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CALVARY CHAPEL CENTRAL OAHU

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI`I

THE STATE OF HAWAII, *Ex. Rel.* MITCHELL KAHLE and HOLLY HUBER, Plaintiffs, v. ONE LOVE MINISTRIES; CALVARY CHAPEL CENTRAL OAHU; DOE ENTITIES 1-50; JOHN DOES 1-50; and JANE DOES 1-50, Defendants.	CIVIL NO. 13-1-0893-03 LWC (Other Civil Action) **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT BASED ON THE PUBLIC DISCLOSURE BAR** Hearing Date: April 14, 2020 Time: 9:00 a.m. Judge: Hon. Lisa W. Cataldo Trial Date: None presently scheduled

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Defendants One Love Ministries and Calvary Chapel Central Oahu (collectively, the "Churches"), by and through their attorneys, file this Memorandum of Law in Support of their Motion to Dismiss and/or for Summary Judgment Based on the Public Disclosure Bar, together with the Declaration of James Hochberg and the Exhibits referred to therein and attached thereto.

INTRODUCTION

Mitchell Kahle and Holly Huber filed this litigation as Relators for the State of Hawaii ("Plaintiffs"). Plaintiffs are political activists with a long history of seeking to impose their vision of proper church-state relations. Believing that local Christian churches were "monopolizing" public school facilities under Hawaii's community use program, Plaintiffs set out to prepare a report detailing church use of school facilities with the goal of convincing the State to restrict or eliminate that use. (Kahle Dep. 45:20–46:02, attached as Ex. A.)[1] To that end, Plaintiffs filed public records requests, observed portions of church activities after reviewing church calendars and service schedules on publicly accessible websites, and recorded the information gleaned from those public sources. But after realizing the State did not share their concerns—and after being told by their attorney about the Hawaii False Claims Act (HFCA)—Plaintiffs jettisoned their plan and sued not the State, but rather the churches for, of all things, fraud. (Kahle Dep. 47:03–49:23, 52:20–57:03; Huber Dep. 39:17–40:11, attached as Ex. B.)

The gist of Plaintiffs' complaint is that the Churches should be penalized millions of dollars because they, and the principals at the schools they used, interpreted and applied the rules governing Hawaii's community use program too loosely. But this creates no liability under the HFCA, which is uniquely concerned with *false* and *fraudulent* claims for payment. The Churches openly contracted with public school officials to pay agreed-upon rates and provide substantial improvements to school properties and then faithfully discharged these contractual obligations. This destroys any claim of fraud. The government, after all, cannot defraud itself. And here, Hawaii public school officials agreed to, acquiesced in, and ultimately benefited from the Churches' use of school facilities.

Even so, at this stage of the litigation, the Intermediate Court of Appeals remanded for this Court to determine whether the Act's public disclosure bar precludes Plaintiffs' claims at the outset. It does. Simply put, the HFCA is not a proxy for political advocacy, nor is it a sword to be

[1] All citations to exhibits reference the exhibits attached to James Hochberg's accompanying declaration.

wielded by neighbor against neighbor or political activists against churches. The public disclosure bar thus precludes actions where, as here, the information on which the allegations are based have been publicly disclosed and the plaintiffs are not original sources of that information. Far from presenting previously unknown, insider information, Plaintiffs' complaint parrots information contained in public records and publicly accessible websites. In fact, approximately 80% of the over 600 false claims alleged against the Churches, ranging from March 2007 to March 2013, arise from services and events that occurred before Plaintiffs even commenced their hunt and issued their first public records request in December 2011. That Plaintiffs catalogued public information in their own idiosyncratic manner is not enough to overcome the public disclosure bar. The First Amended Complaint should be dismissed with prejudice in its entirety.

BACKGROUND

A. Hawaii's Community Use Program

The State of Hawaii makes its school facilities available for "general recreational purposes" and "public and community use," so long as the use does not "interfere with the normal and usual activities of the school and its pupils." HRS § 302A-1148; HAR § 8-39-1. Applicants apply directly to the school, and school officials determine the rental fees and service charges (if any) based on the nature of the requested use. HAR §§ 8-39-2, 8-39-5. For example, the State waives rental fees for "Type I" and "Type II" users but not for "Type III" users. *Id.* § 8-39-5(c). Although relevant rules and regulations provide "[e]xamples" of the three types of users, they do not categorize all potential uses. *Id.* The examples serve as illustrative guidance for local school principals and officials, who are individually responsible for approving or disapproving the applications and determining appropriate fees and charges. *Id.* § 8-39-4(a).[2]

B. The Churches' Use of School Facilities

Defendants rented public school facilities under Hawaii's community use program. One Love Ministries rented Kaimuki High School, and Calvary Chapel Central Oahu rented Mililani High School. Besides paying agreed-upon rates and charges, the Churches poured additional funds, resources, and energy into the schools due to their agreements with public school officials.

[2] Charging churches more than other nonprofits for similar use of school facilities raises serious constitutional problems, something the State of Hawaii was aware of before Plaintiffs filed this lawsuit. *See* Ex. C (letter to Hawaii Attorney General explaining constitutional issues).

For example, One Love Ministries provided landscaping and maintenance of the school campus, donated golf carts to the school for security use, removed graffiti from the school weekly, replaced the auditorium stage floor, rewired the auditorium's audio-video equipment, painted the auditorium's interior, constructed and donated an archery range to the school, donated materials and supplies to the school's teaching staff, and invested in remodeling all the school's bathrooms. *See* Ex. D at 2; Ex. E. Calvary Chapel Central Oahu invested in Mililani High School by, among other things, buying air conditioning units and cafeteria tables. *See* Ex. F at 2 (noting purchase of air conditioners); Ex. G at 1 (noting purchase of cafeteria tables).

