

Court Rules that "Upon Information And Belief" Allegations of FCA Violations Leveled Against Competitor Fail to Withstand Pleading Requirements

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by Peter R. Mayer

A Federal court in Ohio recently dismissed a qui tam lawsuit brought under the False Claims Act by Kustom Products, Inc. against Hupp & Associates, Inc., a defense contractor, and in so doing provided judicial treatment of the common practice of alleging facts "upon information and belief." *United States ex rel. Kustom Prods. v. Hupp & Assocs.*, No. 2:15-cv-03101, 2017 U.S. Dist. LEXIS 72814 (S.D. Ohio May 12, 2017),

Hupp had six contracts to supply maintenance kits to the U.S. Military for its Family of Medium Tactical Vehicles ("FMTV"). Under those contracts, Hupp was required to purchase seals for its FMTV kits from one of only two approved suppliers. Kustom alleged that it had learned "in the course of business" that Hupp was not purchasing its seals from either of those two suppliers, even though Hupp represented to the Military that it had. 2017 U.S. Dist. LEXIS 72814 at *3-4. Kustom's complaint made a number of these accusations "upon information and belief." *Id.* The United States government declined to intervene in the lawsuit. *Id.* at *4. Hupp brought a motion to dismiss Kustom's complaint in its entirety. *Id.*

Evaluating the pleading standard under the False Claims Act, the court noted the familiar rule that "the heightened pleading standard set forth in Rule 9(b) applies to complaints alleging violations of the FCA," and that standard requires that the circumstances constituting fraud or mistake shall be stated with particularity. *Id.* at *5 (citations omitted). In other words, Kustom was required to allege the "who, what, when, where, and how" of the alleged fraud. *Id.* at *6. However, Kustom's allegations about Hupp's fraud were lacking much detail, such as, "upon information and belief, Hupp submitted at least one invoice" that fraudulently certified that its products were purchased from approved suppliers. *Id.* at *7. The court found that this bare allegation did not satisfy the heightened 9(b) pleading standard, and noted that, in general, "allegations 'on information and belief'... are insufficient under Rule 9(b)." *Id.* In sum, Kustom's "speculative allegations that 'on information and belief' Hupp has invoiced the government for parts supplied under the contracts fall far short of meeting the Rule 9(b)

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standard.” Id. at *8. The court found that these deficiencies existed with all of Kustom’s claims, and, because they were not pleaded with the particularity required by Rule 9(b), all of Kustom’s claims failed to state a claim upon which relief can be granted.

The decision underscores the importance of pleading the particular facts and allegations that give rise to a claim under the False Claims Act. Although not categorically rejecting “upon information and belief” style pleading, the Court expressed significant wariness with such allegations, particularly when the plaintiff fails to plead the source of knowledge or some other reliable indicia of plausibility.