

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 , )  
 )  
*Qui Tam* Plaintiffs, )

v. )

CIVIL ACTION  
FILE NO. 3:06-CV-16

JOHN WALKER, PH.D., )  
JULIA W. GASKIN, )  
ROBERT B. BROBST, )  
WILLIAM P. MILLER, PH.D., )  
E. WILLIAM TOLLNER, PH.D., )  
L. MARK RISSE, PH.D., )  
THE BOARD OF REGENTS OF THE )  
UNIVERSITY SYSTEM OF GEORGIA, )  
THE UNIVERSITY OF GEORGIA )  
RESEARCH FOUNDATION, INC. )  
and JOHN DOE (S) )  
 )  
Defendants. )

**MEMORANDUM OF LAW IN RESPONSE TO  
JULIA W. GASKIN, L. MARK RISSE,  
WILLIAM P. MILLER, AND E. WILLIAM TOLLNER’S  
MOTION TO DISMISS**

COME NOW David L. Lewis, Ph.D., R. A. McElmurray, III , and G. William Boyce  
(the “Relators”) on behalf of the United States of America against the Defendants, John  
Walker, Ph.D., Julia W. Gaskin, Robert B. Brobst, William P. Miller, Ph.D., E. William  
Tollner, Ph.D., L. Mark Risse, Ph.D., Board of Regents of the University System of Georgia,

University of Georgia Research Foundation, Inc., and John Doe(s), and file this their Memorandum of Law in Response to Defendants, Julia W. Gaskin, L. Mark Risse, Ph.D., William P. Miller, Ph.D., and E. William Tollner, Ph.D.'s Motion to Dismiss.

### **I. OVERVIEW AND STATEMENT OF THE CASE**

Relators filed this action under seal on February 17, 2006 against the above-named Defendants for violations of the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA"). Specifically the Defendants made false statements on grant applications submitted to the United States Government for funding to produce a report designed to sabotage claims filed by the Relators against the City of Augusta, Georgia. All of the grant applications in question were made in knowing violation of the Federal Grants and Cooperative Agreement Act, because the funds used to produce the study were solicited for a specific purpose to benefit the United States Environmental Protection Agency ("EPA") (Complaint<sup>1</sup> ¶ 29); because the applications contained false statements about the specific qualifications of the researchers (Complaint ¶ 30); because the study did not contain the required quality control mechanisms (Complaint ¶ 31); and because the Defendants did not properly disclose financial conflicts of interest (Complaint ¶ 31). The Defendants conspired to use the funds obtained through these fabricated applications to knowingly use falsified data to produce a report that was then used as a springboard to obtain additional grant monies.

---

<sup>1</sup> Citations to Complaint herein are to Plaintiffs' Amended Complaint filed with this Court on March 28, 2006 and unsealed by this Court on November 17, 2006.

Defendants Julia W. Gaskin, L. Mark Risse, Ph.D., William P. Miller, Ph.D., and E. William Tollner, Ph.D. filed their Motion to Dismiss on February 12, 2007.

Relators file this Memorandum of Law in Response to Defendants' Motion to Dismiss.

## II. STANDARD FOR A MOTION TO DISMISS

A complaint should be dismissed under Rule 12(b)(6) only where it appears beyond doubt that no set of facts could support the plaintiff's claims for relief. Fed.R.Civ.P. 12(b)(6); *see Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957); *Linder v. Portocarrero*, 963 F.2d 332 (11<sup>th</sup> Cir. 1992). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff. *See Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp., S.A.*, 711 F.2d 989, 994-95 (11<sup>th</sup> Cir. 1983). Generally, notice pleading is all that is required for a valid complaint. *See Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11<sup>th</sup> Cir. 1985), *cert. denied*, 474 U.S. 1082, 106 S. Ct. 851, 88 L.Ed.2d 892 (1986). Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *Id.* *See Braswell v. Board of Regents of the University System of Ga.*, 369 F. Supp.2d 1371 (2005).

Motions to dismiss for failure to state a claim are viewed "with disfavor and ... should rarely be granted." *Rios v. Dillman*, 499 F.2d 329, 330 (5<sup>th</sup> Cir. 1974) (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1357 at 598 (1969)).

### **III. FACTS**

During 1979 through 1990, sewage sludge processed by the Messerly Wastewater Treatment Plant (“MWTP”) was distributed under the guise of being safe fertilizer to Relator McElmurray’s family farm. During 1986-1997, with the exception of 1995, Relator Boyce’s farm received the same toxic sludge under false pretenses of being safe fertilizer. (Complaint ¶ 19).

After experiencing an unprecedented increase in mortality rates, Relators Boyce and McElmurray began to investigate the source of the damage to their otherwise healthy dairy herds. After extensive investigation, Relators Boyce and McElmurray discovered: that the sewage sludge applied to their lands contained numerous hazardous wastes in highly dangerous concentrations; that the City of Augusta had never calculated loading rates to the land receiving sewage sludge; that the City of Augusta never properly tested the sewage sludge as required by law, and thus, had no idea of the true constituents of the sewage sludge. (Complaint ¶ 19, n. 6; ¶¶ 40, 45, 46, 51, 60, 61).

In 1998, Relators McElmurray and Boyce filed suit against the City of Augusta, alleging that the sewage sludge used to treat their lands 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.

Defendants Risse, Gaskin, and Miller committed fraud in submitting a grant application to the EPA in approximately June of 1999, to conduct what has become known

as the “Risse Project.” (Complaint ¶¶ 25-34). Defendant Tollner later became associated with the project. (Complaint at 5 n. 3). 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)

As part of their work, Defendants authored a paper summarizing the results of their study.<sup>2</sup> On approximately December 19, 2001, Julia Gaskin submitted the final version of that paper to the Journal of Environmental Quality (“JEQ”) and it was accepted and published in the January-February 2003 issue (“Gaskin paper”). (Complaint ¶ 35; *see also* p. 19 n. 28).

