UNITED STATES DISTRICT COURT
FOR THE ZZZZZZZZ DISTRICT OF MMMMMM
WWWWWWW DIVISION

URIAH HEEP, Relator,	§	
Bringing this Action of Behalf of	§	
The United States Government	§	
	§	
Plaintiff,	§	Case No.
	§	
vs.	§	
	§	
JOHN PAUL XXXXXX,	§	
and MELVIN FELON	§	
	§	
Defendants.	§	

DEFENDANT XXXXXX'S MOTION TO DISMISS PURSUANT TO RULES 9(b) AND 12 (b)(6)

COMES NOW John Paul Xxxxxx, Defendant herein, and makes this his motion to dismiss the Amended Complaint in this action (hereinafter referred to as the "Complaint") under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, stating as follows:

SYNOPSIS OF THE CASE

This case arises out of the misapplication of federal funds disbursed to Yyyyyyyy, Inc., under a federal grant (the "Yyyyyyyy Grant") during the years from 20XX to 20YY Melvin Felon, a Defendant in this action, was prosecuted and convicted in the Zzzzzzzz District of Mmmmmm, *United States v. Felon,* Case No. 5:10-cr-234, for a felony misapplication of Yyyyyyyy Grant funds. The court may take judicial notice of those proceedings,[1] and relevant documents from that

[1] "In deciding a motion to dismiss the court may consider . . . documents attached matters of which judicial notice may be taken." *Lovelace v. Software Spectrum Inc.,* 78 F.3d 1015, 1017–18 (5th Cir.1996). *Colonial Penn Ins. Co. v. Coil,* 887 F.2d 1236, 1239 (4th Cir, 1989)([t]he most frequent use of judicial notice of ascertainable facts is in noticing the content of court record")(citation omitted).

prosecution are attached in the Appendix. Appendix 001-006. Mr. Heep alleges he was an employee of Yyyyyyyy and that it was his revelations of misspent grant money which led to the criminal prosecution. He further alleges that Mr.. Xxxxxx was an officer of Yyyyyyyy and claims that Mr. Xxxxxx is liable for damages under three provisions of the False Claims Act.

Mr. Xxxxxx contends in this motion that the claims against him do not meet the requirements of Rule 9(b) of the Federal Rules of Civil Procedure and therefore must be dismissed under Rule 12(b)(6).

STATEMENT OF THE ISSUES

(1) Whether the Court should dismiss Count I against Mr. Xxxxxx for the failure of the Complaint to state the circumstances constituting Mr. Xxxxxx's alleged fraud with particularity;

(2) Whether the Court should dismiss Count II against Mr. Xxxxxx for the failure of the Complaint to state the circumstances constituting Mr. Xxxxxx's alleged fraud with particularity;

(3) Whether the Court should dismiss Count III against Mr. Xxxxxx for the failure of the Complaint to state the circumstances constituting Mr. Xxxxxx's alleged fraud with particularity.

THE FIFTH CIRCUIT HAS ESTABLISHED CRITERIA TO ACHIEVE RULE 9(b)'S IMPORTANT PROTECTIVE GOALS

Rule 9(b) requires that

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

The law in the Fifth Circuit has long been that claims under the False Claims Act are essentially fraud claims, and the allegations of an FSA claim must comply with Rule 9(b). See, e.g., *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir 1997).

The Importance of Rule 9(b)

The leading treatise on the False Claims Act lists five major purposes of this requirement:

> (1) to provide the defendant with enough notice to allow for the development of a defense against the charges (including the filing of dispositive motions); (2) to eliminate fraud actions in which all of the facts are learned after discovery; (3) to safeguard potential defendants from frivolous accusations of moral turpitude; (4) to protect defendants from harm to their goodwill and reputation; and (5) to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.

BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS §5.04 (Fourth Ed. 2013). Rule 9(b) does not impose a pointless technicality. The Fifth Circuit has pointed out that Rule 9(b) was promulgated in 1938 in the original federal rules of civil procedure as an important counterweight to the broad discovery rules those rules inaugurated:

> The cry of pleading technicalities must be put in perspective. The rules of civil procedure adopted in 1938 implemented a profound change in the role of pleading in defining issues for trial. In the main, the complaint became an ignition point for discovery. Issues were to be "defined" by discovery, not pleading. Our reverential treatment of the large achievements of the 1938 rules may not have fully counted its price, or at least the price over time seems to have gone up as pretrial process dwarfs actual trials. We do not fully understand the extent of these difficulties or their cause. It does remain clear that ready access to the discovery engine all the while has been

> held back for certain types of claims. An allegation of fraud is one. Rule 9(b) demands a larger role for pleading in the pre-trial defining of such claims.

Williams v. WMX Technologies, Inc., 112 F.3d 175, 178 (5th Cir. 1997). These words perhaps ring truer today than when they were written almost two decades ago as the trial process labors under increasingly onerous burdens of discovery. As Judge Higginbotham wrote,

> In cases of fraud, Rule 9(b) has long played [the]screening function [of raising a hurdle in front of plaintiff's nigh immediate access to discovery], standing as a gatekeeper to discovery, a tool to weed out meritless fraud claims sooner than later. We apply rule 9(b) to fraud complaints with "bite" and "without apology."

U.S. ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 187 (5th Cir. 2009). In its own way, Rule 9(b) acts in the role of gatekeeper not entirely unlike the role of the grand jury in criminal proceedings.

Rule 9(b) in the Fifth Circuit

Stringent standards have been set for pleadings that satisfy Rule 9(b). In the Fifth Circuit,

> At a minimum, Rule 9(b) requires that a plaintiff set forth the "who, what, when, where, and how" of the alleged fraud

U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 903 (5th Cir. 1997). Phrased differently, Rule 9(b)

> requires a plaintiff to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir.1993).

Williams, 112 F 3d at 177-178.

It is possible to satisfy Rule 9(b) in False Claims Act cases without the particulars of specific bills having been sent on the to Government, but in such cases , there must be

> particular and reliable indicia that false bills were actually submitted as a result of the scheme – such as . . . evidence of the [defendant's] standard billing procedure.

U.S. ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 189 (5th Cir. 2009). In a case where a violation of the Anti Kickback Act were coupled with False Claims Act claims, the court said in finding the False Claims Act pleadings inadequate under Rule 9(b):

> while the complaint contains a somewhat detailed account of KBR's alleged kickback scheme, it is devoid of any reliable indicia that false claims were actually presented to the government. Specifically, the complaint states only that "the cost of [the tainted subcontracts] was inflated at a minimum by the amount of the kickbacks paid by EGL and Panalpina and accepted by" KBR, which subsequently invoiced those costs to the Army under LOGCAP III. The court finds this conclusory allegation insufficient to serve as "reliable indicia that leads to a strong inference that [false] claims were actually submitted." *Grubbs,* 565 F.3d at 189

U.S. ex rel. Vavra v. Kellogg Brown & Root, Inc., 903 F.Supp.2d 473, 486-487 (E.D. Tex. 2011), *reversed and remanded only on Anti Kickback Act claims,* 727 F.3d 343 (5th Cir. 2013).

Mr. Heep's theory seems to be: lots of bad things were happening so there must have been false claims submitted.[2] Without the "reliable indicia that false bills were actually submitted," however, Rule 9(b) is not satisfied by that line of reasoning.

Mr. Heep's Ignorance of Relevant Procedures at Yyyyyyyy
And the Unusual Nature of the Yyyyyyyy Grant

There is a reason why Mr. Heep cannot provide this sort of reliable data about billing and claims presented to the government for payment: he knows nothing about the financial side of Yyyyyyyy. Mr. Heep worked as a software developer for Yyyyyyyy from 20XX through 20ZZ. Complaint ¶9. His tasks were all on the technological side of Yyyyyyyy.[3] He does not allege that

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[2]E.g., Complaint ¶ 56: "This ensured that a false or fraudulent claim would be allowed or paid for the cost of the laptop by Yyyyyyyy, and ultimately by the government, which was funding Yyyyyyyy."

