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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FAWN CAIN, TANYA ARCHER, and SANDI OVITT, Relators and Plaintiffs, vs. **SALISH KOOTENAI COLLEGE, INC., et al**., Defendants.	Cause No.: CV 12-181-M-BMM **PLAINTIFFS' RESPONSE OPPOSING MOTION TO DISMISS INDIVIDUALS**

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COME NOW Relators and Plaintiffs ("Plaintiffs"), by and through their counsel of record, Trent Baker and Jason Williams of the law firm Datsopoulos, MacDonald & Lind, P.C., and file this Response in opposition to Motion to Dismiss Individual Defendants (Doc. 111). Plaintiffs oppose the motion to dismiss the individual defendants ("Defendants") on the grounds that the complaint meets the pleading standards of for False Claims Act ("FCA") Claims and the individual defendants are subject to the jurisdiction of this court.

INTRODUCTION

Plaintiffs filed this action seeking to hold the Defendants liable pursuant to the federal False Claims Act, Title 31, United States Code, Section 3729,et seq., by reason of the Defendants' fraudulent conduct which resulted in the government paying unwarranted grant money. In addition, the Defendants took retaliatory actions against the Plaintiffs for their investigation and questioning of the fraudulent conduct.

The Defendants' fraudulent activity included changing nursing student grades, falsifying reports, fraudulently supplying information, and changing information, all of which was supplied to the United States government, so that they could obtain unwarranted grant money from the United States of America. The fraudulent activity resulted in the improper award of over 2.3 million dollars in grant funds from the United States government. Upon learning that the Plaintiffs

questioned the fraudulent activity, the Defendants retaliated against the Plaintiffs in their employment positions. Moreover, the Defendants' conduct enabled a substantial number of ill-prepared students to graduate the program, many of whom were subsequently unable to pass their nursing board examinations and obtain their nursing licenses.

Defendants have now moved to dismiss the individuals named in the suit despite the fact that the Amended Complaint clearly details the fraudulent scheme that these individuals devised and participated in against the Federal Government. The Amended Complaint properly identifies the who, what, where, when and how as required in claims under the FCA.

Defendants' Motion cannot be granted as the Amended Complaint complies with the pleading standards for a FCA claim and Defendants have failed to establish that the Plaintiffs can prove no set of facts in support of his claim which would entitle them to relief.

PLEADING STANDARD FOR FCA CLAIMS

The standard for dismissal under Rule 12(b) is well established. "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." Hicks v. Small, 69 F.3d 967, 969 (9th Cir. 1995) (quoting Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1990)); See also United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1170 (9th Cir. 2006) (applying Rule 12 to False Claims Act). The complaint should not be dismissed "unless it

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id.

"The focus of any rule 12(b) dismissal — both in the trial court and on appeal — is the complaint." Schneider v. California Dep't of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). "We review dismissals under Rule 12(b)(6) de novo, accepting as true all well-pleaded allegations of fact in the complaint and construing them in the light most favorable to the [Plaintiffs/Relators]." Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001).

Under Fed. R. Civ. P. 8(a)(2), a plaintiff's complaint must make a "short and plain statement of the claim." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). The pleading of specific facts in support of a complaint is not necessary. Erickson v. Pardus, 551 U.S. 89, 93 (2007). Instead, a complaint need only give the defendant "fair notice of what the . . . claim is and the grounds upon which it rests." Id. Accordingly, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

Further, when alleging fraud, "a party must state with particularity the circumstances constituting fraud," although "knowledge, and other conditions of a

person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "To meet this standard, an FCA plaintiff must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby. These facts are often referred to as the 'who, what, when, where, and how' of the alleged fraud." United States ex rel. Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 379 (4th Cir. 2008) (internal citations omitted). "A court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts." United States ex rel. DeCesare v. Americare in Home Nursing, 757 F. Supp. 2d 573, 582 (E.D. Va. 2010) (quoting Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999).

The Amended Complaint meets the pleading requirements established for FCA claims. Defendants fail to take the Complaint as a whole and try to piecemeal out paragraphs in their motion instead of looking at the whole Amended Complaint. Moreover, the Amended Complaint clearly states with specificity the fraudulent scheme of the individual Defendants.

