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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

THE STATE OF HAWAIʻI, *Ex. Rel.* MITCHELL KAHLE and HOLLY HUBER, Plaintiffs, *v.* NEW HOPE INTERNATIONAL MINISTRIES dba Oahu South Foursquare Church and/or New Hope Oahu, Hawaiʻi Kai Community Foursquare Church and/or New Hope Hawaiʻi Kai, and New Hope Christian Fellowship Kapolei and/or New Hope Kapolei; 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 VLC (Other Civil Action) **RELATORS' OPPOSITION TO DEFENDANTS ONE LOVE MINISTRIES AND CALVARY CHAPEL CENTRAL OAHU'S MOTION TO DISMISS FILED OCTOBER 9, 2013; CERTIFICATE OF SERVICE** **HEARING:** Date: December, 19, 2013 Time: 9:00 a.m. Judge: Virginia L. Crandall **JUDGE:** Hon. Virginia L. Crandall No Trial Date

RELATORS' OPPOSITION TO DEFENDANTS ONE LOVE MINISTRIES AND CALVARY CHAPEL CENTRAL OAHU'S MOTION TO DISMISS FILED OCTOBER 9, 2013

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I. INTRODUCTION

Relators, Mitchell Kahle and Holly Huber, ex rel. for the State of Hawaii ("Relators"), respectfully submit their Opposition to Defendants One Love Ministries ("OLM") and Calvary Chapel Central Oahu's ("Calvary," together with OLM, "Defendants"), Motion To Dismiss filed October 9, 2013 ("Motion").

Defendants' arguments for dismissal fall into three categories. First, they attack Relators' year-long independent investigation, personal on-site surveillance and the assessment, summarization and presentation of the results as *de minimus*, claiming that the Complaint is based on nothing but publicly disclosed information, and, therefore, Relators should not be allowed to bring this action. Second, Defendants employ word-play, claiming they violated no laws and made no actual affirmative, false representations to the State because they were free to define "use" of school facilities however they saw fit, since "use" – they incorrectly claim – is undefined. They further argue that even if the churches *knowingly* paid incorrect or wrongfully discounted rates – or, in many cases, **paid nothing at all** – due to oversights, errors or improper *quid pro quo* arrangements with school employees responsible for assessing charges (who did *not* have authority to stray from DOE-set rates and classifications), Defendants' calculated silence does not comprise an actionable, affirmative false claim. Lastly, Defendants challenge the sufficiency of the Complaint, claiming: (i) it does not explain how Defendants' filings and "reverse false claims"[1] were actually false; and (ii) that the Complaint fails to state its claims with the specificity required by Hawaii Rule of Civil Procedure ("HRCP"), Rule 9(b).

II. FACTUAL ALLEGATIONS

The Complaint, viewed in its entirety, sets forth in detail the labor-intensive and lengthy independent investigation, surveillance and data collection – as well as, its compilation and creation of models and projections based thereon– undertaken by Relators. Relators' efforts took place over the course of an entire year and resulted in a written disclosure by Relators to the State of over 2,242 Bates-numbered pages of evidence. *See* Complaint, ¶ 19. These independent efforts included but were not limited to: (1) visiting, in person, and attending services at Defendants' church services and events over twelve months, Complaint, ¶ 18; (2) extensive on-line computer and other research regarding various aspects of each Defendants' events, services, attendance, and their actual use of Hawaii public school property, *id.*, ¶¶ 18 and 22; (3) extensive investigation of Defendants' on-line webpages and church bulletins, announcements, Facebook pages, and other disseminated information, *id.*; (4) photographs and on-site surveillance of numbers of attendees at Defendants' events and services and

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[1] A "reverse false claim" occurs when one knowingly fails to the pay the government what is required, as opposed to a standard false claim to obtain an improper or undeserved payment. *See* Hawaii Revised Statutes ("HRS") § 661-21(a)(6). This is what is being alleged against Defendants here.

their actual use of the schools' facilities, grounds and parking areas, *see id.* and Exs. 8(d) (for OLM) and 8(e) (for Calvary); (5) photographs and in-person, on-site, surveillance of set-up, tear-down, and clean-up, and the use of lighting, sound, production and other technical equipment, and storage and other facilities, for each of at Defendants' events and services, *see id.* and ¶ 25; (6) monitoring Defendants' sermons and broadcasts from such events and services, *id.*; and (7) independent assessments and projections calculated in relation to each Defendant's actual use of facilities rentals and utilities, through the creation of computer spreadsheets and models, (i) to reveal the difference between Defendants' *claimed* usage, as shown in Exs. 6(d) and 7(d) (for OLM) and 6(e) and 7(e) (for Calvary), in comparison to their *actual* usages and payments, as well as, (ii) to show what each Defendant *should* have paid to the State had DOE rates been applied, and the resulting dollar losses to the State. *See id.* at ¶¶ 18-27 and Exs. 6(d), 7(d) and 9(d) and 6(e), 7(e) and 9(e) and Ex. 2.

Relators' year-long, comprehensive investigation, surveillance, analysis and computations produced significant facts regarding the churches' *actual* usage of school facilities and utilities which: (i) were, until then, unknown; (ii) belied by the information then present in the government's public records; (iii) led to the allegations in the Complaint; and (iv) are summarized and presented in the charts created by Relators and attached to and incorporated by reference into the Complaint: Exhibits 9(d) (for OLM) and 9(e) (for Calvary).

Defendant OLM:

The undisclosed facts uncovered by Relators' efforts included, but are not limited to, that for OLM's use of Kaimuki High School on any given Sunday during 2011-2012, OLM:

- claimed and paid for 2 hours of *utilities* for the High School's main auditorium, but actually used the auditorium and its related utilities for 8 hours and failed to correct or notify anyone of the discrepancy or pay for the additional usage;
- claimed and paid for 5 hours of utilities in connection with use of the High School's cafeteria, but actually used the cafeteria and its related utilities for 8 hours and failed to correct or notify anyone of the discrepancy or pay for the additional usage;
- claimed and paid for 5 hours of utilities in connection with use of six of the High School's classrooms, and actually used them for 6 hours and failed to correct or notify anyone of the discrepancy or pay for the additional usage;
- did not pay for any rent for use of the auditorium, cafeteria and all 6 classrooms, *see* Complaint, Ex. 7(d), with full knowledge that it was expected to pay rental fees to the High School, as required by law, yet failed to correct or notify it of the discrepancy and pay for such use; *see* Ex. 6(d)