C. Plaintiffs and the First Amended Complaint

Plaintiffs Mitch Kahle and Holly Huber are self-described "activists" and "long-time advocates for the separation of church and state." (Kahle Dep. 44:01–06; Huber Dep. 14:10.) Plaintiffs founded Hawaii Citizens for the Separation of State and Church based on the belief that "government and religion should remain separate," and have been involved in over 100 church-state separation cases in the past 20 years. (Kahle Dep. 44:21–25; 123:01–19.)[3] This activism, according to Mr. Kahle, has made him "one of the most well-known [activists] in the state." (Kahle Dep. 29:14–15.) He explained:

> [W]hen I walk down the street in Honolulu, I get people looking at me, they know who I am. I'm on the news, I'm in the newspapers. Virtually everyone knows who I am.

(Kahle Dep. 91:22–25.) Although former residents of Hawaii, Plaintiffs now reside in Michigan, where they continue their church-state activism. (Huber Dep. 10:7–9.)[4]

According to the First Amended Complaint, Plaintiffs decided in December 2011 to look into church use of Hawaii's public schools after reading about a "highly publicized court ruling" involving similar church use in New York City. (FAC ¶ 22.). Plaintiffs began their review by submitting public records requests to the Hawaii Department of Education, seeking "current contracts or agreements" between churches and schools, and later visited schools "to observe and take photographs documenting churches' actual use of school facilities." (*Id.* ¶¶ 23–24.)

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[3] Hawaii Citizens for the Separation of State and Church is an involuntarily dissolved Hawaii nonprofit corporation. *See* https://hbe.ehawaii.gov/documents/business.html?fileNumber=109917D2.

[4] *See, e.g.*, Francis X. Donnelly, *Atheist's crusade shakes up towns*, THE DETROIT NEWS (Jan 24, 2015), https://bit.ly/2Q9WlkG; Darren Cunningham, *Group complains about 'three wise men' atop public school*, FOX 17 WEST MICHIGAN (Nov. 30, 2018), https://bit.ly/2rzCrG2.

Although Plaintiffs initially intended to file a report with the State documenting church use of school facilities, they became "extremely frustrated" when they realized the DOE was not going to "take action." (Kahle Dep. 52:20–54:01.) Plaintiffs' attorney then introduced them to the HFCA, and Plaintiffs determined that filing this *qui tam* action was the only way to accomplish their objective given the DOE's perceived unwillingness to "cooperate." (Kahle Dep. 52:04–07, 55:20–57:03.) Before filing their complaint, Plaintiffs presented their findings and documentary support to Hawaii's Attorney General. The State declined to participate. (FAC ¶¶ 5–6.)

In short, the First Amended Complaint alleges that the Churches violated the Hawaii False Claims Act, or HFCA, by fraudulently underpaying the State for their use of school facilities between March 22, 2007 and March 22, 2013. According to Plaintiffs, the Churches paid for "fewer hours" and "fewer facilities" than "actually used" and thus defrauded the State by not "paying the full and proper amounts in rental fees, utilities and other costs and charges." (*Id.* ¶ 42.) Plaintiffs mainly contend that, for each Sunday during the relevant period, One Love Ministries should have paid rental fees and utilities charges for at least eight hours use of Kaimuki High School's auditorium, cafeteria, classrooms, grounds, and parking lots (*Id.* ¶ 87), but instead negotiated agreements with the school allowing it to pay little to "no known rental fees" and "reduced utilities charges." (*Id.* ¶ 90; *see also id.* ¶¶ 97–99, 103.) Plaintiffs likewise contend that Calvary Chapel Central Oahu should have paid rental fees and utilities charges for at least five-and-a-half hours use of Mililani High School's cafeteria, classrooms, grounds, and parking lots (*Id.* ¶ 147), but instead negotiated agreements with the school reducing its rental fees for the cafeteria and classrooms. (*Id.* ¶¶ 149a, 152, 155, 157a, 158.) Although the First Amended Complaint claims the Churches conspired with local school officials to reduce their rates and charges, Plaintiffs have not named a single school official who they believe has defrauded the very school he or she works for.[5]

The First Amended Complaint contains just three causes of action but asserts over 600 false claims against the Churches. Plaintiffs allege that One Love Ministries made at least 342 false claims against the State—313 for each weekly Sunday service during the relevant period and 29 for special events. (*Id.* ¶ 113.) Plaintiffs assert at least 333 false claims against Calvary Chapel Central Oahu—313 for weekly Sunday services and 20 for special events. (*Id.* ¶ 174.)

[5] These government employees should be named if the case proceeds. *See* HRCP 17(d).

D. Hawaii False Claims Act

Congress first enacted the federal False Claims Act in 1863 primarily to "stop[] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Servs., Inc. v. United States,* 136 S. Ct. 1989, 1996 (2016) (internal quotations and citation omitted). Although there have been numerous congressional amendments since its inception, the FCA's "focus remains on those who [knowingly] present or directly induce the submission of false or fraudulent claims." *Id.* Because the Hawaii False Claims Act is patterned after the federal FCA, *Haw. ex rel. Kahle v. One Love Ministries*, 416 P.3d 918 (Haw. Ct. App. 2018), courts look to the federal Act for guidance in interpreting the HFCA. *U.S. ex rel. Woodruff v. Haw. Pac. Health*, 560 F. Supp. 2d 988, 997 n.7 (D. Haw. 2008).

The HFCA was first enacted in 2000 and later amended in July 2012. Like the federal FCA, it authorizes both the Attorney General and private *qui tam* relators to recover from persons who make false or fraudulent claims for payment to the State. *See* HRS §§ 661-22, 661-25. While the Act seeks to encourage "whistle-blowing insiders with genuinely valuable information" about the fraud to come forward, it also contains provisions designed to discourage "opportunistic plaintiffs who have no significant information to contribute of their own." *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 294 (2010). One such restrictive provision is the public disclosure bar, which precludes *qui tam* actions when the fraud allegations or transactions were publicly disclosed, unless the relator is an original source of the underlying information. *See* HRS § 661-28 (2011); HRS § 661-31.