I. THE AMENDED COMPLAINT PROPERLY PLEADS SPECIFICITY AS TO INDIVIDUAL DEFENDANTS AND ARE LIABLE UNDER THE FCA CLAIM

In determining whether an official may be liable for money damages in their individual capacity, courts should not rely wholly on "the elementary mechanics of captions and pleading." Idaho v. Coeur d' Alene Tribe of Idaho, 521 U.S. 261, 270 (1997). The Ninth Circuit Court of Appeals in Stoner v. Santa Clara County Office of Educ., clearly stated that individuals in their official capacity are still liable under the FCA. The Court stated:

> We therefore hold that state employees may be sued in their individual capacities under the FCA for actions taken in the course of their official duties. Stoner, 502 F.3d 1116 at 1124-1125.

The Stoner case reasoned that “to state a claim against [the individuals] in their personal capacities, Stoner need show only that the individual employees "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Stoner, 502 F.3d 1116 at 1124. Under the FCA, "knowingly" is defined as "(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729 (b).

Stoner's complaint alleged that the individuals knowingly presented or caused to be presented false or fraudulent statements to the United States Department of Education to obtain federal funds for various educational programs.

If true, these allegations are sufficient to state a claim for personal liability under 31 U.S.C. § 3729(a)(1). The Court stated that the complaint "need not allege that the individual defendants personally profited from such false submissions," and "[n]othing in § 3729(a)(1) requires the person knowingly making a false submission to obtain a personal benefit from the wrongful act." Id.

Stoner indicates that individuals are still liable under the FCA even when they are performing their official duties. The fact that the individuals committed the fraud and then retaliated against the Plaintiffs while performing official duties is irrelevant. The important issue is that the individual Defendants committed fraud and retaliation in violation of the law.

Moreover, the court in Stoner did not look to whether an immune party would later indemnify the individuals. The Stoner case, when analyzing whether the eleventh amendment would bar a FCA claim against an individual acting in a state capacity, held that "the fact that a state may choose to indemnify the employees for any judgment rendered against them bring the Eleventh Amendment into play." Stoner, 502 F.3d 1116 at 1125; citing Demery v. Kupperman, 735 F.2d 1139, 1147-1148 (9th Cir. 1984). "Where a plaintiff seeks to hold individual employees personally liable for their knowing participation in the submission of false or fraudulent claims to the United States government, the state is not the real party in interest, and the Eleventh Amendment poses no barrier to such a suit. Stoner, 502 F.3d 1116 at 1125 (internal citations omitted).

Ninth Circuit District Courts have also followed the Stoner case, holding individuals liable in their personal and official capacity. In Dahlstrom v. Sauk-Suiattle Indian Tribe, a former employee of a tribal health care provider brought actions against the Sauk-Suiattle Indian Tribe, CNM Health Clinic and the individual doctors that owned and operated the health clinic. The Defendants moved to dismiss the individuals based on official capacity and sovereign immunity. The District Court dismissed the claims against the tribe, but allowed the claims against the individuals to proceed. The court indicated "as the reasoning of Stevens extends to provide Tribes with sovereign immunity, so too does the reasoning in Stoner extend to permit suits against individual tribal employees for actions taken in the course of their official duties," because "individual defendants are thus not immune from suit due to sovereign immunity." Dahlstrom v. Sauk-Suiattle Indian Tribe, No. C16-0052JLR, 2017 U.S. Dist. LEXIS 40654, at *10 (W.D. Wash. Mar. 21, 2017) (internal citations omitted).

Furthermore, it is clear that fraudulently changing student data and retaliating against employees goes against the principals and purpose of the Tribes, SKC, and the Foundation. Fraudulently altering data and grades to graduate individuals who are not prepared to take certification tests appears to be contrary to the SKC Mission Statement and therefore outside of the official duties of the Individuals. In addition, acting in a retaliatory manner would not be in line with the mission of the SKC.

It is clear that the individual Defendants were the ones that oversaw and participated in the falsification of data and the preparation and submission of the grant forms which defrauded the United States government of over 2.3 million dollars. It was also the individual Defendants that engaged in the retaliation against the Plaintiffs. The individual Defendants can and should be held accountable for their actions under the False Claims Act.

