper to a “claim for payment” from the government. Accordingly, all of the Relators’ claims regarding false statements in the Gaskin Paper fail to satisfy the particularized pleading requirements of Rule 9(b), and those claims should therefore be dismissed.

C. Other Grant Applications

Finally, the Relators allege that the Defendants violated the FCA by seeking “Other Grants Based on False and Fabricated Data and Information.” (Complaint at 37). This section of the Complaint presents yet another example of the Relators’ repeated failure to satisfy Rule 9(b). Indeed, the only allegations concerning “other grants” are as follows:

The false information in the Gaskin paper served as a springboard for applying for additional funding under the SARE program and other sources of federal assistance. [Complaint ¶ 63].

Altogether, Defendants have submitted approximately nine additional applications for federal assistance, using false or fabricated data from the Risse project and Gaskin paper. Six of these applications, from which federal funds were awarded, have resulted in approximately \$1.6 million in damages to the United States. The remaining four, if funded, will result in approximately \$12.5 million in additional damages. [Complaint ¶ 64].

The Relators fail to allege precisely what false statements were made in the purported additional applications—applications that are not even identified—much less the time and place of each application. Indeed, all the Relators allege is

simply that the Defendants submitted these “other grant” applications “using” false data and information from the Risse Project and Gaskin Paper.

Again, Rule 9(b) requires that a *qui tam* relator allege “facts as to time, place, and substance of the defendant’s alleged fraud, and the details of the defendant[’s] allegedly fraudulent act, when they occurred, and who engaged in them.” *Corsello*, 428 F.3d at 1012 (*quoting Clausen*, 290 F.3d at 1310) (internal quotation marks and brackets omitted). In this case, many critical details, which would have been sufficient to put the Defendants on notice of the particularized charges of fraud being asserted against them, have been glossed over. What false statements were used? How were they used? Who used them? When? Where? Because the Relators’ Complaint contains no allegations that answer any of these questions as to the alleged additional grant applications, all of Relators’ claims relating to any grant application after the initial 1999 grant fail to meet the particularized pleading requirements of Rule 9(b) and should accordingly be dismissed.¹²

VII. CONCLUSION

Therefore, the Court should dismiss the Relators’ Complaint in its entirety

¹²Footnote 52 of the Complaint is insufficient to save this claim from dismissal. Although the Relators list individual defendants and dollar figures (several of which are described as “potentially funded”), this information alone falls far short of the standard for pleading fraud under Rule 9(b) as set forth in *Brooks*. See *discussion supra* at Section VI of this brief.

with all costs cast against the Relators.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

UNITED STATES OF AMERICA, *ex*
rel. DAVID L. LEWIS, PH.D., R.A.
McELMURRAY, III, and G. WILLIAM
BOYCE

Plaintiffs,

v.

JOHN WALKER, PH.D., et al.,

Defendants.

CIVIL ACTION FILE
NO. 3:06-cv-16-CDL

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing MOTION OF DEFENDANTS GASKIN, MILLER, RISSE, AND TOLLNER TO DISMISS with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record :

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