

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

UNITED STATES OF AMERICA, )  
ex rel. DAVID L. LEWIS, PH.D., *et al.*, )  
 )  
 *Qui Tam* Plaintiffs, )  
 )  
 v. )  
 )  
 JOHN WALKER, PH.D., *et al.*, )  
 )  
 Defendants. )

CIVIL ACTION FILE NO.  
3:06-CV-00016-CDL

**REBUTTAL IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS**  
**UNIVERSITY OF GEORGIA RESEARCH FOUNDATION, INC.**  
**AND DR. JOE L. KEY**

**Introduction**

In response to the motion by the Foundation and Dr. Key to dismiss the claims against them under Rule 9(b), the Relators have done nothing but regurgitate the same bald assertion that by merely signing a federal grant application, Dr. Key knew or should have known that certain statements contained within that application were false. This is not a contract case where knowledge is imputed to the signing party. This is a fraud case under the False Claims Act, and Rule 9(b) requires particularity in the pleadings.

**Relators Cite Wrong Legal Standard**

In their response, the Relators stated that this motion falls under Rule 12(b)(6) and that motions to dismiss under Rule 12(b)(6) “are viewed with disfavor and should rarely be granted.” (Response, p.4 (quotations omitted).) The Relators are incorrect. This

motion does not fall under Rule 12(b)(6). It falls under Rule 9(b), which contains a “heightened pleading standard.” *Kirwin v. Price Communications Corp.*, 391 F.3d 1323, 1324 (11<sup>th</sup> Cir. 2004). *See also United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1309 (11<sup>th</sup> Cir. 2002); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1012 (11<sup>th</sup> Cir. 2005) (explaining that a complaint that alleges violations of the False Claims Act must comply with Rule 9(b)).

The heightened pleading standard under 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). That is, a relator must allege the “who, what, where, when and how” of any alleged fraud to satisfy Rule 9(b). *See Corsello*, 428 F.3d at 1014 (quotations omitted). The Relators have fallen far short of this standard and thus the Foundation and Dr. Joe Key should be dismissed.

### **Relators Still Fail to Allege Fraud With Particularity**

In their response, the Relators repeated the allegation that the grant application at issue in this case contained four falsehoods: (1) the application violated the Federal Grants and Cooperative Agreement Act because the funds were solicited for the purpose of benefiting the Environmental Protection Agency, (2) the application contained false statements about the qualifications of the researchers, (3) the study did not contain the required quality control mechanisms, and (4) financial conflicts of interest were not

disclosed. What the Relators still failed to do in their response, however, is allege how Dr. Key knew or should have known about these alleged falsehoods.

The Relators did at least allege that Dr. Key should have known about the alleged falsehoods “because of his position.” (Response, p.10.) In fact, they asserted that a “cursory review” of the application at issue would have revealed the falsehoods to him. *Id.* However, allegations that an individual defendant, because of his position within an organization, “must have known” a statement was false or misleading are “precisely the types of inferences which [courts], on numerous occasions, have determined to be inadequate to withstand Rule 9(b) scrutiny.” *In re Advanta Corp. Securities Litigation*, 180 F.3d 525, 539 (3<sup>rd</sup> Cir. 1999) (citing *Maldonado v. Dominguez*, 137 F.3d 1, 10 (1<sup>st</sup> Cir. 1998). “Generalized imputations of knowledge do not suffice, regardless of the defendants' positions within the company.” *Id.* (citing *Rosenbloom v. Adams, Scott & Conway, Inc.*, 552 F.2d 1336, 1338-39 (9th Cir.1977) (“A director, officer, or even the president of a corporation often has superior knowledge and information, but neither the knowledge nor the information necessarily attaches to those positions.”)). Therefore, the allegation that Dr. Key knew or should have known of the alleged fraud simply by his position, and nothing more, is insufficient as a matter of law to sustain a claim under Rule 9(b).

Unfortunately for the Relators, the most specific allegation that they can truthfully make about Dr. Key is that he signed the application. Indeed, they trumpet this fact as if it is enough to show that he knew or should have known about its alleged falsehoods. This is the same mantra that the Relators have been chanting all along. Now, in their

response, they repeat it like a broken record. In fact, they wrote the verb “sign” or one of its synonyms no less than 14 times:

- “signed and certified” (p.3)
- “signed” (p.7)
- “signed and attested” (p.8)
- “signed and attested” (p.8)
- “signed and attested” (p.9)
- “signed and attested” (p.9)
- “signed” (p.9)
- “authorized” (p.9)
- “signed and attested” (p.9)
- “as . . . signor” (p.10)
- “signed” (p.10)
- “signed” (p.11)
- “authorizing and executing” (p.11)
- “signed” (p.11)

Of course, the problem is not that the Relators are being redundant. The problem is that the Relators are arguing that each beat in their mantra is a *separate* allegation. In the response, they asserted, “The following specific *allegations* are not mentioned by Dr. Key, but are made against Dr. Key in the First Amended Complaint.” (Response, p.8 (emphasis added).) The Relators went on to provide the Court with a list of seven seemingly separate allegations. Instead of actually listing seven separate allegations, however, the Relators simply repeated the same allegation *seven times*.

