

Report on Research Compliance Volume 16, Number 5. May 01, 2019 Duke's \$112M False Claims Act Case: A Tale of Fraud, Fabrication and Two Brothers

By Theresa Defino

The recent \$112.5 million False Claims Act settlement involving Duke University over research misconduct was the result of a confluence of events that brought together an embezzling lab tech and a pair of brothers—one her coworker and the other an attorney who happened to specialize in FCA cases.

The historic settlement is all the more remarkable because the government never formally entered the whistleblower suit, which attorney John Thomas initiated in 2013 on behalf of his younger brother, Joe. Cases whistleblowers bring on their own are rarely successful. Federal officials helped broker the settlement and conducted their own investigation but did not legally intervene.

But perhaps most noteworthy: Joe Thomas didn't uncover the fraud at the heart of his case. He learned what Erin Potts-Kant had done from being privy to Duke's own investigation into her misdeeds.

In a wide-ranging interview with RRC, the Thomas brothers shared highlights of the six-year journey leading up to the settlement and the damage done by Potts-Kant. They also expressed their hope it results in some overdue soul-searching by universities about how to better manage grant funds and an examination of a culture Joe Thomas said is built on "misaligned motives."

The settlement, more than 10 times larger than the previous record amount for fraud based on data fabrications, should also serve as a warning to other universities that they could be next. "I don't think this case is going to be the last case of this kind. I think there are going to be others, unfortunately," said John Thomas, a partner with Healy Hafemann Magee in Savannah, Georgia.

In its March 25 announcement, the Department of Justice said the \$112.5 million settlement "resolves allegations that between 2006 and 2018, Duke knowingly submitted and caused to be submitted claims to the NIH and to the Environmental Protection Agency that contained falsified or fabricated data or statements in 30 grants, causing" NIH and EPA "to pay out grants funds they otherwise would not have." John Thomas told RRC of the 30, only one was from the EPA. Half of the amount is repayment of grants and half is penalties, he said.

Joe Thomas was granted 30% of the settlement amount, or \$33.75 million, which he shares with his brother and his firm and two other sets of attorneys. John Thomas said he could not discuss how this money will be apportioned among them.

Although the DOJ statement doesn't mention former Duke lab worker Potts-Kant, the lawsuit names her as the perpetrator of the fraud in her capacity as a clinical research coordinator in the Pulmonary, Asthma and Critical Care Division of Duke University Medical Center; she later admitted to fabricating the data, a pattern that began a year after her hiring in 2005. Duke was also named in the suit, as was William M. Foster, Potts-Kant's supervisor.

Although it was the basis of the suit, research misconduct wasn't the thread that started the unraveling of Potts-Kant's life—and Joe Thomas', ultimately. It was the discovery "sometime between November 2012 and March

2013” that Potts-Kant had embezzled a total of \$25,000 from Duke by submitting falsified receipts for “scientific equipment and supplies.”

Foster’s lab where Potts-Kant worked was conducting “airway physiology studies for a variety of different groups of people that were interested in having a mouse model” to test airway responsiveness and hyper-responsiveness to certain triggers, Joe Thomas explained. Apparently she alone operated a machine called the flexiVent and her work was not checked by others, including Foster.

For the first four years of his employment after he was hired in 2008, Joe Thomas worked in the Cell Biology Department; in February 2012, he moved to a lab of the pulmonary division as a laboratory research analyst. A year later, as Potts-Kant faced embezzlement charges, the pulmonary division began reviewing data from Foster’s lab created by Potts-Kant that was used in grant applications, progress reports, publications, even redoing some experiments. As noted earlier, Joe Thomas did not uncover the fraud himself—he was part of this review.

Prior to being involved in the review, Joe Thomas had limited interactions with Potts-Kant. At one point he was a coauthor with her (and a number of others) on a paper, and for a time “worked just down the hall” from her. Joe Thomas said he “didn’t really work too closely with her at all because a lot of the work that my lab did was more human-oriented,” while hers was animal-based.

Review Uncovered Misconduct

Joe Thomas said he could not speculate on Potts-Kant’s motivation. “It’s one of the situations where you feel like you know someone fairly well and then something happens and you realize you don’t know them at all,” he said.

Said John Thomas: “I think the most accurate way to describe it is that she really did want to help people she was working for and that was how she thought she was helping them.”

In court, Potts-Kant agreed to make restitution and complete probation for the embezzlement. She no longer works at Duke but is employed by a private company, her attorney Amos Tyndall said in an email to RRC. Tyndall said she did not want to comment on the settlement.

At this point, her troubles may not be over, however. The HHS Office of Research Integrity is finalizing its investigation into her activities and could make a finding that bars her from federally supported research or imposes a supervisory plan.

Once the review was underway and the extent of the fraud was becoming more evident, “I started talking with John. It was good that I had a brother who was an attorney” to discuss the situation and “get some advice,” said Joe Thomas. He was “pretty frustrated...in the early stages” and considered either filing suit or going to the media to bring attention to the situation, to “potentially have the opportunity to change behavior...maybe shine some light on a problem that exists within the research system as a whole.”

Joe Thomas said he didn’t know whether the media would write a story and he understood that the “legal route... was a bigger step [and] particularly for me, it was one that was going to definitely have repercussions” in his personal life and career. The qui tam, or whistleblower, suit, was filed May 17, 2013.

To people who might say the case only happened because John and Joe Thomas are brothers, John Thomas agreed that “this case really did have kind of a very unique origin.” Joe Thomas also acknowledged that, “potentially,” anyone else at Duke could have brought suit.

Joe Thomas left Duke in September of 2014 while the case was still under seal. He said he faced no retaliation by Duke for his actions. “I think at the time I left there was a definite awareness that there was a lawsuit but people didn’t know that I was the whistleblower,” he said.