Under the pre-amended HFCA, the public disclosure bar deprives courts of *subject matter jurisdiction* over claims:

> [B]ased upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, unless the action is brought by the attorney general or the person bringing the action is an original source of the information.

HRS § 661-28 (2011). The pre-amended HFCA defines "original source" as an individual (1) "who has direct and independent knowledge of the information on which the allegations are based," (2) "has voluntarily provided the information to the State before filing an action" based on the information, and (3) "whose information provided the basis or catalyst for the investigation, hearing, audit, or report that led to the public disclosure." *Id.*

In contrast, under the amended HFCA, the public disclosure bar operates as an *affirmative defense* and requires dismissal:

> [I]f the allegations or transactions alleged in the action or claim are substantially the same as those publicly disclosed:
>
> (1) In a state criminal, civil, or administrative hearing in which the State or its agent is a party;
>
> (2) In a state legislative or other state report, hearing, audit, or investigation; or
>
> (3) By the news media,
>
> unless the action is brought by the attorney general or the person bringing the action is an original source of the information.

HRS § 661-31(b). "Original source" is defined, in relevant part, as an individual who "[h]as knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the State before filing an action." *Id.* § 661-31(c).

E. Procedural History and ICA Ruling

Plaintiffs filed their initial complaint in March 2013. This Court dismissed for failure to plead fraud with particularity but granted leave to amend, which Plaintiffs did in February 2014.

The Churches moved to dismiss the First Amended Complaint in March 2014, arguing that the public disclosure bar deprived this Court of jurisdiction. In denying that motion, this Court determined that the public disclosure bar was an affirmative defense, not a jurisdictional bar. The Court explained that it was limited at the motion-to-dismiss stage to the four corners of the complaint and could not make "factual finding[s]" about whether Plaintiffs were "original sources" of the information underlying their allegations. Mot. to Dismiss, Hr'g Tr. at 30:18–24 (May 27, 2014). Even so, the Court granted the Churches' request for an interlocutory appeal, noting the "split of authority" about whether amendments to the federal FCA (on which the HFCA's 2012 amendments were based) applied retroactively and whether the public disclosure bar was jurisdictional or an affirmative defense. An interlocutory appeal was warranted in the Court's view because "resolution of those issues may result in a speedy determination of this litigation" by "either significantly limit[ing] the issues to be litigated" or "resolv[ing]" the case. Mot. for Leave to File Interlocutory Appeal, Hr'g Tr. at 27:3–16 (Oct. 29, 2014).

In February 2018, the Intermediate Court of Appeals reversed. While the ICA agreed that the 2012 amendments changed the public disclosure bar from a jurisdictional bar to an affirmative defense, it held that the amendments did not apply retroactively. *One Love Ministries*, 416 P.3d at 924–25. The court thus vacated the denial of the Churches' motion to dismiss with respect to any claims based on conduct before the amendments' July 9, 2012 effective date. *Id.* at 929. Noting that the Churches had "raised a factual challenge to jurisdiction in moving to dismiss claims arising before July 9, 2012," the ICA explained that, "aside from agreeing that the BO-1 Applications obtained by the Relators in response to their [public records] requests constitute publicly disclosed materials for purposes of applying the public disclosure bar," the parties disagreed about "how and when" Plaintiffs "acquired knowledge and information" forming the "basis for their First Amended Complaint and the significance of the [their] independent investigation and activities in revealing the alleged fraud." *Id.* The ICA remanded so this Court could "resolve any factual disputes necessary to determine whether the public disclosure bar is applicable, including whether the Relators are original sources under the Pre-Amended HFCA, for claims arising before July 9, 2012." *Id.*

As guidance, the ICA stated that discovery could help determine exactly "how and when the Relators obtained the information on which particular alleged false claims are based," given that the public disclosure bar and original source exception "depend upon the scope of the particular false claim at issue and the facts and circumstances relevant to that claim." *Id.* The ICA further advised that it would be helpful for the parties to address: the scope of the false claim at issue; the extent to which each claim is based on publicly disclosed information; Plaintiffs' "direct and independent knowledge" of the information on which each of their claims is based; and how Plaintiffs' "information provided the basis or catalyst for the investigation, hearing, audit, or report that led to the public disclosure." *Id.* Given the ICA's instructions, the parties agreed to (and completed) a limited discovery period on the public disclosure bar and original source exception under both the pre-amended and amended HFCA.

LEGAL STANDARDS

The First Amended Complaint alleges false claims ranging from March 22, 2007 to March 22, 2013, and therefore implicates both the pre-amended and amended versions of the public disclosure bar. Because the pre-amended bar is jurisdictional, whereas the amended bar operates as an affirmative defense, the Churches move to dismiss the claims arising before July

9, 2012, for lack of subject matter jurisdiction and seek summary judgment on their public disclosure affirmative defense for the claims arising on or after that same date.

Motion to Dismiss. A *qui tam* relator has the burden of establishing jurisdiction by a preponderance of the evidence. *U.S. ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 916 n.2 (9th Cir. 2006). "The court presumes a lack of subject matter jurisdiction until the plaintiff proves otherwise." *Malhotra v. Steinberg*, No. C09-1618JLR, 2013 WL 441740, *5 (W.D. Wash. Feb. 5, 2013). In a factual attack on jurisdiction, the court is "not restricted" to the complaint, "but may review any evidence, such as affidavit[s] and testimony, to resolve factual disputes concerning the existence of jurisdiction." *Yamane v. Pohlson*, 137 P.3d 980, 987 (Haw. 2006).