No matter how many times the Relators repeat themselves, they fail to satisfy the heightened pleading standard under Rule 9(b). That is, they fail to allege the “who, what, where, when and how” of any alleged fraud. *See Corsello*, 428 F.3d at 1014 (quotations omitted). The “how” is especially important here. If the Relators are asserting in this case that Dr. Key was deliberately ignorant of the alleged falsehoods contained within the 1999 grant application, or that he demonstrated a reckless disregard for the falsity of that information, then the Relators must allege *how* he was deliberately ignorant or reckless.

Again, the Relators have asserted how they think *other* Defendants in this case knew or should have known of the alleged falsity of the information in the subject grant applications. As this Court described last year, “In order to support the allegations relating to Defendants’ knowledge of falsity, Relators primarily rely upon correspondence sent to, from, and among Defendants.” (Order dated September 14, 2007, p.10.) In other words, the Relators alleged that other Defendants, all employed by the University of Georgia or the EPA, participated in certain correspondence in which they discussed their research, then submitted research grant applications that contradicted information shared in the correspondence.

Importantly, the Relators have not alleged that Dr. Key, vice president of the separate Foundation, participated in – much less knew about – any such correspondence. Aside from this correspondence, the Relators have not alleged any other way in which Dr. Key actually knew or even should have known about the alleged falsity of the information provided in any grant application that he ever signed on behalf of the Foundation. In other words, the Relators have wholly failed to allege with particularity how Dr. Key could have been deliberately ignorant or reckless in this case, which is the necessary standard for imputed knowledge of a fraud, including falsity alleged under the False Claims Act. *See Ziemba v. Cascade International, Inc.*, 256 F.3d 1194, 1210 (11<sup>th</sup> Cir. 2001) (dismissing under Rule 9(b) because plaintiffs failed to allege “any facts suggesting actual awareness . . . of any fraud” or at least “facts suggesting that [the accounting firm] was severely reckless in not knowing about any fraud.”).

Possibly the Relators think they are satisfying Rule 9(b) by listing the four alleged falsehoods and then asserting that these falsehoods should have been “red flags” to Dr.

Key. As the Eleventh Circuit made clear in *Ziembra*, however, merely listing red flags is not enough. The Relators must further allege that Dr. Key had some reason to spot them. The obvious examples cited in *Ziembra* are “tips, letters, or conversations” in which a person learns about information that is later contradicted in some way. The Relators apparently alleged such “tips, letters, or conversations” regarding other Defendants in the correspondence that the Court identified on page 10 of its order dated September 14, 2007. However, the Relators did not allege that Dr. Key took part in any such correspondence.

Tellingly, the Relators also argued in their response that allegations sufficient to satisfy Rule 9(b) lie elsewhere. For example, they argued that “detailed accounts” of Dr. Key’s fraud are contained in the pleadings. (Response, p.8.) However, the pleadings do nothing more than allege that Dr. Key either actually knew or should have known of the alleged fraud because he signed the grant application. As shown, this is not sufficient as a matter of law. The Relators added that “even more specific acts implicating Dr. Key are sure to surface in discovery.” (Response, p.8.) Surely the Relators are not suggesting that they need discovery in order to fashion allegations sufficient to satisfy Rule 9(b). As the Eleventh Circuit has made clear, 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.” *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1359 (11<sup>th</sup> Cir. 2006) (citation omitted). Since the Relators have failed to identify a single claim suggesting that Dr. Key was deliberately ignorant or reckless in this case, they have failed to satisfy Rule 9(b).

### **Since Dr. Key Must Be Dismissed, So Must the Foundation**

Since the Relators have failed to allege fraud by Dr. Key with particularity, their claims should be dismissed both as to Dr. Key and to the Foundation itself. As the Court has previously held in this case: “Relators have failed to state a claim for vicarious liability against the Foundation, and none of the factual allegations support a claim for direct liability.” (Order dated September 14, 2007, p.17.) As the Court is well aware, a corporation may be held vicariously liable only for the False Claims Act violations of its employees acting within the scope of their employment and for the purpose of benefiting the corporation. *See Grand Union Co. v. United States*, 696 F.2d 888, 891 (11th Cir. 1983) (reaffirming holding of *United States v. Hanger One, Inc*, 563 F.2d 1155) (5th Cir. 1977)<sup>1</sup>. Since the Relators have failed to allege fraudulent conduct by anyone else working for the benefit of the Foundation, and their allegations regarding Dr. Key were not stated with particularity, then both Dr. Key and the Foundation should be dismissed from this civil action.

### **Conclusion**

The Relators clearly know nothing about Dr. Key. They just know that he signed the 1999 application on behalf of the Foundation. In a desperate attempt to keep the Foundation in this case, they now extrapolate that just because Dr. Key signed the application, he actually knew or should have known about the four alleged falsehoods in the application. Clearly, this fanciful extrapolation fails to satisfy Rule 9(b). Under Rule 9(b), the Foundation and Dr. Key should be dismissed from this case. Dr. Key should be

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<sup>1</sup> Decisions issued by the United States Court of Appeals for the Fifth Circuit issued on or before September 20, 1981 are binding precedent on this Circuit. *Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

dismissed because the Relators have failed to assert how he could have known of the alleged falsity of any claim for payment, and the Foundation should be dismissed because Dr. Key is the only individual for whom the Relators have alleged the Foundation to be vicariously liable.

Respectfully submitted,

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This 12<sup>th</sup> day of May 2008.

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