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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES ex rel. SHARMAN  
WOOD,

Plaintiff,

v.

FAMILY HEALTHCARE NETWORK, et  
al.,

Defendants.

1:07-cv-00700-OWW-SKO

MEMORANDUM DECISION REGARDING  
MOTION TO DISMISS (Doc. 58)

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**I. INTRODUCTION.**

Plaintiff Sharman Wood ("Plaintiff") proceeds with this action pursuant to the False Claims Act on behalf of the United States. Plaintiff filed the complaint on May 11, 2007. (Doc. 1).

Defendants filed a motion to dismiss the complaint on August 27, 2010. (Doc. 58). Plaintiff filed opposition to the motion to dismiss on October 15, 2010. (Doc. 63). Defendants filed a reply on October 25, 2010. (Doc. 64).

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**II. FACTUAL BACKGROUND.**

Family HealthCare Network ("FHCN") is a private health care center that provides primary care services at clinical facilities located throughout Tulare County in California. (Comp. at 2, 5). Defendant Harry L. Foster ("Foster") was the President and Chief Executive Officer ("CEO") of FHCN at all times relevant to the

1 complaint. (Comp. at 6). Defendant Tony M. Weber ("Webebr") was  
2 the Chief Financial Officer ("CFO") of FHCN at all times relevant  
3 to the complaint. (Comp. at 6).

4 On February 23, 2003, FHCN submitted an application for an  
5 Expanded Medical Capacity grant to the Health Resources and  
6 Services Administration ("HRSA"), an agency of the United States  
7 Department of Health and Human Services ("HHS"). (Comp. at 7, 8).  
8 FHCN's February 2003 grant application requested funds for  
9 expanding the staff and extending the operating hours at FHCN's  
10 clinic in Ivanhoe, California. (Comp. at 15). On August 8, 2003,  
11 FHCN was awarded a grant in the amount of \$1,980,000.00 ("Ivanhoe  
12 grant") based on the information provided in its February 2003  
13 grant application. (Comp. at 9). FHCN submitted a second grant  
14 application to the HRSA on April 29, 2003 seeking funds to hire  
15 additional staff needed to establish a new FHCN clinic in Goshen,  
16 California. (Comp. at 8, 15). On September 21, 2003, FHCN was  
17 awarded a grant in the amount of \$4,200,833.00 ("Goshen grant")  
18 based on the information provided in its April 2003 grant  
19 application. (Comp. at 9).

20 Foster and Webber provided proposed staffing and budget  
21 figures included in the Ivanhoe and Goshen grant applications.  
22 (Comp. at 15). Both the Ivanhoe and Goshen grant applications  
23 represented that additional staff were needed, that recruitment for  
24 the positions proposed in the grant applications was underway, and  
25 that all proposed positions would be filled within ninety days of  
26 a grant award. (Comp. at 17-18). The complaint alleges that at  
27 the time FHCN submitted the Ivanhoe and Goshen grant applications,  
28 Foster and Webber did not intend to hire the staff proposed staff

1 and knew the proposed staff would not be hired. (Comp. at 15, 21,  
2 22). The complaint also alleges that when FHCN submitted progress  
3 reports in connection with the Ivanhoe and Goshen grants,  
4 Defendants knew that data presented in the reports unduly inflated  
5 the number of "new users" serviced at the clinics. (Comp. at 26).

### 6 **III. LEGAL STANDARD.**

7 Dismissal under Rule 12(b)(6) is appropriate where the  
8 complaint lacks sufficient facts to support a cognizable legal  
9 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th  
10 Cir.1990). To sufficiently state a claim to relief and survive a  
11 12(b)(6) motion, the pleading "does not need detailed factual  
12 allegations" but the "[f]actual allegations must be enough to raise  
13 a right to relief above the speculative level." *Bell Atl. Corp. v.*  
14 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).  
15 Mere "labels and conclusions" or a "formulaic recitation of the  
16 elements of a cause of action will not do." *Id.* Rather, there must  
17 be "enough facts to state a claim to relief that is plausible on  
18 its face." *Id.* at 570. In other words, the "complaint must contain  
19 sufficient factual matter, accepted as true, to state a claim to  
20 relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S.  
21 ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal  
22 quotation marks omitted).

23 The Ninth Circuit has summarized the governing standard, in  
24 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to  
25 survive a motion to dismiss, the nonconclusory factual content, and  
26 reasonable inferences from that content, must be plausibly  
27 suggestive of a claim entitling the plaintiff to relief." *Moss v.*  
28 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal

1 quotation marks omitted). Apart from factual insufficiency, a  
2 complaint is also subject to dismissal under Rule 12(b)(6) where it  
3 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or  
4 where the allegations on their face "show that relief is barred"  
5 for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct.  
6 910, 166 L.Ed.2d 798 (2007).