[3]Complaint ¶ 11: Heep's duties "included proofreading the technical portions of the original grant proposal submitted in 2003, designing and implementing the majority of the software developed during the grant, and overseeing the work of other software developers and artists that contributed to the grant project. Relator was also the primary author of the technical portions of the quarterly progress reports for the grant."

he had any contact with the funding of the grant or the financial side of Yyyyyyyy. He is not able to allege anything about, for example, Yyyyyyyy's "standard billing procedures," or whether any such procedures existed.

There is another problem that Mr. Heep tries to sidestep. It appears that this grant may be one where no claims for expenses were sent to the government for payment. The Complaint refers to the Yyyyyyyy Grant as an "NIST ATP" grant. Complaint ¶14. NIST is the National Institute of Standards and Technology, an institute within the U.S. Department of Commerce; ATP refers to Advanced Technology Program, a unique program that existed within NIST until 2007. In ATP's charter, posted at http://www.atp.nist.gov/atp/charter.htm, Appendix 010, ATP said it invested government funds in "high risk research." ATP felt this was a task for government because "few financial institutions, venture capitalists, and angel investors fund unproven, early-stage technologies." *Id.* The charter went on to state:

> ATP accelerates the development of new-to-the-world technologies by sharing the cost and the risk with companies when research risks are too high for the private sector to bear alone.

Id. ATP grants created "partnerships with the private sector," in which the private sector would contribute capital. *Id.* In the case of the Yyyyyyyy Grant, $90,600.00 in private funds were to be contributed to the venture. Appendix 007-009. It appears that ATP researchers like Mr. Felon were given substantial leeway in their expenses since, after all, the project was experimental and the bright young folk getting these grants needed flexibility to follow up on any promising lines of inquiry.

The success of the Yyyyyyyy Grant, a high risk project, was to be measured not in dollars spent to develop a product – the "high risk" in this sort of research is that no product whatsoever will be produced – but in the technological progress that was made. Mr. Heep hints at this in his several

references to importance of the progress reports that were given to NIST in the course of the grant and suggests that lack of performance would have led to a termination of the grant. Complaint ¶¶ 20, 23, 35, 36, 48, 53, 59. Since he claims to have been the only person working on the Yyyyyyyy Grant project, Complaint ¶ 23, 30 , that he was the "primary author of the technical portion of the quarterly portions of the quarterly progress reports for the grant," Complaint ¶11, and attended meetings on the progress of the grant, Complaint ¶ 35, this is an area on which he had a great deal of knowledge. He refers to false or misleading progress reports, Complaint ¶¶ 20, 48, 52, but never suggests what it was in these progress reports that was false. Perhaps it was his contributions that were false, and he is chary about incriminating himself. One sympathizes with that motivation, but the fact remains that the allegedly false progress reports do not meet the Rule 9(b) standard because he doesn't provide us with the "'who, what, when, where, and how' of the alleged fraud."

Mr. Heep Misleads the Court About the Criminal Investigation and Prosecution

Mr. Heep misleads the court regarding Mr. Felon's criminal prosecution. Mr. Heep states that the criminal investigation was one regarding "grant fraud committed by the Defendants," Complaint ¶¶ 8, 16, 23, 31, 33, 57, 67. That is inaccurate. Mr. Felon was prosecuted not for fraud but for misapplication of grant funds. Appendix 005. The government made no claim that fraudulent documents were submitted to the NIST, but rather, that the money, once received, was misspent by Mr. Felon – intentionally misspent and therefore criminal. As discussed above, there is a very strong possibility that this was a project without claims for payment, but rather a block grant with discretionary spending. It was the unauthorized discretionary spending which was criminal, not a series of false claims.