Motion for Summary Judgment. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Field v. NCAA*, 431 P.3d 735, 745 (Haw. 2018). The moving party bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Nozawa v. Operating Eng'rs Local Union No. 3*, 418 P.3d 1187, 1198 (Haw. 2018). When the moving party carries its burden, the opposing party must do more than just show that there is some metaphysical doubt about the material facts and come forward with specific facts showing there is a genuine issue for trial. *Id.*

ARGUMENT

Discovery has confirmed what was mostly apparent from the start—Plaintiffs are not the quintessential inside whistleblowers the HFCA relies on to root out fraud against the government. They are instead opportunistic piggybackers who seek financial gain by reviewing and compiling publicly disclosed information, while seeking to advance their political agenda. Both the pre-amended and amended public disclosure bars preclude their action.

I. The First Amended Complaint triggers both the pre-amended and amended public disclosure bars.

Although the pre-amended public disclosure bar is jurisdictional and the amended bar is an affirmative defense, the initial inquiry under both is virtually identical. This initial inquiry is "typically not hard to meet," *Malhotra*, 2013 WL 441740, at *5, and serves as a "quick trigger to get to the more exacting original source inquiry." *Hagood v. Sonoma Cty. Water Agency*, 81 F.3d 1465, 1476 n.18 (9th Cir. 1996).

Under the pre-amended bar, this Court must first determine (1) whether Plaintiffs' "allegations or transactions" were publicly disclosed through one or more of the sources specified in the statute and (2) whether the lawsuit is "based upon" those publicly disclosed allegations or transactions. HRS § 661-28 (2011); *accord U.S. ex rel. Solis v. Millennium Pharm., Inc.*, 885 F.3d 623, 626 (9th Cir. 2018). Courts interpret "based upon" to mean "substantially similar to" or "supported by." *U.S. ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 573 (9th Cir. 2016); *U.S. ex rel. Boothe v. Sun Healthcare Grp., Inc.*, 496 F.3d 1169, 1174 (10th Cir. 2007). The amended bar likewise requires this Court to determine whether Plaintiffs' "allegations or transactions" are "substantially the same as those publicly disclosed." HRS § 661-31(b). While neither version defines "allegation" or "transaction," courts have interpreted "allegation" to mean "a direct claim of fraud" and "transaction" to "refer to facts from which fraud can be inferred." *Mateski*, 816 F.3d at 571. In other words, if "X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements." *Id.* The bar applies if *either* the fraud allegation (Z) or its essential elements—the misrepresented facts (X) and the true facts (Y)—are publicly disclosed. *Id.*

Here, the alleged fraud's "essential elements" have been publicly disclosed. The First Amended Complaint claims that the State was defrauded because the Churches paid for "fewer hours" and "fewer facilities" than "actually used." (FAC ¶ 42.) For One Love Ministries, Plaintiffs assert that for each Sunday during the relevant period the church should have paid for at least eight hours use of Kaimuki High School's auditorium, cafeteria, classrooms, grounds, and parking lots (FAC ¶ 87), but instead negotiated agreements with the school allowing it to pay little to "no known rental fees" and "reduced utilities charges." (FAC ¶ 90; *see also id.* ¶¶ 97-99, 103.) For Calvary Chapel Central Oahu, Plaintiffs assert the church should have paid for at least five-and-a-half hours use of Mililani High School's cafeteria, classrooms, grounds, and parking lots each Sunday (FAC ¶ 147), but instead negotiated agreements with the school reducing its rent for use of the cafeteria and classrooms. (FAC ¶¶ 149a, 152, 155, 157a, 158.)

To be clear, allegations that public school officials *agreed* to reduce rental fees and utilities charges does not establish *fraud*, as the government cannot defraud itself. *See, e.g., U.S. ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 545 (7th Cir. 1999) ("If the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter

cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government's knowledge effectively negates the fraud or falsity required by the FCA.").

But for this threshold motion, what matters is that the essential elements of Plaintiffs' claims were publicly disclosed before they filed their initial complaint. It is well-established that responses to public record requests are "reports" subject to the public disclosure bar. *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 410–11 (2011). And it is undisputed the State produced the very agreements Plaintiffs say *prove* the fraud—indeed, that is the only reason Plaintiffs know about them. For example, in response to public records requests, the State produced a written agreement between One Love Ministries and Kaimuki High School detailing the reduced rates and fees and promising that, in exchange for the church's contributions "to enhance the school each quarter," the school "will not be charging" rent. Ex. E; *see also* Huber Dep. 124:19–126:02 (admitting Plaintiffs learned about the agreement through a public records request). Similarly, in direct response to a public records request, Mililani High School told Plaintiffs that the school principal had promised to reduce Calvary Chapel Central Oahu's rent for use of the cafeteria and classrooms in exchange for the church's "purchase and installation of [two] air conditioners for the cafeteria." Ex. F at 2. Moreover, the Churches' BO-1 Applications, invoices, and payment receipts—all of which the State possessed and produced in response to public records requests—also reflect the reduced rates and fees. *See, e.g.*, Ex. G.

Given that "a critical mass" of the facts and allegations "have been disclosed prior to the *qui tam* complaint being filed," *Amphastar Pharmaceuticals Inc. v. Aventis Pharma SA*, 856 F.3d 696, 703 (9th Cir. 2017), the First Amended Complaint triggers the public disclosure bar under both the pre-amended and amended HFCA. This action is barred unless Plaintiffs can prove they are "original sources" of the information underlying their claims, which they cannot do under either the pre-amended or amended HFCA.