A. The Amended Complaint Pleads the Who, What, When, Where, and How of the Alleged Fraud

"When fraud is alleged, it must be particularized as Rule 9(b) requires, but it still must be as short, plain, simple, concise, and direct, as is reasonable under the circumstances, and as Rules 8(a) and 8(e) require." Carrigan v. California State Legis., 263 F.2d 560, 565 (9th Cir. 1959). As a general matter, pleadings are sufficient under Rule 9(b) if the defendant can prepare an adequate answer from the allegations. Semegen v. Weidner, 780 F.2d 727, 734-35 (9th Cir. 1985). Rare indeed would be the case that relator possesses all such information prior to suit, and to impose such a pleading requirement would undermine the purposes of the of the False Claims Act. United States ex rel.Springfield Terminal Ry. Co. v Quinn, 14 F.3d 645, 656-57 (D.C. Cir. 1994).

Fraud allegations under Rule 9(b) need to be "'specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they

have done anything wrong.'" Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir. 1993) (internal quotation marks omitted)). Where a complaint identifies "(i) some of the specific customers defrauded, (ii) the type of conduct at issue, (iii) the general time frame in which the conduct occurred, and (iv) why the conduct was fraudulent, it was 'not fatal to the complaint that it [did] not describe in detail a single specific transaction … by customer, amount, and precise method.'" United States ex rel. Lee v. Smithkline Beecham Clinical Labs., 245 F.3d 1048, 1051 (9th Cir. 2001) (citing with approval Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1998)).

The Ninth Circuit Court of Appeals stated when discussing the standard under the False Claim Act that "[i]n our view, use of representative examples is simply one means of meeting the pleading obligation. We join the Fifth Circuit in concluding, "in accord with general pleading requirements under Rule 9(b)", it is sufficient to allege "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." Ebeid v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010) (citing United States ex rel. Grubbs v. Ravikumar Kanneganti, 565 F.3d 180, 190 (5th Cir. 2009)).

Plaintiffs' Complaint complies with Rule 9(b) as Defendants are clearly able to prepare an adequate answer to Plaintiffs' complaint. Under established Ninth Circuit law, that is all that is required. See Semegen, 780 F.2d at 734-35.

The Amended Complaint meets the 9(b) standards when taken as true under Fed R. Civ. P. Rule 12.

Count I states, in addition to incorporating all other facts:

> 38. Beginning in July 2008, continuing through March 2012 **(the when)**, and semi-annually between those dates, SKC and Individual Defendants **(the who)** knowingly presented or caused to be presented to USDHHS and IHS false or fraudulent statements to obtain $1,675,002.00 in federal grant funds **(the what)**, and SKC and Individual Defendants knowingly made, used or caused to be made or used false records or statements to support such claims to federal funds. SKC received **(the where)** federal grant funds totaling $1,340,000.00, distributed in annual $335,000.00 increments, based upon the false or fraudulent statements and records **(the how)**. See Amend. Compl. ¶38. Doc. 40, pg. 20. (notations added) (Dec. 18, 2014).

As for Count II the Amended Complaint states in addition to incorporating all other facts:

> 63. In order to acquire and maintain NWD grant funds, Individual Defendants Fouty, Durglo, Peirre, Swaney, Plant, Acevedo, Kelly, Moran, Ross, Taylor, Frank, Harmon and Hulen **(the who)** each knowingly presented or caused to be presented false or fraudulent statements to the USDHHS, HRSA and HIS to obtain federal funds **(the how)** for various educational programs within the SKC and its Nursing Program **(the where)**, and knowingly made, used or caused to be made or used false records or statements to support such claims, all as more specifically detailed below.
>
> 64. As a result of the false or fraudulent statements and supporting records, SKC received approximately $1,052,339.00 in federal grant funds. **(the what)** The Individual Defendants named above oversaw and participated in or caused the preparation and submission of those applications, reports, and supporting records, which contained representations that they knew to be false. **(the how)** Such applications and reports were submitted on or about July 1, 2009, May 11, 2010, and March 15, 2011 **(the when)**. See Amend. Compl. ¶63-64. Doc. 40, pg. 27 (notations added) (Dec. 18, 2014).

Moreover, the Amended Complaint exceeds the 9(b) standards by providing specific as to: 1. The manner in which grades, retention, graduation rates, course passage and continuing program viability reports were not compliant with the federal grant standard; 2. The improper spending of the grant monies which was a violation of the federal grant procedures; 3. The approximate number of students who had failed but were not reported to Federal officers; 4. The knowledge that the individual Defendants obtained through the Realtor regarding the misrepresentation. See Amend. Compl. ¶29-78. Doc. 40, pg. 18-31 (Dec. 18, 2014).