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 and false. Nonetheless, Defendants represented the data as being reliable and submitted this article for publication. Defendants knew that the data relied upon

---

<sup>2</sup> Julia 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). (Complaint at 5 n. 3, 19 n. 28).

in the Gaskin paper was unreliable when they submitted the article to the JEQ and that they, therefore, published a fraudulent article. (Complaint ¶ 38).

Defendants have submitted approximately nine additional applications for federal assistance, citing the fabricated Gaskin paper as background experience used to obtain additional grant monies. (Complaint ¶ 64). These applications, which are tainted by the references to the Gaskin paper, must be considered false claims for the purposes of the FCA.

#### **IV. ARGUMENT AND CITATIONS TO AUTHORITY**

##### **A. The Board of Regents and Research Foundation, Inc. Are Not Entitled to Sovereign Immunity Under the False Claims Act.**

The Board of Regents of the University System of Georgia (“Board of Regents”) is not entitled to sovereign immunity from a False Claims Act lawsuit, because the United States of America is the real plaintiff-in-interest and a state-created corporation cannot assert immunity from an action by the federal government.<sup>3</sup> Because the United States is the

---

<sup>3</sup> There is a disparity in the two leading United States Supreme Court cases discussing government liability in the FCA. *See Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858 (2000); *Cook County, Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 123 S. Ct. 1239 (2003). In *Stevens*, the Supreme Court, in a five to four decision, held that a state cannot be held liable in a FCA lawsuit because of the punitive nature of the award. However, three years later, in *Cook County*, the Supreme Court held unanimously that a county or any other municipal corporation is subject to liability in a FCA case. *Cook County* clearly establishes that a state created corporation is a person for the purposes of the FCA. That holding is instructive, because a county is a fundamental unit of a state and the Board of Regents is merely a corporation created by statute. A state, which is not subject to FCA liability under *Stevens*, cannot exist but for its counties, but these individual counties are fully liable under the FCA. The Board of Regents is merely a statutory creation, much less a fundamental building block

plaintiff in any FCA lawsuit, a state or state agency cannot claim sovereign immunity from a greater sovereign. *U.S. v. Mississippi*, 380 U.S. 128, 85 S. Ct. 808 (1965); *West Virginia v. U.S.*, 479 U.S. 305, 107 S. Ct. 702 (1987).

It is well established that, in a FCA lawsuit, the real party-in-interest is the United States Government. *U.S. ex rel. Milam v. The University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46 (1992). Federal Rule of Civil Procedure 17(a) commands that every action shall be prosecuted in the name of the real party-in-interest. “Unless the statute and the rule are in conflict, the United States must be the real plaintiff in this suit.” *Milam* at 48.

We hold that the United States is the real party in interest in any False Claims Act suit, even where it permits a qui tam relator to pursue the action on its behalf. The Center’s Eleventh Amendment immunity defense therefore evaporates, because states may be sued in federal courts by the United States.

*Id.* at 48.

The FCA holds:

Any person who – ... knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval; ... is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person ...

31 U.S.C. § 3729.

---

of the state; therefore, this statutory corporation is fully subject to liability under the FCA.

The Board of Regents fits squarely within the legal definition of a “person” for the purposes of the FCA, because it is a corporation.<sup>4</sup>

While § 3729 does not define the term “person,” we have held that its meaning has remained unchanged since the original FCA was passed in 1863. *Stevens*, 529 U.S., at 783, n. 12, 120 S.Ct. 1858. There is no doubt that the term then extended to corporations, the Court in 1826 having expressly recognized the presumption that the statutory term “person” “ ‘extends as well to persons politic and incorporate, as to natural persons whatsoever.’ ” “That corporations are, in law, for civil purposes, deemed persons, is unquestionable” A corporation “is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage”. This position accorded with the common understanding among contemporary commentators that corporations were “persons” in the general enjoyment of the capacity to sue and be sued. See, e.g., 2 J. Bouvier, *A Law Dictionary* 332 (6th ed. 1856) (def. 2: The term “person” “is also used to denote a corporation which is an artificial person”); “A corporation then, or a body politic, or body incorporate, is a collection of many individuals, united into one body, ... and vested, by the policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued ...”.

*Cook County, Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 123 S. Ct. 1239 (2003) (selected cites and punctuation omitted). *See also U.S. ex rel. Burlbaw v. Regents of the New Mexico State University*, 324 F. Supp.2d 1209 (2004), where the court determined that a legal entity

---

<sup>4</sup> Defendant, University of Georgia Research Foundation, Inc. (“Research Foundation, Inc.”), failed to submit its own brief, and merely adopted the position of the Board of Regents. Relators fail to understand why the Research Foundation, Inc. believes that it is entitled to sovereign immunity because it is unquestionably a corporation, and thus a “person” for the purposes of the FCA. *See Stevens, supra*.

with the power to own property, enter into contracts, or sue or be sued, was considered a “person” for the purposes of the FCA. *Id.* at 1213.

The Board of Regents was created and is defined as a corporation. O.C.G.A. § 20-3-20. *See also*, O.C.G.A. § 20-3-31(4); *Villyard v. Regents of the University System of Ga.*, 204 Ga. 517, 50 S.E.2d 313 (1948). The Board of Regents may sue and be sued. *See McCafferty v. Medical College of Georgia*, 249 Ga. 62, 287 S.E.2d 171 (1982). The Board of Regents may own property. O.C.G.A. § 20-3-33. The Board of Regents may execute contracts. O.C.G.A. § 20-3-37.

The Defendants, Board of Regents’ and Research Foundation, Inc. position in this case would deny the ability of the United States to recovery from a corporation created by state statute. Such a holding would elevate a state statute above the Constitution of the United States and would convey immunity to a statutory corporation from suits against the federal government, the highest power in the land.

Ordinarily, statutes authorizing suits in federal courts must explicitly displace a state’s Eleventh Amendment immunity; silence leaves immunity intact. The False Claims Act is silent, but the states have no Eleventh Amendment immunity against the United States ab initio. Therefore, there is no reason Congress would have displaced it in the False Claims Act.

*Milam* at fn. 3.