II. Plaintiffs are not "original sources" under the pre-amended public disclosure bar.

To be an original source under the pre-amended bar, Plaintiffs must have "direct and independent knowledge of the information on which the allegations are based." HRS § 661-28 (2011). The requirement is conjunctive—Plaintiffs must have direct *and* independent knowledge. To have direct knowledge, "a person's knowledge must be firsthand, obtained through his own labor, and unmediated by anything else." *Prather v. AT&T, Inc.*, 847 F.3d 1097, 1104 (9th Cir. 2017). To have independent knowledge, the relator must have "relevant evidence of fraud prior

to the public disclosure of the allegations." *Amphastar Pharm.*, 856 F.3d at 705 (internal quotation omitted). Because Plaintiffs have neither direct nor independent knowledge, they are not original sources and the pre-amended public disclosure bar deprives this Court of jurisdiction over the alleged false claims arising before July 9, 2012.

A. Plaintiffs do not, and cannot, have "direct and independent knowledge" of conduct that occurred long before they began their purported investigation.

As an initial matter, this Court can quickly dismiss most of Plaintiffs' claims because they have *no* firsthand knowledge of the Churches' services and activities before they started "investigating" the Churches in 2012. This is hardly surprising given that Plaintiffs are quintessential outsiders rather than the true whistleblowing insiders the original-source exception was meant to benefit.

The First Amended Complaint asserts hundreds of false claims dating back to March 2007, yet Plaintiffs have conceded that they knew nothing about the Churches' use of school facilities until 2012, when they first received the Churches' BO-1 Applications in response to public records requests. (*See* Kahle Dep. 41:22–42:02 (testifying that, before receiving public records, they "didn't know anything" and were "[s]tarting from scratch").) This is significant because the original source analysis "must be conducted on a claim-by-claim basis." *Malhotra v. Steinberg*, 770 F.3d 853, 861 (9th Cir. 2014). Plaintiffs therefore must prove they have "direct and independent knowledge" for each claim.

Plaintiffs fall far short of this standard. As explained in more detail below, Plaintiffs testified that they visited Mililani High School three times and Kaimuki High School twelve times during their purported investigation. Notably, all these visits occurred in 2012—though Plaintiffs say they cannot remember exactly when in 2012—and Plaintiffs confirmed that they never observed a One Love Ministries or Calvary Chapel Central Oahu service or event before then. (Kahle Dep. 96:24–97:02; Huber Dep. 30:25–31:06, 89:24–90:17.) Far from having firsthand knowledge, Plaintiffs admitted they have no *actual* knowledge of church services and activities taking place before 2012; their complaint instead *assumes* the Churches followed the same schedule and used the school facilities the same way every Sunday for a six-year period. (Kahle Dep. 97:03–07; Huber Dep. 101:06–16.)

A "prediction" or suspicion of wrongdoing, however, is not "direct and independent knowledge" and cannot satisfy the "original source" exception. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 476–76 (2007); *accord Malhotra*, 770 F.3d at 860 (a "generalized

suspicion" does not constitute independent "knowledge"). To be an original source, a relator must have "*true* knowledge." *Prather*, 847 F.3d at 1104 (emphasis added). Plaintiffs' guesswork, suspicions, and predictions—no matter how confidently made—are not enough "since the purposes of the Act would not be served by allowing a relator to maintain a qui tam suit based on pure speculation or conjecture." *Id.*

Nor can Plaintiffs' limited in-person school visits in 2012 somehow bestow them with original-source status for hundreds of claims arising from conduct allegedly occurring between March 2007 and March 2013. In fact, the U.S. Supreme Court held that the public disclosure bar prohibits precisely that sort of "claim smuggling." *Rockwell*, 549 U.S. at 476. In *Rockwell*, the Court expressly rejected the argument that a relator's "original-source status" for some claims "provided jurisdiction with respect to all of his claims." *Id.* A relator's "decision to join all of his or her claims in a single lawsuit," the Court explained, "should not rescue claims that would have been doomed by [the public disclosure bar] if they had been asserted in a separate action." *Id.*

Such is the case here. Setting aside whether Plaintiffs acquired some direct and independent knowledge through their "in-person visits" to and "on-site surveillance" of the Churches' services and events—which, as explained below, they did not—any such knowledge is necessarily limited to those particular services and events. They could have no firsthand or independent knowledge about the Churches' *actual* use of school facilities for services and events they neither attended nor observed. All those claims should be dismissed out of hand.

B. Plaintiffs do not have "direct and independent knowledge" about the Churches' Sunday services because all the relevant information was publicly disclosed through public records requests and publicly accessible websites.

Plaintiffs are not original sources of the information underlying their claims about the Churches' Sunday services because that information was previously disclosed through responses to public records requests and publicly accessible websites. The pre-amended public disclosure bar thus deprives this Court of jurisdiction over the overwhelming majority of Plaintiffs' claims.[6]

As noted, the crux of Plaintiffs' complaint is that, for each Sunday between March 2007 and March 2013, the Churches' actual use of school facilities exceeded their claimed use. For One Love Ministries, Plaintiffs say the church should have paid rental fees and utilities charges

[6] The First Amended Complaint asserts 675 false claims against the Churches—626 of which relate to the Churches' Sunday services (313 per church). Out of those, 554 relate to Sunday services taking place before the HFCA was amended on July 9, 2012. (FAC ¶¶ 113, 174.)

for at least eight hours use of Kaimuki High School's auditorium, cafeteria, classrooms, grounds, and parking lots. (FAC ¶ 87.) For Calvary Chapel Central Oahu, Plaintiffs say the church should have paid rental fees and utilities charges for at least five-and-a-half hours use of Mililani High School's cafeteria, classrooms, grounds, and parking lots. (*Id.* ¶ 147.) Rather than pay these fees and charges, Plaintiffs contend, the Churches and schools *agreed* to reduced rates and charges. (*Id.* ¶¶ 90, 97–99, 103, 149a, 152, 155, 157a, 158.)