1. The Amended Complaint identifies "Who" was responsible for the fraudulent actions.

Rule 9(b) does not require that Relator detail specific transactions or identify precise methods used to carry out the fraud. United States v. United Healthcare Ins. Co., 848 F.3d 1161, 1180 (9th Cir. 2016). The complaint need only allege particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted. Ebeid, 616 F.3d at 998.

Defendants complain that the Amended Complaint repeats certain allegations describing each of the various individual Defendant's involvement in the fraud. However, the individual Defendants all acted in similar manners, had similar involvement in the fraudulent behavior, had similar interactions with the

Plaintiffs and similar knowledge. The Defendant has not disputed these allegations and cannot dispute them in a Rule 12b motion before the Court.

Beyond merely identifying the "who," the Amended Complaint pleads particular facts about Defendant's knowledge of, involvement with and motive to execute the fraudulent scheme. See Amend. Compl. ¶7-21; Doc. 40, pg. 3-16 (Dec. 18, 2014). The Defendant argues that the repetition of the allegations is inappropriate. However, under Rule 12(b) motion of dismissal the "facts are taken as true and construed in the light most favorable to the nonmoving party" (Hicks v. Small, 69 F.3d 967, 969 (9th Cir. 1995)) and each of the individual Defendants participated in the fraud. Defendants' argument that the grouping of individual Defendants does not meet the standard is misapplied in this case as the Amended Complaint both specifically identifies the Defendants , the knowledge that they had, the actions that they took, as discussed below, and details of the scheme that they perpetrated.

The Amended Complaint specifies both the parties involved and the actions that they took. Just because a number of individual Defendants acted in a similar manner does not mean that the Amended Complaint did not properly and sufficiently plead the FCA claim in this case. Defendants have not and cannot factually dispute the allegations just because multiple individual Defendants engaged in similar wrongful actions.

2. The Amended Complaint sufficiently describes "What" the fraudulent schemes were.

The FCA claims are based upon allegations that each of the Defendants personally engaged in two different fraudulent schemes. The Amended Complaint describes in detail each of those schemes that resulted in the Defendants knowingly submitting, or causing the submission of, false claims.

First, the PINE Grant scheme is based on allegations that the Defendants caused the SKC records and reports to be altered to comply with federal grant requirements. See Amend. Compl. ¶39-42; Doc. 40, pg. 21 (Dec. 18, 2014). The individual Defendants violated protocols so that SKC would remain eligible for grant funding. See Amend. Compl. ¶43; Doc. 40, pg. 22 (Dec. 18, 2014). Individual Defendants did not follow the retention track plan guidelines when students were failing in the nursing program as required under the federal grant requirements. See Amend. Compl. ¶46, 47; Doc. 40, pg. 22, 23(Dec. 18, 2014). The Amended Complaint also states that the individual Defendants had knowledge about the wrongdoings yet still participated in the illegal scheme. See Amend. Compl. ¶57; Doc. 40, pg. 25(Dec. 18, 2014). The amount of funding that was fraudulently obtained is also identified in the Amended Complaint. See Amend. Compl. ¶38, 49; Doc. 40, pg. 20, 23(Dec. 18, 2014). In addition, the Amended Complaint gives notice that the individual Defendants also engaged in the

retaliatory action taken against the Plaintiffs. See Amend. Compl. ¶58; Doc. 40, pg. 25(Dec. 18, 2014).

Second, the Amended Complaint also specifically describes the individuals' dealings with the NWD Grant. The individuals Defendants again amended, changed, and misrepresented the records required for the federal NWD Grant. See Amend. Compl. ¶63, 64, 66, 70-78, Doc. 40, pg. 27-31(Dec. 18, 2014). The amount involved in that fraudulent activity is also identified. See Amend. Compl. ¶64, 67, Doc. 40, pg. 27, 28 (Dec. 18, 2014).

Finally, the Plaintiffs brought the fraudulent activities to the individual Defendants' attention and the conduct continued and the Plaintiffs were terminated and their grievances denied. See Amend. Compl. ¶77, Doc. 40, pg. 31(Dec. 18, 2014).

The Amended Complaint pleads specific details from which each of the Defendants can discern precisely what conduct they must address in their defense.

3. The Amended Complaint alleges "When" and "Where" the fraudulent schemes were implemented

The Amended Complaint states that the scheme to defraud the money from the federal government involving the PINE grant began in July of 2008 and continued through March 2012. See Amend. Compl. ¶38, Doc. 40, pg. 20 (Dec. 18, 2014). While the fraudulent activity with the NWD Grant occurred during July 2009, May 2010, March 2011 and August 2011. See Amend. Compl. ¶64, 67,

Doc. 40, pg. 27, 28 (Dec. 18, 2014). The Amended Complaint indicates that these are the times in which the individual Defendants submitted the reports to the federal government to obtain the grant money.