The Eleventh Circuit has never held that the Board of Regents is not a “person” for the purposes of the FCA. *See Battle v. Board of Regents for Georgia*, 468 F.3d 755 (11<sup>th</sup> Cir. 2006). In *Battle*, the relator brought claims against the Board of Regents and others for violations of First Amendment rights, in addition to violations of the FCA. The district court

dismissed the relator's FCA claims on *original source grounds, not immunity grounds*. Battle at 759. The Eleventh Circuit affirmed the district court's dismissal of the FCA claims on original source grounds, and never discussed the sovereign immunity of the Board of Regents in the FCA context. Battle at 762-3.

Defendant Board of Regents has cited U.S. ex rel. Adrian v. Regents of University of California, 363 F.3d 398 (5<sup>th</sup> Cir. 2004) to assert that the Board of Regents is not a "person" for the purposes of the FCA. The holding in Adrian was reached by analyzing the Ninth Circuit's interpretation of sovereign immunity in unrelated lawsuit contexts, particularly 42 U.S.C.A. § 1983. Adrian at 401-2. Because the Fifth Circuit determined that the California Board of Regents was immune from suit under § 1983, the court held that the California Board of Regents was also immune from suit under the FCA. Adrian at 402.

The court in Adrian cited Donald v University of California Bd. of Regents, 329 F.3d 1040 (9<sup>th</sup> Cir. 2003), as precedent that the California Board of Regents was not subject to the FCA. In Donald, the court ruled that the California Board of Regents was immune from an FCA claim; however, Donald was premised wholly on Stevens, and was issued prior to the Supreme Court's ruling in Cook County. Donald at 1042.

Defendant Board of Regents cites Williams v. Board of Regents of University System of Georgia, 441 F.3d 1287 (2006) (which was replaced by Williams v. Board of Regents of University System of Georgia, --- F.3d ---, 2007 WL 431047 (11<sup>th</sup> Cir. 2007)) to argue that immunity for the Board of Regents under § 1983 should be extended to provide immunity for the FCA. In Williams, the Eleventh Circuit held that the Board of Regents was not liable

for a § 1983 claim brought by a private citizen; *Williams* did not involve any claims in the FCA context. The plaintiff in *Williams* was a private citizen attempting to bring a cause of action against the Board of Regents for violations of Title IX, using § 1983 as a mechanism to bring a cause of action. The court held that “Congress validly abrogated the states’ immunity from Title IX suits,” but that “Congress has not abrogated states’ immunity from § 1983 suits.” *Id.* at 15. These two statutory schemes are based upon private citizens filing suit against a state and are inapplicable to the FCA context, in which the real party in interest is the United States as plaintiff.

Defendant Board of Regents is attempting to extend the holding in *Williams* (that the Board of Regents is immune to civil rights claims brought by private citizens) to the non-binding holding in *Adrian* (that the Board of Regents cannot be considered a “person” for the purposes of the FCA). To permit this interpretation would effectively undermine the purposes of the FCA and prevent the United States Government from recovering monies improperly taken from the public *fi*sc by a state actor.

Because the United States is the Plaintiff and real party-in-interest in this lawsuit, and because the Board of Regents is a corporation created by state statute, the Research Foundation, Inc. is a corporation, and therefore are “person[s]” for purposes of the FCA, the Board of Regents and Research Foundation, Inc. are not entitled to sovereign immunity against the federal government, and this lawsuit should not be dismissed.

**B. Relators' Claims Relating to the 1999 Grant Application Are Timely Pursuant to 31 U.S.C. § 3731(b)(1).**

Defendants assert in their Motion that Relators' relatings to the grant application submitted to the EPA on June 15, 1999 are barred by the FCA's statute of limitations, because the application was submitted more than six years prior to Relators' filing of their Complaint. (Motion, pp. 6-7) (citing *Smith v. U.S.*, 287 F.2d 299, 304 (5<sup>th</sup> Cir. 1961)). 31 U.S.C. § 3731 provides, in relevant part, that:

- (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.

31 U.S.C. § 3731(b); *accord Foster v. Savannah Communication*, 140 Fed.Appx. 905, 907 (11<sup>th</sup> Cir. 2005) (*per curiam*).

For purposes of the FCA, knowledge of the "government" means the United States Department of Justice, the entity responsible for prosecuting the FCA. "[The] 3 year statute of limitations does not begin to run until the material facts are known by an official within the *Department of Justice* with the authority to act in the circumstances." *U.S. ex rel. Colunga v. Hercules, Inc.*, 1998 WL 310481 at \*3 (D. Utah, 1998) (emphasis in original).

“The appropriate standard for determining when the three year limitation period in § 3731(b)(2) began to run is when the Department of Justice received information as to the violation.” *Colunga* at \*5.

In this case, the Relators did not acquire the information regarding the Defendants’ false claims on the loan documents, which are required to establish a *prima facie* case against Defendants for violations of the FCA, until late-2004. (Complaint ¶¶ 60-62). Once Relators had assimilated all of the information relevant to the required elements to establish this FCA lawsuit, they immediately contacted the United States Department of Justice for the Middle District of Georgia. This lawsuit was filed on February 17, 2006, well within three years of Relators’ knowledge of Defendants’ false statements on the loan documents, and well within three years of providing the relevant evidence to the United States Department of Justice.

The statute of limitations has been tolled by 31 U.S.C. § 3731(b)(2), because neither the Relators nor the United States Department of Justice were aware of the false statements made by Defendants on the grant applications until, at the earliest, in late-2004. Therefore, Relators’ claims are not barred by the statute of limitations, and Defendants’ Motion to Dismiss should be denied.

**C. The Relators are the Original Source of the Information Underlying this Lawsuit.**

Defendants have argued that this lawsuit should be dismissed for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6), because the Relators are not the original source of the information forming the basis of this lawsuit. The courts have ruled that a motion to

dismiss an FCA case based upon original source status is in fact a motion to dismiss for lack of subject matter jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1). *See U.S. ex rel. McElmurray v. Consolidated Government of Augusta-Richmond*, 464 F. Supp.2d 1327 at 1341 (N.D. Ga. 2006). A motion to dismiss for lack of subject matter jurisdiction, prior to permitting any discovery on jurisdictional issues, is premature.