Although the First Amended Complaint insists Plaintiffs' "year-long, comprehensive investigation, [and] surveillance" is "the only thing" that "exposed" the difference between the Churches' claimed use and actual use for Sunday services (*Id.* ¶ 38), the discovery record tells a different story. Not only did public school officials agree to and approve the Churches' actual use of school facilities, but the State produced as public records the very agreements Plaintiffs say evidence fraud. Moreover, Plaintiffs' "comprehensive investigation" was in fact limited, revealing only inconsequential details about the Churches' use of school facilities.

Indeed, despite the allegations of the First Amended Complaint, discovery showed that Plaintiffs:

- Never attended a single One Love Ministries or Calvary Chapel Central Oahu service or event, either before or during their "investigation" (Kahle Dep. 92:07–09, 102:07–09; Huber Dep. 95:18–25);
- Never observed an entire One Love Ministries or Calvary Chapel Central Oahu service or event from start to finish (Kahle Dep. 96:24–97:02; Huber Dep. 89:24–90:17);
- Never went inside the school facilities while the Churches were using them to determine how the facilities were being used (Huber Dep. 87:01–03, 88:23–89:02, 90:05–17);
- Never rented or tried to rent Kaimuki High School or Mililani High School, despite falsely alleging that they had done so (Kahle Dep. 62:23–63:13; Huber Dep. 81:15–82:08; *see also* FAC ¶ 36); and
- Never spoke with anyone about the Churches' activities or use of school facilities during their in-person visits to the schools (Kahle Dep. 77:10–14; Huber Dep. 87:12–17, 90:18–21).

In fact, neither Mr. Kahle nor Ms. Huber could recall exactly when they visited Kaimuki High School or Mililani High School. Despite having what they describe as a "custom relational database" to track information supposedly learned through their investigation (*see* FAC ¶ 29), Plaintiffs testified that they "did not keep a log" of their visits and would have destroyed

contemporaneous notes from those visits if any existed. (Huber Dep. 56:15–16; 89:03–08.) The most Plaintiffs could say was that they visited Kaimuki High School "at least" a "dozen" times and Mililani High School just "three" times during their 2012 investigation. (Kahle Dep. 86:11–25; Huber Dep. 82:09–23, 87:25–88:24, 190:16–23.)

Yet Plaintiffs seek original-source status for hundreds of alleged false claims dating back to March 2007. That is not how the False Claims Act works. The original source analysis "must be conducted on a claim-by-claim basis." *Malhotra*, 770 F.3d at 861. Thus, to be an original source for each Sunday service under the pre-amended public disclosure bar, Plaintiffs must prove they have "direct and independent knowledge" for *each Sunday service* between March 2007 and July 9, 2012. Plaintiffs conceded they have no such knowledge:

> Q: Now, you make those allegations in your First Amended Complaint. Do you know if that type of usage, that length of usage, was the same for every Sunday in every year of your complaint?
>
> A: I would have no way of knowing that.

(Kahle Dep. 97:03–7; *accord id.* 103:17–105:09.)

In addition, Plaintiffs cannot even establish they are original sources for the Sunday services they might have partially observed, because "collateral research and investigations" alone do not establish "direct and independent knowledge" for purposes of the original source exception. *U.S. ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993). Plaintiffs' reliance on their haphazard and admittedly limited personal visits are insufficient—they must instead "show that the information" ostensibly learned through their purported investigation and surveillance was "qualitatively different" from "what had already been discovered and not merely the product and outgrowth of publicly disclosed information." *U.S. ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439, 443 (5th Cir. 2008); *see also U.S. ex rel. Settlemire v. Dist. of Columbia*, 198 F.3d 913, 919 (D.C. Cir. 1999) ("more specific details" about the alleged fraud "does not matter" when "the general practice has already been publicly disclosed"). But Plaintiffs cannot show this, as their "surveillance" of One Love Ministries and Calvary Chapel Central Oahu was limited both in scope and revelation. Plaintiffs testified that their in-person visits to the schools typically lasted less than an hour, with most visits lasting around 15 minutes. (Huber Dep. 89:24–90:14.) And Plaintiffs testified that out of their three visits to Mililani High School, Calvary Chapel Central Oahu was holding a Sunday service just "one time." (Kahle Dep. 86:11–17, 102:13–16; Huber Dep. 87:25–88:24.) Even then, Plaintiffs

did not stay on-site for the whole service; Mr. Kahle said it was "hot in the car" so they stayed in the parking lot for "probably" a "half hour" before leaving. (Kahle Dep. 102:07–23.)

Plaintiffs' decision to conduct limited visits and surveillance, however, makes complete sense given that all one needed to know about the Churches' actual use of school facilities was already in public records and publicly accessible websites, which qualify as "news media" for purposes of the public disclosure bar. *See U.S. ex rel. Beauchamp v. Academi Training Ctr.*, 816 F.3d 37, 43 n.6 (4th Cir. 2016) ("Courts have unanimously construed the term 'public disclosure' to include websites and online articles."); *U.S. ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 813 (11th Cir. 2015) (health clinic's publicly available websites qualified as "news media" because they were "intended to disseminate information about the clinics' programs").