(application for use of a single classroom, Room A-104, with no request for or indication of OLM's use of the school's cafeteria, auditorium or other 5 classrooms); *see also* Hawaii Administrative Rules ("HAR") §§ 8-39-5(c)(3) ("A rental fee shall be assessed..." and "[a] service charge for the cost of utilities shall be assessed.") and -2 (applications must be submitted in writing for all uses);

- did not pay any rent or utilities for – and did not disclose to the State, in its applications or payments, OLM's usage of – various other portions of the High School's grounds (8 hours) and parking facilities (12 hours, for 2 lots at 6 hours each), with full knowledge that it was expected to disclose such usages and pay for such; *see id.*; *see also* Ex. 2 (Fee Schedule);
- did not pay any rent or utilities for OLM's many other events held at the School, such as "extra" pre- and post- worship events and seasonal services, with full knowledge that it was expected to apply for and pay for such use, and as required by law, *see* HAR §§ 8-39-2 and -5(c)(3);
- made a false claim on its BO-1 Applications when it checked "NO" in response to question #6: "Is there a fee, tuition, or donation collected?" *see* Ex. 6(d);
- all of which, with other misrepresentations, resulted in the school improperly having to cover the costs for OLM's usage of its facilities and utilities, *see* HAR § 8-39-5(b)(2), and a total known underpayment for 2011-2012 by OLM in the amount of $231,865.29, not including additional unpaid amounts for many of the additional events and services in 2010-11 or for any previous years. *See* Complaint, Ex. 9(d) (which is expressly referenced and incorporated by reference "as though fully set forth" in the Complaint in ¶ 23). *See also id.*, ¶¶ 27, 29-31. Thus, the total projected intentional underpayments for OLM for the period 2006-2012 in regard to its use of Kaimuki High School total at least $930,190.07. *See id.*, Ex. 9(d).

The facts regarding falsity of Defendants' representations and omissions did not come from public sources. *Id.*, ¶¶ 16, 18-19, 23 and 25. There are no documents falling under the categories barred by the statute (discussed below) that assess OLM's *actual* usage of school facilities and utilities in comparison to its *applied for, claimed* and *paid for* usage. Defendants are unable to point to any such document, public or otherwise, which does so. Rather, the information regarding Defendants' actual usage were derived exclusively from Relators' efforts. *See id.* and Exs. 6(d), 7(d), 8(d) and 9(d) (each respectively incorporated by reference into the Complaint).

For example, breaking down the Complaint's Ex. 9(d), one sees how Relators' efforts exposed OLM's misrepresentations to Kaimuki High School employees that it was only using the auditorium for services for two hours each Sunday, *see id.*, Ex. 7(d) at KH988-89 and 993-94, while paying no rental fees and just two hours of utilities in connection therewith. In reality, OLM was conducting

services every Sunday in the auditorium from 8:00-9:30 a.m. and from 10:30 a.m.-12:30 p.m., for a total usage of *at least* 4.5 hours, *see, e.g., id.*, Ex. 8(d) at KH1111 and KH1040. Exhibit 7(d), notably, contains multiple handwritten notes from Kaimuki High School employees: (i) stating that OLM directly told them that it was using the school auditorium only two hours each weekend, with OLM pointing to a 2009 agreement it had signed with the school claiming such reduced usage; and (ii) in response, directing substantial refunds be given to OLM due to its asserted usage. *See id.*, Ex. 7(d) at KH989 and KH994 and Ex. 8(d) at KH1123.[2]

OLM's *actual* use of the Kaimuki High School auditorium was significantly *longer* than 4.5 hours per week, if one includes set-up and break-down time, pre- and post-service scheduled activities and all its other special events. Exhibit 8(d) to the Complaint, at KH1021-22 and KH1025, consists of undercover surveillance photographs taken by Relators of OLM staff and volunteers already nearly finished setting up for OLM's Sunday worship at various locations on the Kaimuki High School grounds as early as 6:30 a.m, with utility usage having also begun. *See also id.* at KH1033 (September 2011 OLM announcement requesting setup help starting at 6:00 a.m.) *See also, e.g., id.*, at KH1040 (advertising a July 1, 2012 post-worship one-hour Vacation Bible School fundraiser in Kaimuki High School's "air-conditioned" auditorium); *id.*, at KH1034 (inviting worshipers and volunteers to arrive before the 8 a.m. service to partake in and volunteer at OLM's "Hospitality" coffee and refreshments table) and at KH1035 (requesting volunteers assist with setup and break-down before and after Sunday services). Thus, while OLM submitted applications and paid for just basic *utilities* for an asserted two-hours' use of the school auditorium each Sunday, its actual use of the auditorium was approximately 8 hours each Sunday, such use being provided totally rent free. *See id.*, Ex. 9(d).

These examples and the others in the Complaint and its Exhibits of OLM's recurring reverse false claims are not ascertainable from anything produced in response to Relators' UIPA[3] request.

Defendant Calvary:

Likewise, the never-before-disclosed facts uncovered by Relators' efforts regarding Defendant Calvary included that on any given Sunday, Calvary:

- claimed and paid for rent for 5.5 hours use of the Mililani High School cafeteria and classrooms at an improperly discounted rate, (*see id.*, Exs. 6(e) and 7(e));

[2] Like all of the Complaint's exhibits, Exhibits 7(d) and 8(d) are expressly incorporated by referenced "as though fully set forth" therein. *See id.*, ¶¶ 21-22.

[3] "UIPA" stands for Hawai'i's Uniform Inform Practices Act, HRS Chapter 92F.

