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*Of Counsel:*

David J. Moloznik
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November 13, 2013

**Sent via First Class Mail**
Robert Bauchwitz, M.D., Ph.D.
324 Candlewyck Lane
Hershey, PA 17033

**RE: United States of America, ex rel. Robert Bauchwitz, M.D., Ph.D. v. William K. Holloman, Ph.D. et. al. - Civil Action No: 04-2892 (United States District Court for the Eastern District Court of PA)**

Dear Dr. Bauchwitz,

You have asked that we give you a letter stating our understanding as to whether a court ever decided if the defendants had or had not submitted grant applications containing false scientific information.

For the reasons that here follow, it is our opinion that no court ever decided if the defendants did or did not submit grant applications containing false scientific information.

Settlement of the case was not decided as a result of evidence submitted by either side to the court.

1) You filed a Qui tam action under the False Claims act, seeking to hold Cornell University, and certain defendants employed by it, and Thomas Jefferson University and certain defendants employed by it, responsible for having falsified information in grant applications submitted to the United States government.

2) On December 1, 2009, Judge Timothy Savage granted Summary Judgment on all claims against the Jefferson defendants for failing to file them within the required statute of limitations period. (see *United States of America, et al v. Holloman, et al, 671 F.Supp.2d 674 (E.D. Penna 2009*).

3) In that opinion, Judge Savage further ruled that all of the claims against the Cornell defendants, except those relating to grant 2 R01 GM 42482-12A2 were dismissed for failing to file them within the required statute of limitations period.

4) The dismissal for failing to file claims within the required statute of limitations is not a dismissal on the merits, and does not resolve the issue of whether or not the claims were or were not meritorious.

5) The judge's grant of Summary Judgment was based solely on evidence relating to that issue (the statute of limitations).

6) The docket shows that on December 16, 2009, the court issued an order requiring that all discovery be completed by April 9, 2010. We, as your attorneys, had advised you that the amount of time provided for by the court to complete discovery, was in our opinion inadequate to perform the necessary discovery to properly present your claim.

7) On March 30, 2010, Matthew L. Owens, Esquire, entered his appearance on your behalf. On that same date, he filed a Motion to Extend the Time to Complete Discovery.

8) On March 31, 2010, the Motion to Extend the Time to Complete Discovery was denied. On that date, we, Mr. Owens, and his partner, Geoffrey McInroy, Esq., urged you to settle the case because we believed that the judge's ruling would prevent you from proceeding with discovery that we felt would be necessary to prepare for trial.

9) We pointed out that the Court had a significant amount of discretion in determining how much time should be allowed for discovery, and that it would be extremely difficult to overturn on appeal the Court's ruling with respect to the amount of time it granted for discovery. We also pointed out that any appeal of that issue could not be taken until the entire case had been tried to a conclusion.

10) On April 1, 2010, the judge approved of a stipulation of the parties, which called for a voluntary dismissal pursuant to **Local Rule 41.1(b)** and issued an order dismissing the case with prejudice. The same claims by the United States government were dismissed without prejudice.

11) By operation of law, a dismissal with prejudice is a technical adjudication on the merits even if the underlying claims were never submitted for determination by a judge or jury. It generally operates to prevent you from filing a new complaint for the same claims.[i]

12) The Court never was asked to review evidence for the purpose of determining whether or not the grant applications did or did not contain false information. It was never judicially determined by the Court if the grant applications did or did not contain false information.

13) Attached to this letter is a memorandum on the topic of *res judicata* (claim preclusion and issue preclusion) which further reviews the law and terminology discussed above. The undersigned attorneys have read it and found it to accurately describe the distinction between the effect of claim preclusion as distinguished from issue preclusion following a dismissal with prejudice without a factual determination of the issues.

We hope that this letter gives to you the information you requested.

Very Truly Yours,

Stephen R. Bolden, Esq.

Richard C. Ferroni, Esq.

Also signing:

Matthew L. Owens, Esq.
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[i] The dismissal of claims with prejudice is a technical dismissal on the merits, which generally precludes the same parties from asserting the same claims in subsequent litigation. This is known as claim preclusion which is part of the legal doctrine of *res judicata*. *Fatiregun v. City of Philadelphia, 2009 WL 3172766 (E.D.Pa).* (*Res judicata* also includes issue preclusion; see below.)

A court does not have to reach the merits of a party's claims, and indeed did not reach those merits in your case, in order for a dismissal to be accorded *res judicata* effect.

On the other hand, issue preclusion, also known as collateral estoppel, does not apply to an issue which was dismissed in an earlier litigation when no findings of fact or conclusions of law were made in respect to that issue. See *Interdigital Technology Coproration v. Oki America, Inc., 866 F.Supp. 212, 214 (E.D. Penna 1994).* There were no findings of fact in your case.

The Supreme Court explaining the effect of a dismissal with prejudice has stated that where a judgment is unaccompanied by findings, it does not bind the parties on any issue which might arise in connection with another cause of action. *Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 327, 75 S.Ct. 865, 868 (1955); Interdigital Technology, supra.*"