The Amended Complaint also indicates that these events occurred while the individual Defendants were employed by or serving on the board of SKC. The action revolves around the fact that SKC received money fraudulently from the federal government. It was during this time that student grades and data were falsified so that SKC would receive $1,675,002.00 from the PINE Grant and $1,052,339.00 from the NWD Grant. See Amend. Compl. ¶38, 64, 67, Doc. 40, pg. 20, 27, 28 (Dec. 18, 2014).

The Amended Complaint alleges "when" and "where" Defendants' fraudulent schemes occurred with sufficient particularity because the specific details regarding when the schemes began and ended, how much and when the SKC received the grant money.

4. The Amended Complaint alleges "How" the fraudulent schemes worked

The Individual Defendants were able to obtain Federal Grant money by acting contrary to the regulations of the grant guidelines. For instance, the Amended Complaint describes the specific requirements of the grants and how the individual Defendants made fraudulent misrepresentations to IHS under the PINE grant. See Amend. Compl. ¶30, 33, 36, 38, 40-46, 48-53, 57-58; Doc. 40, pg. 18-25

(Dec. 18, 2014). The Amended Complaint identifies that the individuals participated in the preparation, review and submittal of the application and reports. See Amend. Compl. ¶30, 39; Doc. 40, pg. 18, 21 (Dec. 18, 2014). The Amended Complaint also alleges that the individual Defendants were aware of the fraudulent activity, ignored reports and warnings from Plaintiffs and continued to knowingly participate in the scheme. See Amend. Compl. ¶58; Doc. 40, pg. 25(Dec. 18, 2014).

The NWD Grant count pleads similar information about the individuals' involvement in the scheme to defraud the federal government. See Amend. Compl. ¶63, 64, 70 – 73, 75-78; Doc. 40, pg. 27-31 (Dec. 18, 2014). Although the counts are similar, that is because the specific circumstances and conduct are similar for the two grants and the individual Defendants employed a similar scheme to fraudulently obtain funds from both grants.

As illustrated above, the Amended Complaint alleges "how" Defendants' fraudulent schemes worked with sufficient particularity on the submission of specific false documents and how Defendants benefitted from those fraudulent actions.

5. Defendants have been made aware of the particular circumstances for which they will have to prepare a defense at trial.

The Amended Complaint (1) puts Defendants on notice as to fraudulent schemes they have allegedly committed and (2) demonstrates that the Plaintiffs

have developed significant facts showing how Defendants devised and implemented those schemes. The Defendants cannot argue that they are unsure or it is unclear on what activity is being alleged in the Amended Complaint. They falsified student grades and other data, submitted reports containing the falsified data, ignored Plaintiffs' reports and continued to seek and obtain federal funds based on the false reports, and then retaliated against the Plaintiffs for blowing the whistle. The Amended Complaint clearly meets the pleading requirements of Rules 8(a) and 9(b) and should not be dismissed.

B. Plaintiffs' Complaint Contains Sufficient Allegations of Materiality

Defendants assert that Plaintiffs failed to plead facts to support the allegation that the Defendants false statements were "material." As set forth above, the Plaintiffs' Complaint alleges that the Defendants falsified student grades and other data and knowingly submitted those false statements to the government so that SKC would receive $1,675,002.00 from the PINE Grant and $1,052,339.00 from the NWD Grant. See Amend. Compl. ¶38, 64, 67, Doc. 40, pg. 20, 27, 28 (Dec. 18, 2014). The misrepresentations were material in that they related to information that was required to obtain the grant funds. The misrepresentations were material in that they not only harmed numerous nursing students who were graduated without the education necessary to obtain licenses and employment as nursing, but also resulted in the award of grant funds in excess of $2.7 million dollars. This is not a case of an insignificant regulatory or contractual violation, but a deliberate

scheme to defraud the federal government without regard to the collateral damage caused to the very students these grant funds were supposed to help. The Defendants' attempts to minimize the "materiality" of their misconduct is shameful.