The original source provisions of the FCA are intended to prevent numerous lawsuits filed against a defendant for claims discovered through the public domain of which a potential plaintiff could have had no other independent knowledge. “It is evident from reading § 3730(e)(4) that Congress intended to bar **parasitic** qui tam suits.” *U.S. v. CAC-Ramsay, Inc.*, 744 F. Supp. 1158 (1990) (emphasis added).

Congress sought a middle-ground between a restrictive approach that essentially eliminated the FCA’s relator provisions and a free-for-all of parasitic suits based on publicly available information. In 1943, the Supreme Court had held that a relator could bring a qui tam action based solely on information derived from a government criminal indictment. In response, Congress amended the FCA to prohibit relator suits “based on evidence or information the government had when the action was brought.” 31 U.S.C. § 3730(b)(4) (1982) (superseded). The federal courts read this restriction broadly, going so far as to prohibit the state of Wisconsin from bringing a qui tam suit based on evidence of Medicaid fraud when the state was required to report the information to the Department of Health and Human Services. The 1986 amendments were passed as a response to decisions like *Dean* which drastically narrowed the availability of suits by private relators.. As a result, the 1986 Amendments “must be analyzed in the context of [the] twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.”

*U.S. ex rel. Atkinson v. PA. Shipbuilding Co.*, 473 F.3d 506 (3<sup>rd</sup> Cir. 2007).

In this case, there are no parasitic lawsuits filed based upon these claims; therefore, there should be no need to reach a determination of “original source.” However, even if a competing lawsuit were filed, there is no question that the Relators are the original source under the facts of this lawsuit.

This case is controlled by *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11<sup>th</sup> Cir. 1994). In *Cooper*, the relator, after being denied certain medical coverage benefits, began researching the law governing those denied claims and discovered that the defendant was in violation of the applicable coverage laws. *Id.* at 564. The court held that, despite public hearings involving the defendant regarding the exact same offending conduct which Cooper claimed in his lawsuit, his actions rendered him an “original source” for purposes of the FCA. *Id.* at 568. The Eleventh Circuit held that Cooper qualified as an original source for purposes of the FCA, because his research efforts were “‘direct’ and ‘independent’ within the meaning of the FCA.” *Id.* at 568.

The Relators are unquestionably the original source of the information underlying this lawsuit. At a minimum, if any factual questions of original source remain, Relators must be permitted discovery on those issues. “[T]he rules entitle a plaintiff to elicit material facts regarding jurisdiction through discovery before a claim may be dismissed for lack of jurisdiction.” *Blanco v. Carigulf Lines*, 632 F.2d 656, 658 (5<sup>th</sup> Cir. 1980). The court has very limited discretion to deny discovery on jurisdictional issues. *See Williamson v. Tucker*, 645 F.2d 404, 413 (5<sup>th</sup> Cir. 1981). In an attack on subject matter jurisdiction, the plaintiff

has a qualified right to discovery to establish the facts underlying jurisdiction. *See Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 731 (11<sup>th</sup> Cir. 1982).

Thus, though numerous courts have indicated that they have discretion in granting or denying jurisdictional discovery, this is not exactly correct. In the final analysis, a court does not have discretion to grant or deny a request for jurisdictional discovery [when jurisdictional facts are in dispute]. Rather, it is appropriate to speak in terms of a qualified “right” to jurisdictional discovery when a court’s jurisdiction is genuinely in dispute. In order to satisfy the Federal Rules’ implicit policy that cases be decided on the merits, a court should order discovery while protecting the defendant’s interests where necessary through a Rule 26(c) protective order. Thus, the element of discretion, if any, exists not with respect to whether there will be jurisdictional discovery, but rather only with respect to the form that the discovery will take.

*Eaton* at 729 n. 7 (citing *The Use of Discovery to Obtain Jurisdictional Facts*, 59 Va.L.Rev. 533, 546-47 (1973)).

The argument against dismissal on 12(b)(1) grounds prior to discovery is particularly strong when the basis of jurisdiction is also an element of plaintiffs’ cause of action on the merits. Where the jurisdictional issues are intertwined with the substantive merits, “the jurisdictional issues should be referred to the merits, for it is impossible to decide one without the other.” *Chatham Condominium Associations v. Century Village, Inc.*, 597 F.2d 1002, 1011 (C.A. Fla. 1979). In *Williamson v. Tucker*, the former Fifth Circuit quoted extensively from *Bell v. Hood* in support of the proposition that the “Supreme Court has enumerated a strict standard for dismissals for lack of subject matter jurisdiction when the basis of jurisdiction is also an element in the plaintiff’s federal cause of action.” *Williamson v. Tucker*, 645 F.2d 404, 415 (5<sup>th</sup> Cir. 1981). In *Bell*, the plaintiffs had sued the FBI for money damages, basing jurisdiction on federal questions arising under the Fourth and Fifth

Amendments. *Bell v. Hood*, 327 U.S. 678, 679, 66 S. Ct. 773 (1946). The court held that federal jurisdiction did exist, despite the possibility that recovery might not be available under federal law. *Id.* at 681-82. The court in *Bell* recognized a narrow exception to its holding: dismissal of a lawsuit based upon a lack of subject matter jurisdiction prior to discovery is only proper “where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or where such a claim is wholly insubstantial and frivolous.” *Id.* at 682.

In the present case, the question of subject matter jurisdiction is not only a question of fact but, also, is intimately related to the substantive merits of relators’ claims. Jurisdiction in this case depends on the applicability of the statutorily defined term “original source” to facts that are not in dispute. A central tenant of Relators’ claims is that they are the original source of the information underlying this lawsuit. *See* 31 U.S.C. § 3730(e)(4)(A). If the Relators are the original source, then the Court has subject matter jurisdiction.