Mr. Heep also greatly exaggerates the magnitude of the misapplication of funds. He tells us

that the government investigators found that $811,937 of the Yyyyyyyy Grant money had been diverted to pay salaries of Socratic employees. Once again, there is a much more accurate assessment of the amount misspent. Taking judicial notice of the pleadings in Mr. Felon's criminal case, the court will see that the total misapplication of funds was $100,207.41. App. 006. The investigators overstated the loss by over 800%. Perhaps the investigators wanted to burnish their reputations by getting the US Attorney to prosecute the case, and since they knew that it was highly unlikely that the US Attorney would prosecute a case where the loss to the government was scarcely $100,000, they conjured up a more impressive number, albeit one that was wholly unsustainable. Perhaps the investigators were less than candid in other aspects of their report as well.

One thing we can be fairly sure of is that the criminal investigators were not investigating false claims. Mr. Heep obviously had access to their report, and if they had been investigating any false claim, one can be sure that Mr. Heep would have included the particulars in his horse-choker of a complaint.

Let us then turn to the allegations against Mr. Xxxxxx.

COUNT I AGAINST MR XXXXXX IS INADEQUATE UNDER RULE 9(B) AND MUST BE DISMISSED

Count 1 is that Mr. Xxxxxx violated 31 U.S.C. § 3729(a)(1), as it existed in the years 20XX-20ZZ, that provision having been amended in 2009. The statute then read:

> **Section 3729 False Claims**
>
> (a) LIABILITY FOR CERTAIN ACTS. – any person who –
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United State Government or a member of the Armed Forces of the United State a false or fraudulent claim for payment or approval
>
> * * * * *
>
> is liable to the United States Government . . .

The definition of "claim," 31USC § 3729(c), also amended in 2009, at that time read:

> CLAIM DEFINED – For purposes of this section, "claim" includes any requests or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee or other recipient for any portion of the money or property which is requested or demanded.

If There Is No False Claim There Is No Lawsuit

As the title of the False Claim Act would suggest, "The submission of a claim is . . . the *sine qua non* of a False Claim Act violation." *U.S. ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002); accord, *U.S. ex rel. Bennett v. Boston Scientific Corp*., 2011 WL 1231577 *2 (S.D. Tex. 2011). There needs to be a claim filed for there to be a suit under the False Claims Act. And Mr. Heep has not pled any false claim filed by Mr. Xxxxxx or by anyone else.

Mr. Heep Misleads the Court about Documents He Has Intentionally Withheld

What Mr. Heep would like to style Mr. Xxxxxx's false claims are three documents that Mr. Xxxxxx signed, each entitled "Amendment to Financial Assistance Award," and dated 7/20/20XX, 3/23/20YY and 3/24/20ZZ. Complaint ¶ 14. Mr. Craft makes clear that these documents are the basis of the three counts he alleges against Mr. Xxxxxx. Complaint ¶¶ 58, 60, 61. Mr. Heep , however, did not see fit to attach these documents that are so central to his case against Mr. Xxxxxx.

All three documents are attached in the Appendix to this motion at pages 007-009, and it is quite clear why Mr. Heep did not attach them. They are quintessential bureaucratic red tape that don't resemble any kind of a demand for payment. They do not even have any of the language which Mr. Heep says they have. Mr. Heep claimed that the documents

> said that as a condition of the NIST ATP grant . . . Mr. Xxxxxx agreed to exclusively spend the money on the NIST ATP grant project . . .