II. THE INDIVIDUAL DEFENDANTS ARE LIABLE FOR RETALIATION UNDER THE FCA

Defendants assert that the individual Defendants cannot be held liable for retaliation under § 3730(h) of the FCA. However, that assertion is not supported by the plain wording and purpose of § 3730(h) or by any binding precedent.

Section 3730(h)(1) now provides:

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

31 U.S.C. § 3730(h)(1).

In 2009, Congress amended § 3730(h)(1), eliminating language that referred to potential defendants as "employers."[1] Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1624 (2009). The 2009 amendment applies to conduct on or after the date

[1] A subsequent amendment in 2010 cleaned up the language but made no substantive change to the subsection. Pub. L. 111-203, § 1079A(c)(1), 124 Stat. 1376, 2079 (2010).

of enactment, which was May 20, 2009. Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625 (2009). Before the 2009 amendment, § 3730(h)(1) specifically limited plaintiffs' FCA retaliation claims to "employers," providing a cause of action for "[a]ny employee who is discharged . . . by his or her employer because of lawful acts done by the employee. . . ." *Yesudian ex rel. United States v. Howard Univ.*, 270 F.3d 969, 972 (D.C. Cir. 2001) (holding that "the word 'employer' does not normally apply to a supervisor in his individual capacity").

While there appears to be no dispute that the 2009 amendment expanded the class of plaintiffs with claims under § 3730(h)(1), district courts have disagreed on whether the class of defendants subject to liability under that section also expanded. See United States v. N. Am. Health Care, No. 14-cv-02401-WHO, 2015 U.S. Dist. LEXIS 151933, at *24-25 (N.D. Cal. Nov. 9, 2015). Defendants have noted a number of cases the class of defendants was did not expand. There are also courts which found that it did, and that individuals who engage in retaliatory conduct against whistleblowers can be held liable under the amended language of § 3730(h)(1) even if they are not technically the plaintiff's "employer." See United States ex rel. Moore v. Cmty. Health Servs., Inc., No. 3:09cv1127(JBA), 2012 U.S. Dist. LEXIS 43904, 2012 WL 1069474, at *9 (D. Conn. Mar. 29, 2012); Weihua Huang v. Rector & Visitors of the Univ. of Va., 896 F. Supp. 2d 524, 548 n.16 (W.D. Va. 2012); Laborde v. Rivera-Dueno, 719

F.Supp.2d 198, 205 (D.P.R. 2010). The Ninth Circuit Court of Appeals has not addressed the matter.

Here, the individual Defendants engaged in the prohibited retaliatory conduct of which Plaintiffs complain. Plaintiffs alleged that their protected activity included investigating, discussing and reporting complaints and concerns regarding the presentation of the false or fraudulent claims at issue in this case. Amend. Compl. ¶85; Doc. 40, pg. 33 (Dec. 18, 2014). Plaintiffs allege that because of their protected activities, the individual Defendants, "oversaw or participated in adverse employment actions against Plaintiff such as threats, harassment, suspension and other forms of discrimination . . . ultimately resulting in the termination of their employment and cancelation of their contracts in or around May, 2012." Amend. Compl. ¶88; Doc. 40, pg. 33 (Dec. 18, 2014). Plaintiffs also allege that the conduct of individual Defendants prevented Plaintiffs from subsequently obtaining comparable employment, and that individual Defendants blacklisted and defamed the Plaintiffs, preventing Plaintiffs from obtaining other employment following their termination at SKC. Amend. Compl. ¶¶ 91, 95, 96, 97, 104 - 106; Doc. 40, pg. 33 (Dec.18, 2014).

The 2009 amendment extended protection to contractors and agents and should likewise be interpreted to extend the prohibition on retaliation to conduct by an employer's employees, contractors and agents. When Congress eliminated the reference to "employers" as defendants in the 2009 amendment, it opened the door

to claims against individual defendants that participated in various types of retaliatory conduct including discharge, demotion, suspension, threats, harassment and other types of discrimination because of an employee, contractor or agent's protected activity. As is the case here, an employer that is not an individual or natural person can only engage in prohibited retaliatory conduct through the individuals or natural persons who are its agents, contractors and employees. The purpose of § 3730(h)(1) is to protect whistleblowers, whether or not they are "employees," and whether or not the retaliatory conduct is perpetrated by one who is an "employer."

The remedies for a violation of § 3730(h)(1) are set forth in § 3730(h)(2), which provides:

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

31 U.S.C. § 3730(h)(1). The first remedy, reinstatement, would apply only to an employer. However, the other remedies are awards of damages, costs and fees which can be imposed on individual defendants responsible for retaliation just like an award of damages, costs and fees under other provisions of the FCA can be imposed on individual defendants.