7 In deciding whether to grant a motion to dismiss, the court  
8 must accept as true all "well-pleaded factual allegations" in the  
9 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,  
10 however, "required to accept as true allegations that are merely  
11 conclusory, unwarranted deductions of fact, or unreasonable  
12 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988  
13 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,  
14 if a district court considers evidence outside the pleadings, it  
15 must normally convert the 12(b)(6) motion into a Rule 56 motion for  
16 summary judgment, and it must give the nonmoving party an  
17 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,  
18 907 (9th Cir.2003). "A court may, however, consider certain  
19 materials-documents attached to the complaint, documents  
20 incorporated by reference in the complaint, or matters of judicial  
21 notice-without converting the motion to dismiss into a motion for  
22 summary judgment." *Id.* at 908.

#### 23 **IV. DISCUSSION.**

##### 24 **A. Count I: False Claims Act Sections 3729(a)(1) and (a)(2)**

25 Count I of the complaint asserts a claim for violation of  
26 sections 3729(a)(1) and (a)(2). Section 3729(a)(1) provides:

27 In general. Subject to paragraph (2), any person who--

28 (A) knowingly presents, or causes to be presented, a

1 false or fraudulent claim for payment or approval;

2 (B) knowingly makes, uses, or causes to be made or used,  
3 a false record or statement material to a false or  
4 fraudulent claim;

5 (C) conspires to commit a violation of subparagraph (A),  
6 (B), (D), (E), (F), or (G);

7 (D) has possession, custody, or control of property or  
8 money used, or to be used, by the Government and  
9 knowingly delivers, or causes to be delivered, less than  
10 all of that money or property;

11 (E) is authorized to make or deliver a document  
12 certifying receipt of property used, or to be used, by  
13 the Government and, intending to defraud the Government,  
14 makes or delivers the receipt without completely knowing  
15 that the information on the receipt is true;

16 (F) knowingly buys, or receives as a pledge of an  
17 obligation or debt, public property from an officer or  
18 employee of the Government, or a member of the Armed  
19 Forces, who lawfully may not sell or pledge property; or

20 (G) knowingly makes, uses, or causes to be made or used,  
21 a false record or statement material to an obligation to  
22 pay or transmit money or property to the Government, or  
23 knowingly conceals or knowingly and improperly avoids or  
24 decreases an obligation to pay or transmit money or  
25 property to the Government,

26 is liable to the United States Government for a civil  
27 penalty of not less than \$ 5,000 and not more than \$  
28 10,000, as adjusted by the Federal Civil Penalties  
Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note;  
Public Law 104-410), plus 3 times the amount of damages  
which the Government sustains because of the act of that  
person.

31 U.S.C. § 3729(a).

In order to properly plead a false claims action under section  
3729, a plaintiff must comply with the pleading requirements  
applicable to fraud claims set forth in Rule 9(b) of the Federal  
Rule of Civil Procedure. *E.g. Ebeid v. Lungwitz*, 616 F.3d 993, \*12  
(9th Cir. 2010). Rule 9(b) provides:

In alleging fraud or mistake, a party must state with  
particularity the circumstances constituting fraud or  
mistake.

1 Fed. R. Civ. P. 9(b). Rule 9 requires a plaintiff to state "the  
2 who, what, when, where, and how of the misconduct charged." *Ebeid*,  
3 616 F.3d at 13 (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,  
4 1106 (9th Cir. 2003)).

5 **1. Defendants Foster and Webber**

6 The complaint contains sufficient allegations to state claims  
7 for violation of section 3729(a)(1) against Foster and Webber.  
8 According to the complaint, Foster certified the grant applications  
9 for the Ivanhoe and Goshen grants on behalf of FHCN with knowledge  
10 that both applications falsely proposed to create new staff  
11 positions that Foster never intended to fill. (Comp. at 15).  
12 Similarly, the complaint alleges that Webber provided proposed  
13 staffing and budget figures in connection with the grant  
14 applications with knowledge that the proposed staff positions would  
15 not be filled. (Comp. at 15). The complaint's allegations that  
16 Foster and Webber did not intend to hire the additional staff  
17 proposed in the grant applications are supported by inferences  
18 drawn from facts alleged in the complaint.