Complaint ¶14. They do not contain any language like that. Mr. Heep alleged

> all of these documents signed by . . . Mr. Xxxxxx were ***expressly*** made subject to 15 CFR 14.21 which was ***expressly referenced*** in the special award conditions advanced technology program" section. [Emphasis added]

Complaint ¶14. The repeated word "expressly" unequivocally conveys that the language he speaks of is in the very document which Mr. Xxxxxx signed. But it isn't. In these documents there is no mention whatsoever of 15 CFR 14.21, and there is no "'special awards conditions advance technology program' section." which Mr. Heep alleges was "expressly referenced" in the documents. Mr. Heep alleges that in these documents Mr. Xxxxxx was

> agreeing and promising that [Mr. Xxxxxx] would use the NIST ATP grant money awarded to Yyyyyyyy exclusively on the grant project

Complaint ¶14. There is no such agreement or promise in these documents. While in ruling on a

motion under 12(b)(6) and Rule 9(b), the court "accepts as true the well-pled factual allegations in the complaint," *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir.2002); *U.S. ex rel. Willard v. Humana Health Plan of Mmmmmm Inc.*, 336 F.3d 375, 379 (5th Cir 2003), that judicial acceptance evaporates when the plaintiff misrepresents the contents of the very documents on which he bases his allegations.

These documents, moreover, don't vaguely resemble claims within the statutory definition. And if Mr. Heep does consider them to be claims, he gives us no idea of what statement in them is false. He was clearly hoping by not producing the documents to be able to characterize them in a wholly inaccurate manner in order to bypass the stringent requirements of Rule 9(b). Unfortunately, he has been caught in his deceit. Better to find out now rather than later that he is untrustworthy.

It is apparent that these three documents are the only direct evidence that Mr. Heep has against Mr. Xxxxxx. With respect to Mr. Felon, Mr. Heep recounts fairly extensive personal contacts and conversations with him. Clearly he had regular contact with both of them and a good opportunity to observe their actions. He adduces no such evidence against Mr. Xxxxxx. The inference is clear: Mr. Heep never saw or heard Mr. Xxxxxx do anything involving any fraud on the government. Indeed, it appears that he never saw or heard Mr. Xxxxxx do anything.

Thus his conclusions about Mr. Xxxxxx, his actions and his motives are pure speculation, sometimes parroting statutory language. For example, Mr. Heep alleges:

> Mr. Xxxxxx caused to be presented to an officer or employee of the US, all of the false or fraudulent claims for payment or approval regarding all Yyyyyyyy payroll money and other grant resources that was diverted from Yyyyyyyy to Socratic Learning.

Complaint ¶59. This is clearly conclusory. And in the Fifth Circuit, as in other circuits,

> "conclusory allegations . . .will not suffice to prevent a motion to dismiss," [*Taylor v. Books A Million, Inc.,* 296 F.3d 376, 378 (5th Cir.2002)] and neither will "unwarranted deductions of fact." *Guidry v. Bank of LaPlace,* 954 F.2d 278, 281 (5th Cir.1992).

U.S. ex rel. Willard v. Humana Health Plan of Mmmmmm Inc., 336 F.3d 375, 379 (5th Cir. 2003). Mr. Heep's allegations against Mr. Xxxxxx are overwhelmingly conclusory.

Mr. Heep's Final Threadbare Argument

What appears to be the gravamen of Mr. Heep's claims against Mr. Xxxxxx is the alleged "failure on his part to adequately safeguard grant fund assets." Complaint ¶19; *see also* ¶¶ 22, 25, 58, 59, 60 & 61. Mr. Heep quotes15 CFR 14.21(b)(3), a regulatory section setting out the requirements for the financial management system of the award recipient, and seizes on the language that says:

> Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

In the first place, he does not allege any basis on which it was Mr. Xxxxxx's duty to safeguard assets. Merely giving Mr. Xxxxxx the title of CEO does not tell us anything about his duties. In small corporations like Yyyyyyyy, titles tell us very little about what an officer's actual responsibilities are. But even if but even if it had been Mr. Xxxxxx's responsibility to safeguard assets – and Mr. Heep had credibly alleged the particulars of how Mr. Xxxxxx failed to safeguard them – that would not make Mr. Heep's case. The violation of a Federal regulation does not by itself rise to the level of a violation of the False Claims Act. As the Fifth Circuit said in *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010),

> The FCA is not a general "enforcement device" for federal statutes, regulations, and contracts. *U. S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir.1997), *see also Mikes v. Straus*, 274 F.3d 687, 699(2nd Cir. 2001)

> (observing that FCA "was not designed for use as a blunt instrument to enforce compliance"). Not every breach of a federal contract is an FCA problem.