Indeed, as shown below, Plaintiffs' allegations about One Love Ministries' Sunday services simply parrots publicly disclosed information:

One Love Ministries Sunday Services	
Allegation	***Examples of Public Disclosures***
• One Love Ministries holds (and has held) two, Sunday worship services at Kaimuki High School at 8:00 am and 10:30 am. One Love Ministries sets up for two hours starting at 6:00 am, holds the 90 minute service, allows one hour for ingress/egress of congregants between services, conducts a two-hour service, and holds a 90-minute lunch followed by teardown, cleaning and restoration of facilities for students, vacating the campus usually by 2:00 pm, for a total of eight hours use of and presence at the school. (FAC ¶¶ 75-76.)	• Ex. H at 1 (listing two Sunday worship services at Kaimuki High School at 8:00 am and 10:30 am); Ex. I (same). • Ex. J (showing 8 am and 10:30 am Sunday services and length of each service). • Ex. K at 2 (noting lunch held after Sunday services). • Ex. L (showing "set up" time at 6 am); Ex. M at 2 (noting "Levites" ministry helps to "[s]etup and breakdown" the sanctuary, classrooms, and nurseries for Sunday services).
• One Love Ministries should be paying rental fees and utilities charges to cover a minimum of eight hours from 6:00 am to 2:00 pm for use of the Kaimuki High School air-conditioned auditorium, cafeteria, seven or more classrooms, grounds, on-campus storage and multiple parking lots. (FAC ¶ 87.)	• Ex. H at 1 (noting Sunday services held in "air-conditioned" auditorium); Ex. I (same). • Ex. H at 4 (map showing cafeteria used for children's ministry); Ex. N at 1 (noting children's ministry uses cafeteria). • Ex. N at 2 (noting seven class divisions for children's ministry); Ex. O (noting church's use of seven classrooms on Sundays).

	• Ex. K at 2 (noting church's use of "outdoor cafeteria area" after Sunday services); Ex. N at 2 (noting church has "a tent set-up outside" the auditorium during Sunday services). • Ex. H at 4 (map showing parking locations for Sunday services); Ex. K at 1 (noting that church has "greeters in the parking lot" for Sunday services); Ex. M at 2 (noting "Parking & Safety" ministry).

The same holds true for Calvary Chapel Central Oahu:

Calvary Chapel Central Oahu Sunday Services	
Allegation	***Examples of Public Disclosures***
• Calvary Chapel Central Oahu holds a single worship service at 9:30 am lasting about 1.5 hours. Every Sunday, the church requires approximately 2.5 hours for setup, and another 1.5 hours for teardown, cleaning, and restoration of facilities, totaling at least 5.5 hours of use each weekend. (FAC ¶ 140.)	• Ex. F at 2 (stating that church uses school facilities for 5.5 hours each Sunday, from 7 am to 12:30 pm). • Ex. P (noting that "Service Length" is "90 min"). • Ex. Q at 2 (noting "Sunday Morning Set-Up" and "Sunday Morning Take-Down" ministries).
• Calvary Chapel Central Oahu should be paying rental fees and utilities charges for 5.5 hours use of Mililani High School air-conditioned cafeteria, eight or more classrooms, grounds and multiple parking lots. (FAC ¶ 147.)	• Ex. F at 2 (stating that church uses air-conditioned cafeteria, eight classrooms, and parking lot each Sunday). • Ex. P (noting Sunday service held in school cafeteria); Ex. R (church website photo showing Sunday worship service in cafeteria). • Ex. P (stating that children and teens use "covered lanai area" on Sundays and that refreshments are also "[a]vailable outside in the Lanai area); Ex. S (church website photo showing children's ministry using covered lanai area).

Because all the information underlying Plaintiffs' allegations about the Churches' Sunday services was publicly disclosed within the meaning of the public disclosure bar, and Plaintiffs do

not have "direct and independent knowledge" of that information, this Court lacks jurisdiction over the claims based on Sunday services before July 9, 2012.[7]

C. Plaintiffs cannot have "direct and independent knowledge" of the Churches' "special events" when they never attended or observed those events and learned about them only through public sources.

In addition to Sunday services, the First Amended Complaint claims the Churches defrauded the State by underpaying for their use of school facilities during certain "special events." (*See* FAC ¶¶ 107, 168.) But Plaintiffs never attended, observed, or even talked to anyone about any special event referenced in their complaint. (Kahle Dep. 99:12–100:05, 106:16–108:07; Huber Dep. 129:15–130:08, 154:20–155:19.) Rather, Plaintiffs scoured the Churches' publicly accessible websites and social media pages, compared them with publicly disclosed applications, invoices, and payment receipts (or the lack thereof), and then assumed that any apparent discrepancy between the two sources proves fraud. (Kahle Dep. 101:01–102:04, 108:08–109:01; Huber Dep. 130:09–131:09, 155:20–158:01); *see also* Exs. T & U (showing public disclosures for each special event alleged). Because that is not "direct and independent knowledge," Plaintiffs are not original sources and this Court lacks jurisdiction over the claims based on "special events" occurring before July 9, 2012.[8]

D. Plaintiffs' ancillary allegations also fail to establish original-source status.

Desperate to fall within the original source exception, Plaintiffs litter their complaint with ancillary—and immaterial—allegations about the Churches' use of school facilities. Most notable are assertions that the Churches: failed to obtain general liability insurance (FAC ¶ 52); used excessive electricity, water, and sewage (*id.* ¶ 53); plugged electrical lines directly into school outlets (*id.* ¶ 54); used school facilities for more than five years (*id.* ¶ 60); and benefitted from free storage inside the schools (*id.* ¶¶ 117, 162). Even setting aside the veracity of these allegations, they neither evidence fraud nor establish that Plaintiffs have "direct and independent knowledge" of their claims.

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[7] As explained below, Plaintiffs also are not original sources for claims based on Sunday services taking place after the HFCA's July 9, 2012 amendment date.

[8] The First Amended Complaint references 49 special events (29 special events for One Love Ministries and 20 for Calvary Chapel Central Oahu). (FAC ¶¶ 107, 168.) Out of those, 44 allegedly occurred before July 9, 2012, and thus are subject to the pre-amended public disclosure bar. The Churches are entitled to summary judgment for the remaining five special events under the amended public disclosure bar, as explained below.