- did not request all of the facilities it would be utilizing by omitting 7 classrooms, grounds and parking areas from its BO-1 Application; compare *id.*, Ex. 6(e) to Ex. 8(e); *see also* HAR § 8-39-2;
- received discounts not approved by the DOE on rental fees, sometimes as a quid pro quo[4] for the church having installed two air conditioners, (which the churches used every Sunday), *see id.*, Ex. 6(e)(showing rental discounts calculated under TYPE I and TYPE II columns on Calvary's BO-1 Application); *see also* Ex. 8(e) at KH1280 (showing improper "adjustments" from DOE-fixed rates);
- made a false claim on its 2011-2012 BO-1 Applications when it checked "NO" in response to question #6: "Is there a fee, tuition, or donation collected?" *see id.*, Ex. 6(e);
- knowingly failed to disclose to the State in its applications and did not pay for rent or utilities for its use of the High School's grounds (5.5 hours) and parking areas (5.5 hours), with full knowledge that it was expected to report and pay for such charges, compare *id.* to Ex. 9(e); *see* HAR § 8-39-2; *see* also Ex. 2 (Fee Schedule for use);
- did not pay any rent or utilities for Calvary's many other additional events held at the school, "extra" pre- and post- worship events and seasonal services with full knowledge that it was expected to apply for and pay such charges, *id.*, and as required by law, *see* HAR § 8-39-2;
- all of which resulted in a total underpayment for 2011-2012 by the church of at least $35,101.30, not including additional unpaid amounts for previous years and various special events. *See id.*, Chart at Complaint, Ex. 9(e)(incorporated by reference "as though fully set forth" in the Complaint in ¶ 23.). *See also id.*, ¶¶ 27, 29-31. The total projected intentional underpayments for Calvary for 2006-2012 regarding use of Mililani High School came to $171,917.56. *See id.*, Ex. 9(e).

All of the above facts were not "publicly disclosed" as that term is applied under the relevant statute. *Id.*, ¶¶ 16, 18-19, 23 and 25 and Exs. 6(e), 7(e), 8(e) and 9(e). Rather, all of these facts were derived exclusively from the efforts of Relators by which they "bridged the gap" between (i) certain public disclosures showing Defendants' *claimed* and paid-for uses, and (ii) the before-to-unknown knowledge of Defendants' *actual* usage, as derived from independent sources *not* barred by the statute.

III. LEGAL STANDARDS

A. <u>HRCP Rule 12(b)(6)</u>

On a motion to dismiss such as this brought under HRCP Rule 12(b)(6):

[4] The Hawaii Administrative Rules clearly state that fees for rent and utilities must be paid to cover costs, *see* HAR § 8-39-5(b)(2); there is no "ambiguity" that allows an agreement such as the one Calvary created for itself in violation of applicable laws. *See* Complaint, Ex. 8(e) at KH1280.

> The court must accept plaintiff's allegations as true and view them in the light most favorable to the plaintiff; dismissal is proper only if it `appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief.'

Wong v. Cayetano, 111 Hawaii 462, 476 (internal citation omitted) (underline added), *recons. denied*, 111 Hawaii 455 (2006). Thus, if even just one of the many false claim allegations against OLM and Calvary could potentially be actionable, Defendants' Motion must be denied. *Id.*

B. Hawai`i's False Claims Act Statute

HRS § 661-31 states:

> (a) In no event may a person bring an action under this part that is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the State is already a party.
>
> (b) The court shall dismiss an action or claim under this part, unless opposed by the State, if 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, ...

HRS § 661-31(a) and (b). However, Section 661-31 then continues:

> ... unless the action is brought by the attorney general, or the person bringing the action is an original source of the information.
>
> (c) **For purposes of this section, "original source" means an individual who**: (1) Prior to public disclosure under subsection "(b)," has voluntarily disclosed to the State the information on which the allegations or transactions in a claim are based; or (2) **Has 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 under this part.

HRS § 661-31(c) (emphasis added) (Hereafter, HRS Ch. 661 is referred to as Hawaii's "FCA").

C. HRCP Rule 9(b)

1. On a Motion to Dismiss, a Court Must Consider All of a Complaint's Exhibits for Rule 9(b) Assessment.

Where a defendant attacks a pleading claiming its allegations lack the particularity required by Hawaii Rule of Civil Procedure ("HRCP") 9(b), ("Rule 9(b)"), and that it therefore does not fairly provide sufficient notice of its fraud claims against him or her, a court should consider the exhibits

attached to the complaint to assess the movant's assertion. As articulated in *Adams Respiratory Therapeutics, Inc. v. Perrigo Co.*, 255 F.R.D. 443 (W.D. Mich. 2009):

> A documentary exhibit to a pleading is part of the pleading for *all purposes.* Fed. R. Civ. P. 10(c) (emphasis added). 'All purposes' includes the satisfaction of Rule 9(b)'s particularity requirement.

Id. at 446-47 (emphasis in original) (denying dismissal of certain of defendant's defenses due to alleged pleading deficiencies, based on information located in the pleading's **exhibits**). *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322, 127 S. Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007) ("courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, **in particular, documents incorporated into the complaint by reference**") (emphasis added).

As explained by the Supreme Court in *Tellabs,* the pertinent inquiry is "whether *all* of the facts alleged, taken collectively" meet the necessary standard, in that case specifically, whether allegations of fraud/scienter had been sufficiently pleaded. *Id.,* 551 U.S. at 322-33 (emphasis added). *See also Cali v. Chrysler Grp., LLC,* 426 Fed. Appx. 38, 38-39 (2d Cir. 2011) ("To survive a motion to dismiss on the pleadings, the complaint, **including accompanying exhibits and documents incorporated by reference**, must plead 'enough facts to state a claim to relief that is plausible on its face.') (emphasis added); *Amini v. Oberlin College,* 259 F.3d 493, 502–03 (6th Cir. 2001) (reversing dismissal and remanding, based on information located in an exhibit to the complaint and holding: "[i]n determining whether to grant a Rule 12(b)(6) motion, ... *exhibits attached to the complaint*" may be considered) (internal citation omitted) (emphasis in original); *Cortec Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 47 (2d Cir. 1991) (stating any written instrument attached as an exhibit to a complaint is automatically deemed to be part of the pleadings), *cert. denied,* 112 S. Ct. 1561 (1992); *Haralson v. Management & Training Corp.,* 724 F.Supp.2d 82, 85 (D.D.C. 2010) (exhibits rendered complaint in compliance with Rule 9(b)).

In sum, a complaint need not relist and re-explain every misstatement, if the "who," "what," "where" and "when" are apparent from its incorporated exhibits, thereby providing the requisite notice to defendants of the alleged false submissions to the State and the basis for the claimed falsity.