Since a determination of whether this Court has subject matter jurisdiction will hinge on whether the Relators are the original source, that determination will effectively decide the merits of Relators’ claim. Jurisdiction is thus inextricably intertwined with the merits of the Relators’ case. Because the jurisdictional facts implicate the merits of the case, the strict standard enunciated in *Bell* and *Williamson* applies, and discovery must be permitted.

Cases in this Circuit where the Court upheld a dismissal based upon lack of jurisdiction prior to completing discovery are distinguishable from this matter. *See Posner*

*v. Essex Ins. Co., Ltd.*, 178 F.3d 1209 (11<sup>th</sup> Cir. 1999). *Posner* is readily distinguishable, because the issue in *Posner* was of personal jurisdiction, not subject matter jurisdiction. *Id.* at 1215. Furthermore, the defendant in *Posner* submitted affidavits to defeat jurisdiction, and the plaintiffs had an eight-month period to conduct discovery, but propounded no discovery at all. *Id.* at 1214 n. 7. In this case, the issue is subject matter jurisdiction. The Relators have not been provided any opportunity whatsoever for discovery, and no affidavits or evidence of any kind have been submitted. The Relators are entitled to discovery to confirm that they are the original source of the information underlying this lawsuit and to establish subject matter jurisdiction.

*Williamson v. Tucker* sets out the framework of the proper analysis for 12(b)(1) dismissals. *Id.*, 645 F.2d at 413. The central inquiry under the *Williamson* analysis is whether the 12(b)(1) motion attacked the complaint on its face, or whether the motion attacked the asserted factual basis of jurisdiction. *Id.* at 412-13. If the motion to dismiss is a facial attack on the complaint, then the reviewing court must consider the allegations and exhibits in the plaintiff's complaint as true. *Id.* at 415-16. These protections are similar to the procedural safeguards retained when the court grants a 12(b)(6) motion for failure to state a claim. Appellate review of facial attacks is restricted to an examination of whether the complaint sufficiently alleges jurisdiction, assuming that all allegations in the complaint are true. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5<sup>th</sup> Cir. 1981).

The court has the power to dismiss for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by

undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson*, 645 F.2d at 413. In this case there is only a Complaint. As such, the Court only has the authority to dismiss this case based upon a facial challenge based upon the Complaint alone, and is not permitted to make any factual determinations of jurisdiction prior to completion of discovery. *Williamson* at 414.

In a facial challenge of jurisdiction, the court must accept all facts in the complaint as true. "A facial attack is a challenge to the sufficiency of the pleading itself. On such a motion, the court must take the material allegations of the petition as true and construed in the light most favorable to the nonmoving party." *U.S. v. Ritchie*, 15 F.3d 592, 598 (6<sup>th</sup> Cir. 1994).

In this case, there is only the Complaint in the record; there are no facts in dispute, as there has been no opportunity to dispute or develop any extraneous facts. The Court is required to take all facts in the Complaint as true and construe them in the light most favorable to the Relators. *Ritchie*, 15 F.3d at 598. *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342, 1352 (11<sup>th</sup> Cir. 2006).

Nonetheless, when facts are in dispute and the Court makes a determination of facts regarding jurisdiction, the non-moving party is entitled to the safeguards of discovery and a hearing to develop the facts in dispute. *See Surpitski v. Hughes-Keenan Corp.*, 362 F.2d 254 (1<sup>st</sup> Cir. 1966); *Surpitski v. Hughes-Keenan Corp.*, 362 F.2d 254, 255 (1<sup>st</sup> Cir. 1966); *Collins v. New York Central System*, 327 F.2d 880, (D.C. Cir. 1963); *Collins v. New York*

*Central System*, 327 F.2d 880 (D.C. Cir. 1963); *Harmon v. Superior Court of State of Cal. In and For Los Angeles County*, 307 F.2d 796 (9<sup>th</sup> Cir. 1962); *Topping v. Fry*, 147 F.2d 715 (7<sup>th</sup> Cir. 1945).

It is true that the factual determinations decisive of a motion to dismiss for lack of jurisdiction are within the court's power, and that no right to a jury trial exists with regard to such issues. *Menchaca v. Chrysler Credit Corp.*, supra, at 511; *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, supra at 418. But still the district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss.

*Williamson*, 645 F.2d at 414. "Insofar as the defendant's motion to dismiss raises factual issues, the plaintiff should have an opportunity to develop and argue the facts in a manner that is adequate in the context of the disputed issues and evidence." *Id.* at 414.

A factual determination is not permitted on a facial challenge, in direct contraction to the Complaint, that the Relators are not the original source, without affording the Relators an opportunity to develop the facts or present evidence at a hearing to defend jurisdiction.

To qualify as an "original source" under the FCA, Relators must have "direct and independent knowledge of the information on which the allegations are based and have voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(A). In the Complaint, Relators have plead that: the Risse project was conducted in response to actions of the Relators. (Complaint ¶¶ 20, 21, 22, 29, 50, 51, 52, 53). But for the actions of the Relators, the falsity of the data underlying the Risse project would not be known. (Complaint ¶¶ 36, 37, 38, 39, 40, 45, 46, 47, 48, 49, 50, 51, 52, 53). Each of these numbered paragraphs must

be taken as true. *Williamson*, 645 F.2d at 415-6. Defendant has not, and cannot, dispute these facts. As such, if the Court rules that the Relators are not the original source, the Court must reach a factual determination in direct contradiction to undisputed facts in the Complaint.

Defendants have relied upon *Battle*, to argue that the Relators are not the original source of the information underlying this lawsuit. The test is that “a plaintiff need not establish herself as *the* original source of the publicly disclosed information but must establish that she is *an* original source of the information in that she had direct and independent knowledge of the information on which she is basing her FCA claim.” *Battle* at 762 (emphasis in original).

The facts in *Battle* are readily distinguishable because there

none of the facts as evidenced by Plaintiff indicate that she participated in the state audits on which she relies or that she disclosed information to the auditors. More important, Plaintiff does not refer to her own research or documentation to prove that she had direct and independent knowledge of the findings contained in the state audits.