19 The complaint alleges that during a meeting regarding  
20 preparation of the Ivanhoe and Goshen grant applications, Webber  
21 told another person that he and Defendant Foster did not have to  
22 "adhere" to the figures advanced in the grant applications. (Comp.  
23 at 22). Plaintiff avers that Foster told her in November 2003 that  
24 he never intended to hire new staff or expand services at Ivanhoe,  
25 and that he intended to use grant money to fund existing  
26 operational costs all along. (Comp. at 21). The complaint also  
27 alleges that Foster also told other senior management staff members  
28 that all of the staffing positions proposed in the grant were not

1 to be filled. (Comp. at 21). Specifically, the complaint  
2 identifies Defendant Webber as an individual whom Foster instructed  
3 not to hire additional staff for Ivanhoe. (Comp. at 20).

4 The complaint alleges that the staff proposed in the grant  
5 application for the Ivanhoe clinic have never been hired, and that  
6 recruitment efforts were never undertaken to fill the proposed  
7 positions. (Comp. at 19). The complaint also alleges that the  
8 hours of operation at the Ivanhoe clinic were never increased as  
9 proposed in the grant application. (Comp. at 23). The complaint  
10 provides sufficient factual allegations to support an inference  
11 that, at the time the Ivanhoe grant application certification was  
12 submitted, Foster and Webber did not intend to hire additional  
13 staff for the Ivanhoe facility and thus violated the FCA by false  
14 representations to the contrary to wrongfully obtain government  
15 funding.

16 FHCN's application for the Goshen grant represented that  
17 "staff recruitment is underway and ongoing" and that "[FHCN]  
18 expects to successfully fill all new positions, complete staff  
19 training, and be fully operational within 90 days." (Comp. at 19).  
20 As of eight months after the Goshen grant award, the number of full  
21 time employees at the Goshen facility had decreased. (Comp. at  
22 21). Combined with the allegations regarding the Ivanhoe grant,  
23 the fact that the number of employees at the Goshen facility had  
24 decreased eight months after the grant award provides a sufficient  
25 factual basis to permit an inference that, at the time the Goshen  
26 grant application was submitted, Foster and Webber did not intend  
27 to hire additional staff for the Goshen Facility and thus violated  
28 the FCA.

1 Defendants contend that the complaint is deficient because (1)  
2 the complaint refers to "Defendants" as an undifferentiated group  
3 and does not indicate who made which false statements; (2) the  
4 complaint does not indicate what was actually false in the  
5 referenced grant applications; (3) the complaint does not provide  
6 a meaningful explanation of how any statements in grant  
7 applications were false.<sup>1</sup> (Motion to Dismiss at 4-5). None of  
8 Defendants' arguments have merit. The complaint alleges that "what  
9 was actually false" in the Ivanhoe and Goshen grant applications  
10 was FHCN's purported intent to hire additional staff and explains  
11 that the reason such statements were false is that Foster and  
12 Webber did not then intend to carry out the hiring proposals.  
13 Defendants' motion to dismiss Count I of the complaint as to Foster  
14 and Webber is DENIED.

## 15 **2. FHCN**

16 The extent to which an entity is liable under the FCA for the  
17 acts of its employees presents an unsettled question in the Ninth  
18 Circuit. See *United States ex rel. McCarthy v. Straub Clinic &*  
19 *Hosp.*, 140 F. Supp. 2d 1062, 1071 n.7 (D. Haw. 2001); *United States*  
20 *ex rel. McCurdy v. Gen. Dynamics Nat. Steel and Shipbuilding Corp.*,  
21 2010 U.S. Dist. LEXIS 90307\* 10-11 (S.D. Cal. 2010). Drawing every  
22 reasonable inference in favor of Plaintiff, the allegations in the  
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24 <sup>1</sup> Defendants also contend that the complaint's allegations regarding false  
25 statements contained in progress reports and other grant applications are not  
26 pled with the requisite particularity. The allegations regarding false  
27 statements made in other grant applications do not establish independent claims,  
28 rather, it appears these allegations were pled in order to establish that  
Defendants engaged in a pattern of making false representations, which supports  
an inference that Defendants knowingly made false statements in the Ivanhoe and  
Goshen grant applications. With respect to the progress reports, the allegations  
are sufficiently particular.



1 complaint are sufficient to hold FHCN liable for the fraudulent  
2 acts of Foster, whether under an intent-to-benefit,  
3 apparent-authority, or managerial-capacity theory. See *Grand Union*  
4 *Co. v. United States*, 696 F.2d 888, 891 (11th Cir. 1983) (finding  
5 liability based on intent-to-benefit theory); see also *United*  
6 *States ex rel. Rosales v. San Francisco Housing Auth.*, 173 F. Supp.  
7 2d 987, 1004 (N.D. Cal. 2001) (finding liability based on  
8 managerial capacity theory). Defendants motion to dismiss Count I  
9 of the complaint as to FHCN is DENIED.