REITERATED, *U.S. ex rel. Steury v. Cardinal Health, Inc.,* 735 F.3d 202, 205 (2013); SEE ALSO *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp*., 125 F.3d 899, 902 (5th Cir. 1997)("claims for services rendered in violation of a statute do not necessarily constitute false or fraudulent claims under the FCA"). If Mr. Xxxxxx failed adequately to supervise the spending of the funds that is insufficient for liability under the FCA.

> Negligence or even gross negligence does not suffice. . . . Thus, "mismanagement alone of programs that receive federal dollars" does not impose liability under the False Claims Act. [citations omitted]

U.S. ex rel. Stennett v. Premier Rehabilitation Hosp., W.D. La., Case 3:08-cv-00782-EEF-KLH, (January 21, 2011) adopted at WL 841074.

Mr. Heep Is Not above Muddying the Waters

> Mr. Heep speaks of a closed-door session with Mr. Felon in which Mr. Felon told him that
>
> Sydney [*sic*] M. Xxxxxx, a major investor in both Yyyyyyyy and Socratic Learning, Inc., was pressuring him to misappropriate these funds.

Complaint ¶31. The evidence in the public record is that Mr. Felon's statement has been shown to be without merit. Let us turn again to the record of Mr. Felon's prosecution. In that prosecution, Mr. Felon said the same thing to the US Attorney, as is recorded in his Factual Resume where he stated:

> "J.P.X.", the chief executive officer of Yyyyyyyy, identified by his initials,
>
> * * * * *
>
> **Felon** confirmed that he intentionally misapplied NIST/ATP grant funds at the direction of "J.P.X."

Appendix 004-005. It is quite clear that "J.P.X." is John Paul Xxxxxx. The court's long experience

with federal prosecutions will recognize that this format indicates that the major focus of the Yyyyyyyy criminal investigation was Mr. Xxxxxx. Mr. Felon was the small fish; Mr. Xxxxxx was the big fish.

But the big fish turned out to be no fish at all. The court should take judicial notice of the fact that no criminal charges regarding the misspent Yyyyyyyy funds were ever filed against Mr. Xxxxxx – in the Zzzzzzzz District of Mmmmmm nor anywhere else. The court may take further judicial notice that the prosecuting attorney was Edward Prosecutor, a highly-respected and skilled, long-time career prosecutor. The court's experience in working with such prosecutors will doubtless support the inference that such a prosecutor would certainly have relished prosecuting any person who from a position of power was ordering the misapplication of federal funds. And yet no criminal charges were ever filed against Mr. Xxxxxx. The inescapable inference is that Mr. Felon's claim was exposed for what it was: a fabrication cooked up by Mr. Felon to reduce his criminal culpability.

The court should know that this case is the fourth time that Mr. Xxxxxx has been involved in dealing with federal authorities or courts because of these baseless claims of Mr. Felon. The first was the criminal investigation. He presented his case to Mr. Prosecutor, and no action was taken. The second was this case. Mr. Xxxxxx presented his case to Assistant U.S. Attorney John Doe, and thereafter the United States declined to intervene in this action. The third time was when, based on the same claims, the Commerce Department in 2012 moved to debar Mr. Xxxxxx from doing business with the federal government. Again he presented his case. Again, nothing was done. At some point all this needs to come to an end.