*Battle* at 763.

The facts in this case could not be more distinguishable. The information underlying this lawsuit, that was publically disclosed in other lawsuits and administrative actions, was developed by the Relators in the very lawsuits and administrative actions in which the Relators themselves were the plaintiffs. The information proving the falsity of the data underlying the fraudulent report was developed by the Relators themselves. It cannot be argued that the Relators were not an original source of this information.

Furthermore, Defendants have advanced the spurious argument that the Relators cannot be the original source of any information they obtained through the Georgia Open Records Act, O.C.G.A. §§ 50-18-70 *et seq.* or the Freedom of Information Act, 5 U.S.C. § 552. This argument is unfounded.

[T]he disclosure of information in response to a Freedom of Information Act (“FOIA”) request does not necessarily trigger the public disclosure bar; rather, a court must examine each element of § 3730(e)(4)(A) before making such a determination. See *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 722-25 (6th Cir.1999). This Court interprets *Burns* as recognizing that although the FOIA requests may have satisfied the public disclosure element of § 3730(e)(4)(A), the information received must also satisfy the remaining statutory elements. See *Id.* In other words, it must also be shown to be an “allegation or transaction” disclosed in one of the statutorily enumerated sources, i.e., “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.”

*U.S. v. Solinger*, 457 F. Supp.2d 743 (2006). *See also U.S. ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11<sup>th</sup> Cir 1991).

In this case, none of the information obtained through open records procedures and used as a basis for this lawsuit was an “allegation or transaction” disclosed “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.” *Solinger* at 752. Because this information does not meet the second requirement imposed by *Solinger*, the information cannot be considered publically disclosed, and the Relators are clearly the original source of this information being provided to the Government.

The Defendants have cited *U.S. ex rel Kreindler & Kreindler v. United Technologies Corporation*, 985 F.2d 1148, 1152 (2d Cir. 1993), to reach its conclusion that the Relators are not the original source of the information underlying this lawsuit. *Kreindler* is readily distinguishable. In that lawsuit, the relator, Kreindler, was a lawyer who represented the estate of a deceased Army helicopter pilot. *Id.* at 1150. During the course of discovery in the underlying lawsuit, Kreindler became aware that the defendant was falsely certifying compliance with certain regulations regarding helicopter safety features and specifications. *Id.* at 1151-52. Kreindler's prior client did not prompt the creation of any documents exposing the false claims, but merely discovered them during litigation. *Id.* at 1152. Kreindler then filed a false claims act lawsuit with himself as the sole relator. *Id.* The trial court dismissed the lawsuit stating that:

Although Kreindler conducted, as counsel, the litigation that resulted in public disclosure of information concerning Black Hawk helicopters upon which Kreindler relies to bring the qui tam action, UTC and its employees were the original sources of the information disclosed in that litigation.

\*\*\*

Kreindler had no significant direct knowledge regarding the Black Hawks independent of the disclosures made to Kreindler by UTC, and certainly was not a source of that information to UTC. The fact that Kreindler conducted some collateral research and investigations regarding the Black Hawk situation, as would be customary in such litigation, does not establish "direct and independent knowledge of the information on which the allegations are based" within the meaning of § 3730(e)(4)(B); UTC was clearly the source of the core information. Nor does the fact that Kreindler's background knowledge enabled it to understand the significance of the information acquired in the Bryant action make its knowledge independent of the publicly disclosed information.

*Id.*, at 1159 (cites and punctuation omitted).

Because the Relators are indisputably the “original source” of the information underlying this lawsuit, and because any ruling to the contrary prior to allowing any discovery is premature, the Defendants’ Motion to Dismiss should be DENIED.

**D. Relators’ Claims Under 31 U.S.C. § 3729(a)(2) Are Pled With Sufficient Particularity.**

---

Defendants contend that Relators’ Complaint fails the requirements of Federal Rule of Civil Procedure 9(b), which provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Fed.R.Civ.P. 9(b). (Brief, pp. 25-33). However, while Rule 9(b) has been applied to FCA claims in this Circuit, the Eleventh Circuit has further recognized that:

The purpose of Rule 9(b)’s particularity requirement is to “alert[ ] defendants to the precise misconduct with which they are charged and protect[ ] defendants against spurious charges of immoral and fraudulent behavior.” [Cit.]. The particularity requirement, however, must be read in conjunction with Federal Rule of Civil Procedure 8’s directives that a complaint need only provide “a short and plain statement of the claim showing that the pleader is entitled to relief,” [cit.], and that “[e]ach averment of [the complaint] sh[ould] be simple, concise, and direct...”

*Hill v. Morehouse Medical Associates, Inc.*, 2003 WL 22019936, \*3 (11<sup>th</sup> Cir., Aug. 15, 2003) (internal citations omitted) (quoting *Ziembra v. Cascade Intern., Inc.*, 256 F.3d 1194, 1202 (11<sup>th</sup> Cir. 2001); Fed.R.Civ.P. 8(a); Fed.R.Civ.P. 8(e)(1); citing *Friedlander v. Nims*, 755 F.2d 810, 813 n. 3 (11<sup>th</sup> Cir. 1985).

Thus, to comply with Rules 8 and 9(b), “some indicia of reliability must be given in the complaint to support the allegation of” fraud. [Cit.]. To that end, the “plaintiff must plead facts as to time, place, and substance of the

defendant's alleged fraud, specifically the details of the defendants' allegedly fraudulent acts, when they occurred, and who engaged in them." [Cit.]. Therefore, "pleadings generally cannot be based on information and belief."