10 **B. Count II: False Claims Act Sections 3729(a) (3)**

11 Count II of the complaint alleges conspiracy. The FCA imposes  
12 liability on "[a]ny person who conspires to defraud the Government  
13 by getting a false claim allowed or paid." 31 U.S.C. § 3729(a) (3).  
14 Conspiracy claims made under the FCA must meet the particularity  
15 pleading requirement of Fed. R. Civ. P. 9(b). *Vess*, 317 F.3d at  
16 1108. Averments of fraud under Rule 9(b) must be accompanied by  
17 "the who, what, when, where, and how" of the misconduct charged.  
18 *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). Here, the  
19 complaint alleges an agreement between Foster and Webber to submit  
20 misleading grant applications. The complaint also identifies the  
21 false representations made in the applications, the reasons such  
22 representations were false, and the purpose of the false  
23 representations. Defendants' motion to dismiss the conspiracy  
24 claim is DENIED.

25 **C. Count III: False Claims Act Section 3729(a) (7)**

26 Section 3729(a) (7), "the reverse false claims provision of the  
27 FCA, punishes anyone who 'knowingly makes, uses, or causes to be  
28 made or used, a false record or statement to conceal, avoid, or

1 decrease an obligation to pay or transmit money or property to the  
2 Government.'" *United States v. Bourseau*, 531 F.3d 1159, 1164 (9th  
3 Cir. 2008). A reverse FCA claim includes five elements: (1) a  
4 false record or statement; (2) knowledge of falsity; (3) use of the  
5 false statement to conceal, avoid, or decrease an obligation to the  
6 government; (4) purpose to conceal, avoid, or decrease an  
7 obligation to the government; and (5) materiality. *Id.* at 1164-  
8 1171.

9 According to the complaint, FHCN was required to submit two  
10 types of reports to the United States after receiving the Ivanhoe  
11 and Goshen grants: individual grant progress reports and yearly  
12 uniform data system reports. (Comp. at 13-14). Progress reports  
13 for the Ivanhoe grant were due on January 15, 2004, July 15, 2004,  
14 and January 17, 2005. (Comp. at 14). Progress reports for the  
15 Goshen grant were due on December 31, 2003 and June 30, 2004.  
16 (Comp. at 14). The complaint alleges that FHCN's first progress  
17 reports for the Goshen and Ivanhoe grants contained the false  
18 statement that the increase in medical providers would be reflected  
19 in subsequent reports. (Comp. at 23-24). The complaint also  
20 alleges that Foster and Webber were aware that FHCN's database  
21 system, "Mega West," was manipulated to fraudulently inflate the  
22 number of new patients, and that Foster and Webber knowingly used  
23 misleading Mega West data in its progress reports and yearly  
24 uniform data system reports in order to create the appearance that  
25 FHCN was serving more patients than it actually was. (Comp. at 26-  
26 27). The complaint alleges that Foster and Webber knowingly caused  
27 to be submitted progress reports and yearly uniform data system  
28 reports that contained false material information, and that the

1 reports were submitted for the purpose of concealing, avoiding, or  
2 decreasing an obligation to the government. Defendants' motion to  
3 dismiss the reverse FCA claim is DENIED.

4 **D. Short and Plain Statement Requirement**

5 Defendants complain that because the complaint is "replete  
6 with legislative history...[and] regulatory and statutory  
7 authority," the complaint fails to comply with Rule 8's short and  
8 plain statement requirement. (Motion to Dismiss at 7). Although  
9 the complaint does contain some unnecessary background information,  
10 such information does not render the complaint confusing or  
11 otherwise violative of Rule 8. Much of the statutory and  
12 regulatory authority set forth in the complaint is relevant to  
13 establishing Defendants' knowledge of the wrongfulness and  
14 materiality of their alleged false statements.

15 **ORDER**

16 For the reasons stated, IT IS ORDERED:

- 17 1) Defendants' motion to dismiss is DENIED in its entirety;  
18 2) Plaintiff shall lodge a formal order consistent with this  
19 decision within five (5) days following electronic service of  
20 this decision by the clerk.

21 IT IS SO ORDERED.

22 **Dated: December 20, 2010**

**/s/ Oliver W. Wanger**  
**UNITED STATES DISTRICT JUDGE**