For these reasons, the Court should promote the purpose and effectiveness of § 3730(h)(1) of the FCA by denying Defendants' Motion.

III. THE COURT SHOULD EXERCISE SUPPLEMENTAL JURISDICTION OVER STATE LAW CLAIMS

Federal courts may exercise federal question jurisdiction over state law claims that implicate significant federal issues. Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308, 312 (2005). This jurisdictional doctrine "captures the common-sense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law." Id.

In this case, the State law claims are directly tied to substantial questions of federal law. The Plaintiffs investigated and reported the Defendants' fraudulent activity. Their investigation and reporting of that activity is protected under the False Claims Act. However, the Defendants retaliated against the Plaintiffs as set forth above. These same facts support claims under state and federal law, so the Court should not dismiss either.

The Defendants have not provided any support for their assertion that the state law claims are based upon activities which occurred only on tribal land. There is no allegation or evidence that the retaliatory conduct, including defamation and blackballing, only occurred on tribal land.

The cases cited by Defendants are inapposite. In Williams v. Lee, the Court reversed a ruling by the Supreme Court of Arizona that state courts had jurisdiction of a civil suit against reservation Indians for goods sold them by plaintiff, a non-Indian operating a store on the reservation, based in part upon a finding that Arizona had not accepted jurisdiction over such matters. Williams v. Lee, 358 U.S. 217, 222-23 (1959). The facts of this case are neither similar nor analogous.

In United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992), the United States brought suit in federal district court (in its own right and on behalf of the Crow Tribe) against an Indian couple (the Plainbulls), alleging that they trespassed on tribal trust land and failed to comply with orders to pay annual grazing fees on the Crow reservation. The Ninth Circuit Court of Appeal affirmed the district court's dismissal on abstention grounds because the action "essentially involves the enforcement of a tribal resolution against a tribal member," a matter which "the Government should have filed in the tribal court." Id. at 725, 728. Those are nothing like the facts of this case.

Plainbull is instructive in that it recognizes that the doctrine of abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Id. at 727 (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959). Defendants have failed to justify application here of this extraordinary and narrow exception and have not articulated or applied the appropriate analysis for abstention in this case.

IV. IN THE ALTERNATIVE, THE PLAINTIFF/REALTOR SHOULD BE ALLOWED TO AMEND THE COMPLAINT

Dismissals under Rule 9(b) are functionally equivalent to dismissals under Rule 12(b)(6). See Swartz v. KPMG LLP, 476 F.3d 756, 765 (9th Cir. 2007). Leave to amend, therefore, should be granted unless the pleading "could not possibly be cured" by the allegation of other facts. Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001).

In United States v. United Healthcare Ins. Co., 848 F.3d 1161, (9th Cir. 2016), the court evaluated whether the Plaintiff should be allowed to amend the complaint a fifth time. Id at 1182-83. The court allowed the Plaintiff to amend the complaint a fifth time because it was the first time that the Defendant argued that the Complaint lacked specificity as to the actions of the individuals. The court reasoned since this was the first time that the Defendants attacked the complaint as to the sufficiency of the pleadings the Plaintiff should be allowed to amend the Complaint. Id.

Plaintiffs assert that the claims against the individuals are adequately plead. But, should the court find that the Amended Complaint not be sufficiently plead, the Plaintiffs should be allowed to amend the complaint as this is the first time that Defendants have raised the issue about sufficiency of allegations plead against the individuals Defendants.

CONCLUSION

The Defendants' Motion to Dismiss should be denied because the Amended Complaint properly plead conduct in violation of the FCA and gave the Defendants appropriate notice of the actions that they will need to defend. Moreover, the counts against the individuals as they relate to the retaliation against the Plaintiffs should not be dismissed because the Amended Complaint properly plead conduct by the individual Defendants in violation of that provision in the FCA, and the statute does not limit such claims to the employer. For the foregoing reasons, the Court should deny the Motion to Dismiss the Individual Defendants.

DATED this 20th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

In accordance with U.S. District Court Local Rule 7.1(d)(2), the undersigned certifies that the word count of the above brief, excluding captions, certificates of service and compliance, table of contents, table of authorities, and exhibit index is 5,806.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon the following counsel of record, by the means designated below, this 20th day of July, 2018.

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