*Id.* (internal citations omitted) (quoting *U.S. ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1310-11 (11<sup>th</sup> Cir. 2002)). However, "Rule 9(b)'s heightened pleading standard may be applied less stringently, however, when specific 'factual information [about the fraud] is peculiarly within the defendant's knowledge or control.'" *Id.* (emphasis added) (quoting *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1040, 1052 (S.D. Ga. 1990); citing *U.S. ex rel. Russell v. Epic Healthcare Management Group*, 193 F.3d 304, 308 (5<sup>th</sup> Cir. 1999)). "In that instance, the plaintiff may plead based upon information and belief [cit.] provided that [he or she] 'accompan[ies] [her] legal theory with factual allegations that make [her] theoretically viable claim plausible.'" *Id.* (internal citation omitted) (quoting *U.S. ex rel. Russell*, at 308; citing *In re Rockefeller Center Properties, Inc. Securities Litigation*, 311 F.3d 198, 216 (3d Cir. 2002); *U.S. ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1314 n. 25 (11<sup>th</sup> Cir. 2002)).

### **1. The Risse Project Grant Application.**

Defendants Gaskin, Miller, Risse and Tollner complain that Relators' allegations regarding the Risse project grant application allegedly improperly "lump" them together by collectively referring to them as "Defendants." (Brief, pp. 26-29). However, Defendants focus upon the allegations in paragraph 32 of Relators' Complaint and ignore the remainder of Relators' allegations regarding the Risse project grant application. (Brief, pp. 23-24).

Relators have particularly alleged that, in November 1998, Defendant John Walker solicited Gaskin, Brobst, Miller, Tollner, and Risse to organize the Risse project (Complaint, ¶ 20), and that, on or about June 15, 1999, “*Defendants Risse, Gaskin, and Miller* submitted the grant application to EPA for funding of the Risse project,” (Complaint, ¶ 28) (emphasis added).

As one court has held in response to a similar objection pursuant to Rule 9(b) regarding alleging “defendants” in the collective:

[R]elator sufficiently pleads some specific circumstances of the alleged fraud. Treating her allegations as true, it would be virtually impossible for relator to list every instance of fraudulent activity. She does however give the outline of the allegedly fraudulent scheme and give various examples of conduct by the defendants.

...

[W]hile the complaint frequently says that “defendants” engaged in a certain activity, rather than naming an individual defendant, the complaint is specific, when necessary. [Cit.]. Throughout the complaint relator lists specific patients and the doctors who treated them [cit.]. This information, along with other details in the complaint, is enough to inform the individual defendants of their alleged role in the fraudulent activities.

*U.S. v. Cancer Treatment Centers of America*, 2003 WL 21504998, \*1, \*2 (N.D. Ill., June 30, 2003) (internal citations omitted) (citing *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 778 (7<sup>th</sup> Cir. 1994); *Balabanos v. North American Inv. Group, Ltd.*, 708 F. Supp. 1488, 1493 (N.D. Ill. 1988)); *see also U.S. ex rel. Heater v. Holy Cross Hosp., Inc.*, 2007 WL 521931, \*8 (S.D. Fla., Feb. 15, 2007) (denying the defendants’ motion to dismiss the relators’ FCA claims on the grounds that they “merely; lump all; Defendants together and

make no allegations against these separate entities,” holding that “it [was] sufficient to define both together as ‘Defendants’ for purposes of pleading the allegations in the Second Amended Complaint, given the day-to-day interrelationship between the[ ] two entities”). In this case, Relators have alleged that Defendants Gaskin, Miller and Risse submitted a grant application to EPA containing false representations and have alleged in detail the specific representations in the application which were false. Relators have therefore sufficiently alleged “the time, place, and substance of the defendant[s]’ alleged fraud,” *Hill*, 2003 WL 22019936 at \*3 (quoting *U.S. ex rel. Clausen*, 290 F.3d at 1310, 11), which is all that is required for the purposes of Rule 9(b). This is clearly not a case similar to *Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, relied upon by the Defendants, where the Complaint was “devoid” of any “specific allegations with respect to the separate Defendants.” *Brooks*, 116 F.3d 1364, 1381 (11<sup>th</sup> Cir. 1997) (Brief, p. 21, 24). On the contrary, the very paragraph of the Complaint quoted by the Defendants alleges precisely such specific allegations against specific Defendants. (Brief, pp. 23-24) (quoting Complaint, ¶ 32). Defendants, further, cannot seriously maintain that Relators’ Complaint provides no notice of the “precise misconduct” with which they are charged, and the Defendants make no allegation in their Brief that Relators’ allegations relating to the Risse project are in any way “spurious”—the purposes underlying Rule 9(b)’s heightened pleading requirements. On the contrary, despite referring to the Defendants in the collective, Relators’ Complaint, taken as a whole, clearly contains sufficient particularity to adequately inform the Defendants of the claims against them, and therefore, to satisfy Rule 9(b).

Defendants effectively argue that Relators' Complaint should set forth which Defendant took each action and made each representation. Such a heightened pleading burden is wholly unsustainable pursuant to the Federal Rules of Civil Procedure or relevant case law. Relators had no involvement in the organization of the Risse project or the application for the EPA grant, and therefore, cannot be charged with knowledge of any and all facts surrounding the project or the preparation of the application. Rather, in this case, it is clear that "specific 'factual information [about the fraud] is peculiarly within the *defendant[s]'* knowledge or control.'" *Hill*, 2003 WL 22019936 at \*3 (emphasis added) (quoting *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A.*, 755 F. Supp. at 1052). Given this fact, Relators should be permitted to plead some allegations in their Complaint on information and belief or—in response to the Defendants' contentions—against the Defendants collectively. This is especially the case on a Motion to Dismiss, where the Relators have had no opportunity for discovery. Relators' 48-page Complaint provides the Defendants with considerably more than "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed.R.Civ.P. 8(a).

Construing the Complaint in a light most favorable to Relators, Relators should be held to have stated claims under 31 U.S.C. § 3729(a)(2) with sufficient particularity, and the Defendants' Motion should be denied. Granting of the Defendants' Motion is inappropriate, especially in view of the fact that the Court in *Brooks* dismissed the relators' FCA claims in response to the defendants' motion for *summary judgment* on the relators' *amended* complaint. *Brooks*, 116 F.3d at 1365. At minimum, Relators should be given an opportunity

for discovery, and then to be allowed to amend their Complaint as additional facts are learned from the Defendants.