COUNT II AGAINST MR XXXXXX IS INADEQUATE UNDER RULE 9(B) AND MUST BE DISMISSED

In Count II, Mr. Heep claims that Mr. Xxxxxx has violated 31 USC §3729(a)(1)(B), which establishes liability under the False Claims Act for any person who

> knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim

This provision was amended in 2009, replacing language that established liability for any person who

> knowingly makes, uses or cause to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government

Formerly 31 USC § 3729(a)(2). The 2009 amendment was made retroactive. While there are strong arguments, both statutory and constitutional, that the 2009 amendments do not apply to the facts of this case,[4] it makes no difference with respect to Mr. Xxxxxx which version of the statute is applied. He is not liable under Count II for the same reason that he was not liable under Count I: both versions of the statutory violation require a false or fraudulent claim; there is no allegation of the

[4]See BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS §§1.09(A)(6) (FOURTH ED. 2014). The statutory argument is that the amendments were made retroactive only to claims pending in 2008. The term "claim" is defined in the statute as request to the Government for payment; its meaning does not extend to lawsuits or claims made in lawsuits. The Fifth Circuit has dropped a footnote misreading the statute in precisely this manner, *U.S. ex rel. Steury v. Cardinal Health, Inc*., 625 F.3d 262, 267 n.1 (5th Cir. 2010), a footnote contradicted in at least one footnotes in a later case *Gonzalez v. Fresenius Medical Care North America*, 689 F.3d 470, 475 n.4 (5th Cir. 2012). *Steury*, however, has no precedential value. The footnote is purely *obiter dictum*, unnecessary to the court's decision. See *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (1991)(dicta have no *stare decisis* value). Moreover, *Steury's* footnote does not consider the constitutional problem with retroactivity: if 31 USC §3729(a)(1)(B) as amended applies to claims made or pending prior to enactment of the amendment, it will violate Ex Post Facto prohibition of the Constitution. The False Claims Act is a punitive statute, *U.S., ex rel. Ramadoss v. Caremark Inc.*, 586 F.Supp.2d 668 (S.D. 2008) (Ferguson, J.); *Vermont Agency of Nat. Res. v. U.S. ex Rel. Stevens,* 529 U.S. 765 (2000) , and a punitive statute applied retroactively is an *ex post facto* law. The only case counsel discovered in the Fifth Circuit to consider both aspects of the retroactivity of the 2009 amendments at some length, *U.S. ex rel. Gonzalez v. Fresenius Medical Care North America*, 748 F.Supp.2d 95, 106ff (W.D. Tex. 2010), *aff'd*, 689 F.3d 470 (2012), decided that the amendment applied to claims pending at enactment, but not to lawsuits then pending. That *Steury* did not consider these constitutional issues is yet another reason why it does not have *stare decisis* effect. *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1212 (1991)(prior decision which did not consider constitutional issue before the court was not binding precedent).

existence of such a claim that satisfies rule 9(b), much less the existence of any relationship between any such claim and Mr. Xxxxxx. Both versions of the statute also require a "false record or statement." Again, there is no well-pled allegation of such a record or statement made or caused to be made by Mr. Xxxxxx.

COUNT III AGAINST MR XXXXXX IS INADEQUATE UNDER RULE 9(B) AND MUST BE DISMISSED

The third count against Mr. Xxxxxx is a conspiracy claim. It is based on a violation of the former 31 U.S.C. § 3729(a)(3) (also amended in 2009). It imposes liability on anyone who

> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.

The leading treatise on the False Claims Act states that there are six elements to a False Claims Act conspiracy:

(1) A claim to the United States
(2) A false or fraudulent claim
(3) Payment or approval by the government
(4) An agreement to submit that false claim
(5) An act in furtherance of the object of the agreement; and
(6) Intent to defraud.

BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS §2.01[E] (Fourth Ed. 2014). Again, since there is no allegation a false or fraudulent claim which meets the requirements of Rule 9(b), this claim, too, must be dismissed.

CONCLUSION

All claims against Mr. Xxxxxx should be dismissed with prejudice.

Respectfully submitted

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Certificate of Service

The undersigned attorney hereby certifies that he served the attached document on counsel for all parties this 00th day of Month, Year, by electronic service.

/s/ Eugene Zemp DuBose
Eugene Zemp DuBose