2. Failure to Satisfy Rule 9(b) Requires Amendment, Not Dismissal.

In any event, where a complaint fails to state its claims with requisite Rule 9(b) particularity, leave to amend is the proper remedy, *not* dismissal with prejudice. Where the federal statutes and rules are akin to the Hawai`i's, like with the FCA and Rule 9(b), federal case law provides significant guidance. *Gap v. Puna Geothermal Venture,* 106 Hawaii 325, 333 (2004). *See also* Mem. at 4, fn. 2 (citing

U.S. ex rel. Woodruff v. Hawaii Pacific Health, 560 F.Supp.2d 998, 997 n. 7 (D. Haw. 2008) (noting that courts apply the same standards for the federal and state FCAs because the two are almost identical)). Thus, looking to federal jurisprudence, "the usual practice when dismissing a claim based on a lack of sufficient particularity under Rule 9(b) is to allow the plaintiffs to amend the deficient pleading." *Cantin v. Nature Conservancy*, 2007 WL 1266120, *4 (D. Vt. May 1, 2007). *See also Koehler v. Bank of Bermuda (New York), Ltd.*, 209 F.3d 130, 138 (2d Cir.) ("Leave to amend should be freely granted, especially when dismissal is based on Rule 9(b)."), *reh'g denied en banc*, 229 F.3d 187 (2000); *Old Republic Ins. Co. v. Hansa World Cargo Serv., Inc.*, 170 F.R.D. 361, 374 (S.D.N.Y. 1997) ("When a court determines that a plaintiff has failed to comply with Rule 9(b), the pleader is generally allowed to amend the pleading, and failure to permit amendment has been held to be abuse of discretion."); 5A Wright & Miller § 1300 (3d ed. 2013) (same); 5A Fed. Prac. & Proc. Civ. § 1296 (3d ed. 2013) (same).

This rule applies equally to FCA cases, where Relators are generally afforded leave to amend after dismissal of FCA claims for failure to comply with Rule 9(b). *See, e.g., Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 568-69 (11th Cir. 1994); *U.S. ex rel. Pecanic v. Sumitomo Elec. Interconnect Products, Inc.*, 2013 WL 774177, *8-9 (S.D. Cal. Feb. 28, 2013); *U.S. ex rel. Wall v. Vista Hospice Care, Inc.*, 778 F.Supp.2d 709, 719 (N.D. Tex. 2011); *U.S. v. Center for Diagnostic Imaging, Inc.*, 787 F.Supp.2d 1213, 1222 and 1225 (W.D. Wash. 2011) (same); *U.S. ex rel. Ellsworth v. United Bus. Brokers of Utah, LLC*, 2011 WL 1871225, *4 (D. Utah May 16, 2011) (same); *U.S. ex rel. Polansky v. Pfizer, Inc.*, 2009 WL 1456582, **3-4 and *11 (E.D.N.Y. May 22, 2009) (same).

3. Likewise, Failure to State All Elements of an FCA Claim Merits Amendment, Not Dismissal.

This above rule is generally also true where Relators have failed to state necessary elements of an FCA claim, (as opposed to stating a claim but without the requisite particularity). *See U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. Nov. 1, 2010) (reversing and remanding with leave to file an amended complaint, where lower court erroneously disallowed amendment of FCA claim after dismissal for failure to state a claim, where no special circumstances such as undue delay, bad faith or undue prejudice were present). *See also U.S. ex rel. Ernst v. Tenet Healthcare Corp.*, 2005 WL 474244, *2 (N.D. Cal. Mar. 1, 2005); *U.S. ex rel. Westerfield v. Univ. of San Francisco*, 2006 WL 335316, *5 (N.D. Cal. Feb. 14, 2006).

IV. ARGUMENT

A. Defendants' Motion Should Be Denied because They Repeatedly Make Improper, Unsupported Factual Averments, Not Included in the Complaint or Its Exhibits, which Is Not Allowed on a Rule 12(b)(6) Motion.

While some courts may allow consideration of facts external to the complaint to assess the question of whether relators are original sources, viewing pertinent to the issue of jurisdiction, *see, e.g., In re Pharm. Industry Aver. Wholesale Price Litig.*, 2001 WL 1375298, *2 (D. Mass. Mar. 25, 2010), others have converted such motions into ones for summary judgment where such materials are considered, *see, e.g., Reagan v. E. Tex. Med. Ctr. Regional Healthcare Sys.*, 384 F.3d 168 (5th Cir. 2004) (cited at Mem. at 5.) **However, (i) in *no* circumstances are unsupported factual averments sufficient, and (ii) any evidence validly presented and supported must pertain to this issue.** *See In re Pharm. Industry Litig.*, at *2. In direct contradiction to these two principles, Defendants present nothing but unsupported factual averments, most pertaining exclusively to Defendants' substantive defenses, not the question of whether Relators are "original sources." For example, in trying to find something that Defendants can point to as *not* being original source material, Defendants state in connection with Exhibit 6(e):

> This application was filled out and submitted by Calvary Chapel to use Mililani High School. The application shows that the principal of the school utilized a Type I rate for use of the school instead of a Type III rate even though in the application, Calvary Chapel specifically stated that it wanted to use the school for a 'church service.'

Mem. at 7. None of this, however, is evident from Exhibit 6(e).

Elsewhere in their Motion, Defendants contend "the government was fully aware of, and set the terms of the rental arrangements by One Love and Calvary Chapel," *id.* at p. 12; and still elsewhere, that: "[t]he principals of the relevant schools involved obviously made the determination that no general liability insurance was required by the churches because they did not meet [the stated] definition." *Id.* at 14. First, Defendants offer no evidence for either of the latter two statements (and many other similar) bald assertions in their motion.[5] Second, these assertions do *not* pertain to the "original source" issue; they go to Defendants' substantive defenses of lack of falsity of statements to

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[5] *See*, as additional examples: Mem. at 14 (regarding "[t]he fact that some of the principals and some of the churches interpreted that term ["use"] differently") (brackets added); *id.* at 14 (that allegedly "the school principals were aware of the facts surrounding the allegedly false claims at issue"); and *id.* at 12 (regarding principals allegedly exercising their perceived, supposed "discretion in setting the rental charges and the conditions of the rental.") Nothing has been offered by Defendants, however, nor can be on a Rule 12(b)(6) motion, regarding the principals' purported subjective intents and understandings. Defendants' suppositions in that regard are most certainly not "obvious."

the State and/or the alleged absence of any misconduct, and thus, they are not appropriate for consideration on a Rule 12(b)(6) motion, even if properly documented.