## **2. The Gaskin Paper.**

The Defendants further assert that Relators have failed to satisfy Rule 9(b) in their allegations relating to the Gaskin paper to the *Journal of Environmental Quality*, published in the January-February 2003 issue, by allegedly failing to distinguish the Defendants and by failing to link the false data and statements used to prepare the Gaskin paper to any claim for payment pursuant to the FCA. (Brief, pp. 25-28). As set forth in the preceding section, Defendants' first contention is without merit, since Relators' allegations regarding the Gaskin paper set forth the time, place and substance of the Defendants' fraudulent acts and representations with ample sufficiency to inform the Defendants as to the specific misconduct alleged against them under Rule 9(b).

Defendants' second argument is erroneous. Relators clearly allege in their Complaint, as acknowledged by Defendants in their Brief, that Defendants "have submitted approximately nine additional applications for federal assistance, *using false or fabricated data from the Risse project and Gaskin paper.*" (Brief, p. 32), and that "[t]he 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." *Id.* (emphasis added) (quoting Complaint, ¶¶ 63, 64). Defendants' submission of applications for federal funds using the false data and representations in the Gaskin paper, and the governments' payment of such funds, constitute the submission of false "claims" for the purposes of the FCA.

In *U.S. v. Poehlman*,<sup>5</sup> (Civil No. 2:05-CV-66 D. Vt., 2005), a research physician fabricated data in a published study about menopause in women. This study was then cited on numerous grant applications as a springboard to obtain additional funding for other studies. None of the other studies were shown to have contained fraudulent data; however, each of the applications submitted that contained a reference to the fraudulent study was considered an additional false claim for the purposes of the FCA.

The false data and representations underlying the Gaskin paper therefore constitute direct evidence of the Defendants' subsequent false claims to the Government and fraudulent deprivation of millions of dollars in grant monies. Defendants' contentions that Relators have failed to identify any claims relating to the Gaskin paper are meritless.

### **3. Other Grant Applications.**

Defendants Gaskin, Miller, Risse and Tollner further complain that the allegations in the Complaint relating to their grant applications subsequent to the Risse project fail to satisfy Rule 9(b) by allegedly failing to identify specific applications, the time and place of the applications and the false statements made in the applications. (Brief, p. 32). Relators, however, allege that the Defendants have submitted approximately nine applications based

---

<sup>5</sup> A companion criminal case was filed against Poehlman. As a joint settlement of the FCA and criminal cases against him, Poehlman plead guilty of making one material false statement. However, he paid approximately \$180,000.00 in restitution to the Government for the improperly obtained grant monies for numerous grant applications.

upon the false data from the Risse project and the Gaskin paper and further set forth which Defendants received monies, and in what amounts. (Complaint, ¶ 64 n.52).

In *Corsello v. Lincare, Inc.*, cited by Defendants, the Eleventh Circuit affirmed the trial court's grant of the defendants' motion to dismiss pursuant to Rule 9(b), holding that:

[Relator's] second amended complaint ... used vague allegations that improper practices took place "everywhere [the defendant] does business throughout the statutory time period." *The allegations also failed to provide a factual basis to conclude fraudulent claims were ever actually submitted to the government in violation of the False Claims Act.*

...

Underlying improper practices alone are insufficient to state a claim under the False Claims Act absent allegations that *a specific fraudulent claim was in fact submitted to the government.*

*Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11<sup>th</sup> Cir. 2005) (emphasis added) (citing *Clausen*, 290 F.3d at 1311). In contrast to the relator's allegations in *Corsello*, Relators in this case have alleged the actual submission of specific fraudulent claims to the Government in the Defendants' submission of false applications for federal funds. This should be held sufficient for the purposes of the Defendants' Motion to Dismiss, viewing the allegations in favor of Relators.

Relators should be afforded an opportunity to conduct discovery and to amend the allegations in their Complaint. Accordingly, the Defendants' Motion to Dismiss should be denied.

**V. CONCLUSION**

Because Defendants are not entitled to sovereign immunity, because Relators' claims are not prohibited by the statute of limitations, because Relators are the original source of the information underlying this lawsuit, and because Relators have sufficiently plead their claims with sufficient specificity, Defendants' Motion to Dismiss should be DENIED.

Respectfully submitted March 7, 2007.

/s/ F. Edwin Hallman, Jr.

F. EDWIN HALLMAN, JR.  
State Bar of Georgia #319800  
[ehallman@dhbblaw.com](mailto:ehallman@dhbblaw.com)

/s/ Richard A. Wingate

RICHARD A. WINGATE  
State Bar of Georgia #770617  
[rwingate@dhbblaw.com](mailto:rwingate@dhbblaw.com)

For DECKER, HALLMAN, BARBER & BRIGGS  
Attorneys for Relators

260 Peachtree Street, N.W.  
Suite 1700  
Atlanta, Georgia 30303  
(404) 522-1500

/s/ Craig A. Gillen

CRAIG A. GILLEN  
State Bar of Georgia #294838

/s/ Anthony Charles Lake

ANTHONY CHARLES LAKE  
State Bar of Georgia #431149

For GILLEN, PARKER & WITHERS LLC  
Attorneys for Appellants

One Securities Centre, Suite 1050  
Atlanta, GA 30305  
(404) 842-9700

**CERTIFICATE OF SERVICE**

This is to certify that on March 7, 2007, I have electronically filed the foregoing Memorandum in Response to Motion to Dismiss with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney(s) of record:

Julia B. Anderson  
Lamar Clinton Crosby, Jr.  
Michael T. Dawkins  
Donald Lamont Johstono  
Charles Lee Lott, III  
Stefan Ernst Ritter  
George M. Weaver

*/s/ F. Edwin Hallman, Jr.*

F. EDWIN HALLMAN, JR.  
State Bar of Georgia #319800

For DECKER, HALLMAN, BARBER & BRIGGS  
Attorneys for Plaintiffs

260 Peachtree Street, N.W.  
Suite 1700  
Atlanta, Georgia 30303  
(404) 522-1500