“Joe was kind of in an impossible position because the case was under federal seal. [Duke officials] were starting to receive a lot of civil investigative demands from the Department of Justice; they knew there was probably a whistleblower-initiated FCA case,” John Thomas told RRC.

Whistleblower Put in Tough Position

At the same time, Duke was “starting a very thorough internal investigation into everything, and one of the things they wanted to figure out at the time was who the whistleblower was,” said John Thomas. “Joe couldn’t reveal the existence of the lawsuit without violating the federal seal and he couldn’t really be a fully helpful employee to Duke while also assisting the federal investigation. [Resigning] was something that he didn’t want to have to do, but he ultimately left because he felt like he couldn’t do both.”

Prior to the case being unsealed in August 2016, the government was conducting its own investigation, which the Thomases assisted when asked. “We did do as much as we could in terms of an investigation, but our resources were limited compared to what the federal government could do [and] we didn’t necessarily have access to all the grant documents in all the datasets and so on,” said John Thomas.

The case stretched on until this spring, surviving several motions to dismiss, ultimately ending up before U.S. District Judge Catherine Eagles in the District Court for the Middle District of North Carolina. According to John Thomas, the settlement was reached the night before she was to issue summary judgement.

Separately, Duke made its own announcement of the settlement, describing a series of steps it had taken and planned to initiate to better prevent and assure research integrity (“Duke: New Steps Will Further ‘Strengthen’ Research Quality, Integrity,” RRC 16, no. 5).

Asked about the impact on the field of research resulting from the Potts-Kant’s fabrications and falsifications, both Thomases described substantial damage beyond that done to both Duke’s reputation and to that of scientists more generally.

Noting that so much of science is “very interconnected,” Joe Thomas said he believed approximately 20 papers had full or partial retractions as a result, causing a “ripple effect. There will be people’s work that maybe partially relied on conclusions drawn from some of these studies that now are unreliable. So there definitely is an effect.”

John Thomas said some epigenetics research into how maternal diesel exhaust exposure affected subsequent generations of offspring was “entirely abandoned after this fraud was discovered.”

In the recent past, Duke had conducted “really compelling work” in this area “that ended up...essentially a complete dead-end once the truth was really discovered,” he said.

Will Repayment Increase Accountability?

RRC asked Joe Thomas for any words of advice for others in his shoes. Potential whistleblowers should expect a “long and difficult journey,” but that everyone from lab techs and analysts to other “people in the trenches...have to speak up” to ensure the integrity of the research if they suspect something is amiss, he said.

Universities, he said, “need to take a more active approach in analyzing the human component and the human motivations to this problem.”

Joe Thomas told RRC he was “relieved” that the case was over and that, despite the long odds, he had confidence his suit would end well. “It's been a long journey, such a long six years,” he said. “There [were] definitely days that I didn't know how I was going to be able to get through how difficult it was. I kind of always knew that I had done the right thing and I knew we had assembled a great team of people, so there was no doubt in my mind that we were going to be successful. But there [were] definitely challenges along the way.”

Asked if he ever imagined receiving an amount so large, Joe Thomas said “not really.” But he added that, “to be honest, I’m not really particularly motivated by money. You don't go into academic research if you're motivated by money, I guess.” Still, he “knew the scope was large in terms of the impact from a financial perspective as well as a scientific research perspective. I guess in the back of my mind, I always knew there was a potential for a large outcome, but it wasn't really something I gave a ton of thought to.”

One lesson that attorneys who represent whistleblowers express to organizations wishing to avoid creating a suit is to deal effectively with complaints when they arise. Although Joe Thomas did not bring his concerns to Duke officials regarding Potts-Kant, John Thomas said his brother “tried to report different but similar problems in the past internally and had not really encountered a lot of success [or] a very helpful internal process. When this one came around a second time, I think it made him less likely to want to use those internal systems.

His goal with the suit and settlement, said Joe Thomas, is to put a focus on the “crises” in research, including problems with lack of reproducibility of results combined with the ultra-competitive culture and scarcity of funding. “My hope is that the best outcome for everybody out of all of this is [to] shed light on how the system is not really ideally set up...there's not a lot of great motivations in place for investigators [to report fraud] and the way the universities manage the grant process is something that could probably be improved.”

Investigators generally “want their hypothesis to be correct,” said Joe Thomas. When it is “tested in the lab, if they're right, they pat themselves on the back and move forward to the next thing. And if they're wrong, [they think] why could I not be right? A lot of times that's what happens. And I think that's human nature. In this case it was just that you had a person that was willing to do whatever it took to give people great data. And then you had a lot of people that were just unwilling to ask the hard questions about...`is this too good to be true?’”

More Than One Person’s ‘Failure’

In his comments to RRC, Joe Thomas said he wanted to stress that “Duke is a prestigious institution and there's a lot of good people there, and if this kind of thing can happen at a place like Duke University, I think it could be happening anywhere.”

In addition to lack of adequate oversight, the culture of “publish or perish,” and awarding tenure based on funding and publications creates misalignments. “That’s a system that’s built on a lot of bad incentives,” said Joe Thomas.

The settlement may also help hold institutions accountable for misconduct if, like Duke, more have to repay grants and are subject to penalties for research misconduct.

“Misconduct has been kind of perceived, maybe by the public, as just one person's failure,” said Joe Thomas, but “it speaks to the kind of the shortcomings of the system around them.” This case makes clear that there is a “legal remedy” for repayment, so maybe that “will force change,” he added.

Fabrication and falsification “is a larger problem than a lot of people realize,” John Thomas told RRC. “Using the FCA to combat the problem might hopefully bring about some change.”

Link to DOJ settlement announcement: <http://bit.ly/2V2Lvgl>

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