If the Court intends to consider Defendants' unsupported contentions, (a full list of which can be provided to the Court at hearing), this Motion must assessed under Rule 56. In that case, Defendants' Motion should be denied for failure to present <u>admissible</u> evidence, and Relators should, in any event, be provided time for discovery into Defendants' contentions regarding the intent and understanding of the specific school principals and the other employees who filled out the relevant forms, assessed, discounted and/or waived the relevant charges and engaged in *quid pro quo* exchanges.

B. Plaintiffs' Allegations of Fraud Are Not Based on Information Barred under HRS § 661-31, and, even if They Were, Plaintiffs Fall under the Statute's "Original Source" Exception.

The allegations of the Complaint taken as a whole show that Relators are not relying on UIPA-produced public reports for the Complaint's allegations. What Relators derived through their efforts were details of each of Defendants' underlying transactions with the government and nothing more, *i.e.*, Defendants' *claimed* uses of school facilities and utilities, not their *actual* use. Moreover and in any event, Relators squarely fit within the exception in HRS § 661, which states that they may nonetheless bring suit as "original sources," if they have "knowledge that is independent of and ***materially adds to*** the publicly disclosed allegations or transactions." HRS § 661(c) (emphasis added). *See* Complaint, ¶¶ 5, 6, 16-25.

First and foremost, one must distinguish between "allegations" and "transactions." There are no publicly-disclosed "allegations" in this case. Relators do not rely on and Defendants do not point to – (as there are none) – any existing state investigations or reports or audits or even news reports in which charges were leveled that Defendants were engaging in an under-reporting, under-payment scheme, as was the situation in many of the reported decisions on which Defendants relied. Instead, all that existed in the public realm, and all that Defendants point to in their Motion, were documents evidencing "transactions" (agreements, applications, invoices, etc.) between Defendants and the schools, which appear perfectly innocent on their face *and which could not have been disproven simply using other documents acquired from the State.* The knowledge of such "transactions" is necessarily the case in every single FCA action (*i.e.*, there must first and always exist *something publicly-filed* which is false). Relator's eventual knowledge of the falsity of Defendants' submissions to the State and the allegations explaining them came only *after and from* Relators' additional, independent, investigative efforts taking place over the course of a year, which exposed the truth about the publicly disclosed transactions.

Defendants try to get around this distinction and bury Relators' months of independent efforts in various unconvincing ways. First, they mischaracterize the Complaint. For example, Defendants claim Relators are alleging the churches engaged in "regulatory violations" which resulted in innocent undercharges. Mem. at 6. However, the violations of which Defendants are accused are not mere "regulatory violations;" Defendants are alleged to have violated HRS § 661-21(a)(6) over the course of several years, through multiple filings, thereby wrongfully avoiding payment of millions of dollars of Hawaii state taxpayer money. As another example, Defendants misstate that Relators "obtained information through UIPA requests and based their entire Complaint on information obtained through those documents." Mem. at 7. Defendants fail to mention the Complaint's detailed allegations of the intervening twelve months of Relators' surveillance, investigation and analysis of the massive amounts of information received from *non*-public sources, many of which are listed above and in the Complaint at ¶¶ 5, 6, 18-25 and computed by Relators in Exhibits 9(e) and 9(d), again, all of which must be taken as true on this Motion. *Wong*, 111 Hawaii at 476.

Accordingly, with such extensive, independent investigation and analysis performed by Relators and the theretofore-unknown facts they obtained through such efforts, Relators are (1) independent sources of the information on which the allegations in the Complaint are based, and (2) such information materially adds to the publicly disclosed facts regarding the transactions. *See* HRS § 661(c). This makes virtually all of Defendants' cited cases inapplicable. Those cases involved relators who received a public report or obtained documents from a public information request (generally a federal FOIA request) that clearly identified the transactions in issue and all of the necessary facts regarding the suspected *fraud,* and then turned around – with nothing more – and filed a lawsuit that merely parroted the same publicly disclosed transactions and allegations of fraud. Hence, comparing page 1 of a FOIA response to page 25 and thereby having all that is necessary to file a *qui tam* suit is deemed short of what is required to meet HRS § 661(c) standing. This is not such a case.

For instance, Defendants focus heavily on *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S. Ct. 1885, 1893, 179 L.Ed.2d 825 (2011). In *Schindler*, the Supreme Court resolved the split among the federal Circuits of whether responses to FOIA requests – producing documents of any sort or even a summary letter stating that no responsive documents existed – comprise "reports" on which a federal FCA action may not be based, holding the answer to be "yes." *Schindler*, however, dealt with a case where the relator, Kirk, (a former dismissed and disgruntled employee of Schindler), made a FOIA request and received two key sets of documents in response: (A) copies of submissions by Schindler for payments from the government for specific contracts in which the company stated it was in full compliance with certain veterans' minimum employment requirements necessary to be awarded those

contracts, as well as, related veterans' employment reporting laws, and (B) a detailed Department of Labor response, following an internal search and investigation, stating that Schindler had *not* filed any reports showing it was in compliance with applicable employment and reporting requirements for at least five years during which they had submitted payment requests and had been paid. Kirk, putting A and B together, both obtained from the government, thus claimed all of the requests for payments from Schindler during those five years necessarily were false. The Supreme Court concluded that merely linking A to B from two documents received from the government was insufficient "independent effort" by a relator, explaining:

> Although [Relator] alleges that he became suspicious from his own experiences as a veteran working at Schindler, anyone could have filed the same FOIA requests and then filed the same suit. ... anyone could identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a ***qui tam*** action under the FCA.

Id., 131 S. Ct. at 1888 (cited at Mem. at 5-6) (brackets added). *See also U.S. ex. Rel. Davis v. Prince*, 753 F. Supp.2d 569, 579 (E.D. Va. 2011) (to defeat a relator's claim, a public disclosure must either reveal the fraud itself, or expose both a false statement of fact and a true statement of fact, from which fraud in the former can be readily inferred).

In the instant case, anyone could not have filed this action based on the very limited materials received from the State or (purportedly) reported by the news media. While many of the submissions and applications from the churches stating false information came from the State's UIPA responses, the facts and circumstances showing their falsity did not. Thus, this case is not like *Schindler* or the other cases cited by Defendants,[6] where the relators' investigation, if any, contributed little or nothing to the information givng rise to the awareness of and eventual allegations of fraud in the Complaint.