1. General liability insurance

The allegations about general liability insurance fail for several independent reasons. First, they are irrelevant to Plaintiffs' claims of fraud; whether the Churches had general liability insurance has nothing to do with how much the Churches did or did not pay for use of school facilities. Second, neither the contracts nor the applicable rules and regulations require the Churches to carry general liability insurance, as Plaintiffs contend. That obligation instead applies only to "[c]arnivals and fairs" and "non-department sponsored *athletic events* which involve large crowds or greater risk, or both, for personal injury." HAR § 8-39-7(d) (emphasis added). Finally, the First Amended Complaint itself concedes that any allegations about whether the Churches carried general liability insurance are not based on "direct" and "independent" knowledge but stemmed from publicly disclosed documents. *See* FAC ¶ 52 ("BO-1 Applications do not indicate that Defendants ever obtained general liability insurance.").

2. Electricity and utilities

Plaintiffs allege they "learned from their direct investigation" that the Churches' "consumption of electricity and other utilities, such as water and sewer, [was] excessive." (FAC ¶ 53.) But this does not establish original-source status for *any* claim related to the Churches' weekly services or special events, let alone six years' worth.

Plaintiffs have admitted they do not know whether the Churches' consumption of utilities was excessive. They never measured or calculated electricity use and simply "imagine[d] how many times toilets are flushed" and "sinks are used." (Kahle Dep. 109:10–19; Huber Dep. 200:21–23.) As already established, a relator cannot "maintain a qui tam suit based on pure speculation or conjecture." *Prather*, 847 F.3d at 1104.

Moreover, Hawaii's community use program sets specific utilities rates so users do not have to calculate their usage and determine whether it is "excessive." While Plaintiffs may wish the State's rules and regulations did more to recover what Plaintiffs believe to be the schools' actual costs (*see* FAC ¶ 14), there was no requirement (contractual or otherwise) that the Churches independently monitor and calculate their utilities usage. Nor can Plaintiffs' belief that the spirit of the law imposed such a requirement support a *qui tam* action. *See, e.g.*, *Hagood*, 81 F.3d at 1477 (evidence showing a "disputed legal issue" is "not enough to support a reasonable inference" of a false claim); *U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th

Cir. 1999) ("[I]mprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false under the FCA.").

3. Electrical lines

Plaintiffs similarly allege they "observed" the Churches connecting "electrical lines to the respective schools' systems," which they claim is "directly prohibited by HAR § 8-39-7(f)." (FAC ¶ 54.) Again, Plaintiffs misinterpret the rules. That rule prohibits the "[c]onnection of electrical lines to a school's system" only for "carnivals, fairs, and other large activities." HAR § 8-39-7(f). Neither the rule nor the contracts require the Churches to install separate meters and lines for their services. And in any event, the HFCA is concerned with false and fraudulent claims for payment—"violations of laws, rules, or regulations alone do not create False Claims Act liability." *Lum v. Vision Serv. Plan*, 104 F. Supp. 2d 1237, 1241 (D. Haw. 2000).

4. Five-year rental limitation

Plaintiffs also assert that the Churches "violated the DOE's five-year maximum on leasing of school facilities." (FAC ¶¶ 60, 128.) But this allegation fails too. First, no law, regulation, or rule imposes a five-year limitation. Plaintiffs point to an over 30-year-old Attorney General opinion in support of their position, but that advisory opinion does not carry the force of law. Second, whether the Churches rented school facilities for more than five years has nothing to do with the HFCA, as it does not affect whether the Churches defrauded the State by underpaying for their use of school facilities. Third, the information on which this allegation is based was, like all others, publicly disclosed in response to public records requests. *See, e.g.*, Ex. G at 3, 4, 6, 7 (BO-1 Applications noting school rental for more than five years).

5. Inside storage

Plaintiffs contend the Churches committed fraud by using storage areas inside the schools "without submitting BO-1 Applications or making payment." (FAC ¶¶ 117, 162.) But Plaintiffs alleged this without any knowledge about its truth or falsity. Indeed, Plaintiffs testified that they never observed or even heard about the Churches storing anything inside the schools (Kahle Dep. 113:21–23), and claimed they needed discovery to determine whether any such storage really occurred. (Kahle Dep. 115:12–116:2; Huber Dep. 203:22–204:18.) Because Plaintiffs cannot have "direct and independent knowledge" without first having *actual* knowledge, they are not original sources for this allegation either. *See Malhotra*, 770 F.3d at 860 ("generalized suspicion" not "knowledge" for purposes of original source exception).

III. Plaintiffs are not "original sources" under the amended public disclosure bar.

While the amended HFCA contains a slightly different definition of "original source," Plaintiffs do not meet that definition for many of the same reasons identified above.

To be an "original source" under the amended public disclosure bar, Plaintiffs must at a minimum have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." HRS § 661-31(c)(2). But as detailed above, *all* the essential elements of Plaintiffs' claims were disclosed through public records requests and publicly accessible websites. So whatever knowledge Plaintiffs might have acquired is neither "independent of" nor "materially adds to" the public disclosures. *See Malhotra*, 770 F.3d at 860 ("Independent knowledge ordinarily means knowledge that preceded the public disclosure."); *U.S. ex rel. Hastings v. Wells Fargo Bank, NA, Inc.*, 656 F. App'x 328, 331–32 (9th Cir. 2016) ("Allegations do not materially add to public disclosures when they provide only background information and details relating to the alleged fraud."); *U.S. ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211–13 (1st Cir. 2016) ("[A] relator who merely adds detail or color to previously disclosed elements of an alleged scheme is not materially adding to the public disclosures.").

Because Plaintiffs do not fit within the amended original-source exception, the Churches are entitled to summary judgment for the remaining claims arising on or after the HFCA's amendment date—*i.e.*, July 9, 2012.

CONCLUSION

For these reasons, this Court should dismiss this action with prejudice and end seven years of unnecessary heartache and exposure to crippling fines and penalties that Plaintiffs' overreach has brought upon the Churches.

Dated: Honolulu, Hawaii, January 13, 2020

/s/ James Hochberg
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