Second, Defendants also misrepresent the cases they rely upon[7] as holding that a *qui tam* action that in *any way* is partly based on publicly disclosed information is forbidden. Per Defendants' logic, a *qui tam* complaint based one-percent on public information would, in theory, not be actionable. However, the cited cases do not hold this; in fact, no case holds this. Rather, Defendants' cases consistently hold that to be dismissed, a *qui tam* complaint must be based, not simply "in part," on publicly disclosed, barred information, but rather, *primarily* or *in large part* or *in its majority* on publicly

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[6] Such as *U.S. ex rel. Grynberg v. Praxair, Inc.* 389 F.3d 1038 (10th Cir. 2004), *cert. denied*, 125 S.Ct. 2964 (2005); *U.S. ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49 (1st Cir. 2009); *Reagan*, 384 F.3d 168; and *U.S. ex rel. Mistick v. Housing Auth. of City of Pittsburgh*, 186 F.3d 376 (3rd Cir. 2006), *cert. denied*, 120 S.Ct. 1418 (2000). *See* Mem. at 5.

[7] *See* prior footnote.

disclosed, barred information, and that the barred information must outweigh the independent knowledge, if any, obtained by the relator. For example, in *Reagan*, 384 F.3d at 174-76 and 177, cited by Defendants at Mem. at 5, the Fifth Circuit Court of Appeals held that the relator (the former director of a hospital who was claiming the hospital submitted false claims to Medicare and had falsified regulatory compliance information) was not an "original source" of information, because the **majority** of information on which her suit was based came from information disclosed (i) in civil hearings, the documents from which were on file in the public clerk's files, (ii) in reports of audits and investigations conducted by the public health Care Finance Administration into the issue raised, and (iii) other FOIA-request responses. *See id.*, at 174-76. Importantly, in the same sentence that the *Reagan* Court used the term "partly based," it specified "in significant part," *id.*, at 177, and later in the decision, as "almost entirely," *id.*, at 178. Furthermore, the *Reagan* Court went on to explain that the purpose of the "original source" exception is to distinguish between:

> those individuals who, with no details regarding its whereabouts, simply stumble upon a seemingly lucrative nugget and those actually involved in the process of unearthing important information about a false or fraudulent claim.

Id. (internal citation omitted). The *Reagan* Court, thus concluded – and the relator there actually admitted, as noted in the opinion – that the only "independent" contribution she had offered was a disagreement with the existing results of prior public investigations and audits into known allegations of the hospital's fraud, and the conclusions in reports therefrom, in that she felt they evidenced a greater fraud than the government had concluded had been present. *Id.*, at 178-79. The Court expressly noted the absence of any independent investigation or personal, direct, observations to add to the allegations and facts which were available from the public materials. *Id.*

Grynberg, *see* Mem. at 5, follows the same track as *Reagan* and actually supports Relators here, stating: "when a relator's qui tam action is based *solely* on material elements already in the public domain, the relator is not an original source." *Id.*, 389 F.3d at 1054 (emphasis added).

The line of cases that is more applicable to the present matter than Defendants' are listed in *Reagan* at page 179 of that decision. *See, e.g., Cooper,* 19 F.3d at 568; *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn,* 14 F.3d 645, 657 (D.C. Cir. 1994). *Consider also U.S. ex rel. Purcell v. MWI Corp.*, 824 F. Supp.2d 12, 21 (D.D.C. 2011) (confirming that the public disclosure bar prohibits *qui tam* actions only when enough information exists in the public domain to expose **all** aspects of fraudulent transaction); *U.S. ex. Rel. Colquitt v. Abbott Laboratories*, 2012 WL 1081453, *23 (N.D. Tex. Mar. 30, 2012) (confirming that dismissal was proper only because **all** of the information necessary to support the relator's claim were available to any member of the public), *recons. denied* (Aug. 24, 2012).

These cases also hold that the relators have should **not** be barred from bringing suit:

> if the investigation or experience of the relator either ... translate[s] into some additional compelling fact, or demonstrate[s] a new and undisclosed relationship between disclosed facts, that puts a government agency 'on the trail' of fraud, where that fraud might otherwise go unnoticed,....

Reagan, 384 F.3d at 178 (brackets added). *See also, e.g., Cooper,* 19 F.3d at 568 (reversing district court and holding relator to be an original source because, despite *some* of the claims originating from public disclosures, relator's three-year investigation first alerted government to numerous, specific, before-unknown violations and produced much of the information sued upon); *Springfield Terminal Ry. Co.*, 14 F.3d at 657 (holding plaintiff to be original source, because its personal, additional investigation of public records in ongoing litigation revealed details of fraud by a federally appointed arbitrator, theretofore unknown); *Houck, Houck v. Folding Admin. Comm.*, 881 F.2d 494, 505 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1514 (1990) (finding relator to be independent source of information because his knowledge of fraud by committee processing class action settlement was learned through his direct, personal involvement in claims resolution process.)

These cases are fully in harmony with *Schindler*, because in that case, as summarized above, the relator compared invoices submitted for payment received from the government per a FOIA request to a report certifying that the company had not submitted the necessary reports for the same years, and with those two bits of information, had everything he had needed and had used to bring suit. In other words, the Supreme Court's decision in *Schindler* is both distinguishable from and harmonious with this case because the relator there was found to have done nothing to "bridge the gap,"[8] between the public information enumerating the transactions and the ultimate facts showing their falsehood.

To get around this fatal flaw in their argument, Defendants cherry-pick **one** application for OLM and **one** for Calvary that, they argue, anyone could determine to have been fraudulent or false on their faces. Mem. at 7-8. First, Defendants point to a rental application by Calvary that supposedly applies the Type I rental rate for school-related functions, instead of the correct Type III rate to be used for churches. This shows Defendants' poor understanding of Chapter 39 and is a misreading of their actual BO-1 Application. As an initial matter, there is no evidence that the Mililani High principal actually utilized a TYPE I rate. *See* Ex. 6(e). In fact, a TYPE I rate charges no rental or utilities fees. *See* HAR § 8-39-5. Thus, had a TYPE I rate been applied as Defendants contend, the only charges assessed would have been custodial. What is not so "evident" to

[8] *See* prior footnote.

Defendants is how or why the principal was using the TYPE I and TYPE II columns on Exhibit 6(e) to calculate a discount on the rental fees for Calvary.

This Exhibit, thus, is a good example of the analysis performed by Relators to establish just one instance of Calvary's fraud: Relators had to analyze the application and make numerous cross-references and calculations to determine the fees that were actually being charged to Calvary, amongst the jumble of incomprehensible numbers and scribbles. Defendants' inability to read the very document they point to proves Relators' argument as to the *lack* of obviousness of Defendants' scam. *See* Mem. at 7 and Complaint, Ex. 6(e). Exhibit 6(e) is also a good example of a reverse false claim based on Calvary's deliberate silence, since Calvary knew (or, at a minimum, reasonably should have known), it was receiving discounted rental rates. *See* Complaint, ¶ 33-35.

Defendants also point to a single "Bill/Payment Agreement" between OLM and Kaimuki High School that OLM admits is false on its face because it fails to include charges for rent and adequate charges for utilities, parking facilities and use of the grounds and storage, but for which they argue no independent investigation was needed by Relators to expose such falsities. *See id.*, Ex. 8(d) at KH1123. In their agreement, Defendants did not disclose all of the facilities they would be utilizing; OLM omitted grounds & parking. *See id.* In the agreement OLM also misstated the actual hours of facility use for the auditorium, cafeteria and classrooms on Sundays. *See id.* The extent of the false information was determined by Relators' research determining OLM's *actual* use of the school's facilities. OLM further misrepresented its time of use to the DOE superintendent and BOE chair in a letter: "let me remind you that we use the facility one day per week, for 6 hours," when in fact, OLM used the school facilities on Sundays for 8 hours, conveniently omitting the 2 hours from 6:00 to 8:00 AM. *See id.* at 9-10 and Complaint, Ex. 8(d) at KH1120-1123.[9] Whether Defendants' fraud can be determined by looking at these two documents (which it cannot), in the end, is not decisive to their Motion, however, because Relators do not base the entire Complaint on these two transactions.

Finally, Defendants' argument that "Relators would not have had any basis for alleging fraud in their Complaint were it not for the documents obtained through their UIPA requests," Mem. at 7 (and many other places), misses the point. As stated above and repeated throughout Defendants' Motion, to establish an FCA claim, **there must always first exist something *publicly-filed* which**

[9] Notably, Defendants' alleged inability to determine the alleged false and reverse false claims they are being accused of is belied by their demonstrated ability to have found these two specific applications within the Complaint's exhibits and to have gleaned from them and the Complaint the relevant fraud allegations to which they pertain. It appears the Complaint is "too vague" for Defendants only when such is a convenient characterization.

is false. This follows because an FCA claim requires a false statement *to the government,* and government records are, with very few exceptions, the only public records. *See* HRS Chapter 92-F and HRS § 663-31(b). In this case, the publicly-filed documents appear proper, offering nothing on their faces or within them in terms to alert one to fraud. (Certainly the DOE did not know of it). If Defendants' contention accurately states the law, there would almost never be a viable FCA claim.

C. The Complaint Sufficiently States All of Its Claims

1. Defendants Misrepresented Information about Their Use of School Facilities and Utilities and Knowingly Failed to Correct Erroneous Rates and Omitted Rent and Other Charges Intentionally To Avoid Paying Their Debts.

The Complaint and its exhibits, (and Defendants' Motion, no less), are replete with examples of direct misstatements Defendants made to school employees and the State to secure reduced or waived rents and charges. Nonetheless, Defendants contend that "the [school] principals made the determinations [regarding charges] and One Love and Calvary Chapel paid the amounts they were charged by the government officials tasked with setting those rates," *id.* (brackets added), explaining:

> Plaintiffs have not and cannot point to any false claim by the churches where they falsely represented their usage to the principals ... all Relators have shown is that One Love and Calvary Chapel paid what the school required them to pay. ...
>
> '... violations of [agency] regulations are not fraud unless the violator knowingly lies to the government about them.'

Mem. at 11-12 (quoting *Gudur v. Deloitte Consulting, LLP*, 512 F.Supp.2d 920 (S.D. Tex. 2007), *aff'd*, 2008 WL 3244000 (5th Cir. 2009)) (brackets in original). This is wrong on several levels.

First, this has been shown above to be simply untrue. OLM made affirmative false statements to the schools and in its applications regarding its actual use of school and school utilities. And OLM and Calvary both made false statement about their use of other school grounds and parking lots. *See* above, Section II. This case is not based merely on misapplied rates or missing charges and Defendants' knowing silence in response.

Second and moreover, such silence ***is*** actionable, at least with the facts present here. It is not only affirmative misstatements that are actionable under the FCA, it is black-letter law that material known omissions count as well. *See U.S. ex rel. Oliver v. The Parsons Corp.*, 498 F.Supp.2d 1260, 1291 (C.D. Cal. 2006) (material omission is a proper basis for an FCA claim, and questions of materiality are mixed questions of law and fact that are generally **not** appropriate for summary disposition); *U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 255 F.Supp.2d 351, 406 (E.D. Pa. 2002) (same, citing *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732–33 (7th Cir.1997)(noting that where a party knowingly omits material information in presenting a "misleading half-truth" to the government, such

an omission may give rise to FCA liability)); *U.S. ex rel. Berge v. Bd. of Trustees of Univ. of Ala.*, 104 F.3d 1453, 1461 (4th Cir. 1997) ("There can ... be liability under the False Claims Act where the defendant has an obligation to disclose omitted information.") (internal citation omitted), *cert denied*, 118 S. Ct 301 (1997); *U.S. v. Job Resources for Disabled*, 2000 WL 1222205, *3 (N.D. Ill. Aug. 24, 2000) (noting that material omissions "trigger liability under the False Claims Act")). "Accordingly, ... FCA liability will lie against a defendant who incurs – and fails to fulfill – an obligation to protect the government from pecuniary loss," whether by misstatement or material omission. *Atkinson*, 255 F. Supp. 2d at 406.

Here, both Defendants were aware or became aware of the many mistakes, improper discounts, absent charges, less-than-actual hours, misapplied rates, etc., from which they financially benefitted at the expense of the State, yet they repeatedly submitted payments in response to these inaccurate invoices without correcting or notifying anyone of the discrepancies. Complaint, ¶¶ 36-37. This is akin to someone mistakenly being charged for one pound of steak instead of ten, recognizing the error, saying nothing to the cashier, and then walking out of the store claiming that he did absolutely nothing wrong. Few would recognize that as fair, decent or proper. Without question, it violates HRS §§ 661-21(a)(6)[10] and (7).[11]

Furthermore, Defendants are wrong in arguing that the they should not be held accountable for any missing, incorrect, discounted or misapplied charges because they emanated from "government officials tasked with setting those rates" and that:

> [a] FCA lawsuit cannot be used to police compliance with regulations that vest discretion in government decision makers. The regulations governing use of school facilities by community groups *vest discretion in the principals of each school* to set the rates for usage and to determine whether certain provisions of the law actually apply to a particular user.

Mem. at 9 (emphasis added). Tellingly, Defendants do not cite to the claimed regulations or portions thereof that purportedly vest discretion in school principals. This is because they cannot: the relevant rates and fee-types are set by the DOE; school employees, including principals, have no ability or authority to stray from them. *See* Complaint, Exs. 1-3. "The rental fees and service charges applicable

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[10] HRS § 661-21(a)(6) covers one who: "[k]nowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the State, or knowingly conceals or **knowingly** and improperly **avoids** or decreases an obligation to pay or transmit money or property to the State." (Emphasis added). The statute does not require an express, affirmative, direct misrepresentation for a violation to have occurred.

[11] Similarly, HRS § 661-21(a)(7) covers one who: "[i]s a beneficiary of an inadvertent submission of a false claim to the State, who subsequently discovers the falsity of the claim, and fails to disclose the false claim to the State within a reasonable time after discovery of the false claim." Again, this section does not require an express, affirmative misrepresentation, but, instead, makes knowing silence unlawful.

to the use of school facilities **shall be determined by the superintendent of education** to recover costs.... A rental fee **shall** be assessed. ... A service charge for the cost of utilities **shall** be assessed." *Id.*, Ex. 1, § 8-39-5 (emphasis added). *See also* HRS § 302A-1148. School principals (or their designees) are simply designated as the proper persons **to collect** the fees. *See* HAR § 8-39-6. Defendants' "discretionary principal" theory fails, therefore, because, as a matter of law, they had no authority to vary from the DOE rates and categorizations. Nonetheless, this did not stop Defendants from extracting improper waivers and discounts from the set rates in exchange, for example, for *quid pro quo* "inducements" to the schools, putting it politely.

To address this problem, Defendants – in direct contradiction to HAR § 8-39-5 – claim that that SP 6110(5)(B)'s language that principals are to "assess fees, *if applicable* ....," Mem. at 10-11 (emphasis in Mem.), means that principals have unfettered discretion to set, adjust and/or waive fees altogether, wrongly stating thus that "SP 6110 places the assessment of fees squarely and entirely within the province of the principal of each school," *id.* at 13-14. Exs. 1-3 show this contention to be completely false. Every principal must work within the confines of the Rules and the DOE Rental Fee Worksheets, Rate Schedules and Guidelines. *See* HAR §§ 8-39-5 and -6 (which place decision-making authority as to rates in the Superintendent of Education, with fees to be collected by principals and school employees.) Inclusion of the two words "if applicable" does not change this. Defendants' interpretation violates the Statute, the Rules, common word usage and common sense.

Defendants argue further that, even assuming Defendants did utilize the school facilities for more than twice, or ten times, the time applied and paid for, that would still be perfectly acceptable, because neither the Administrative Rules §§ 8-39-1 through -14, (*see* Complaint, Ex. 1), nor their accompanying Rate Schedules and Standard Practices and Guidelines, (*id.*, *see* Exs. 2 and 3), define the word "use" or expressly state that "use" specifically includes time used for set-up and tear-down (apparently, even if utilities, such as air-conditioning or electricity, are "in use" during that time). *See* Mem. at 9-10. According to Defendants, the evidence that "use" can mean whatever they want it to mean comes from the fact that some principals at some schools charged for set-up and tear-down time while others did not, thus evidencing an uncertainty or confusion among school principals that was not *Defendants'* fault and which OLM and Calvary had every right to take advantage of. *See* Mem. at 9-14[12] and fn 5. Like with Defendants' tortured interpretation of the words "if applicable," their wordplay regarding the meaning of "use" presents no valid reason to dismiss the Complaint.

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[12] Defendants' argument at Mem. at 12 that "where disputed legal issues arise from vague provisions or regulations, a contractor's decision to take advantage of a position cannot result in his filing a 'knowingly' false claim,'" is misplaced here, since the DOE rates, classifications and other

Furthermore, Defendants contend: "[n]or is there a requirement that 'use' encompass the time in between events that are held on the same day." Mem. at 10. Frankly, this is absurd. All established rental fees and utilities charges established by the DOE are *hourly* and are determined specifically to "recover costs." *See* HAR § 8-39-6.

2. There Was No "Government Knowledge" of the Underpayments and Misrepresentations/Material Omissions by the Churches.

Defendants also contend that because the government knew of the false claims, it cannot be deemed to have been deceived, and, thus, circularly, there can be no false claim. Mem. at 14-16. However, there has been no evidence provided by Defendants that the "government" actually knew of their underpayments, only (unsupported assertions) that the involved and apparently confused principals, vice principals and/or school officials may have known. Nor have Defendants offered anything to show that the superintendents or anyone, for that matter, at higher levels at the DOE had any knowledge of the false claims or improper actions of low level school officials. Only knowledge by persons at such higher levels will suffice, as "[n]otice of violation to 'low level governmental officials' is insufficient to avoid liability under the False Claims Act." *U.S. ex rel Farrell v. SKF USA, Inc.*, 204 F. Supp.2d 576, 579 (W.D.N.Y. 2002) (citing *U.S. ex rel. Mayman v. Martin Marietta Corp.*, 894 F.Supp. 218, 223–224 (D.Md. 1995); *U.S. ex rel. Hagood v. Sonoma County Water Agency,* 929 F.2d 1416, 1421 (9th Cir.1991) and *U.S. ex rel. Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir.1993)).

In any event, government knowledge is **not** an issue to be resolved on a motion to dismiss. *Hagood*, 929 F.2d at 1421 (reversing trial court's dismissal of complaint and noting that such a determination *cannot* be made on mere inspection of the complaint on a summary disposition motion.) *See also Miller v. Holzmann*, 2007 WL 778596, *7 (D.D.C. Mar. 6, 2007)(refusing to dismiss complaint due to disputed question of material fact as to the level of knowledge the government had or should have had concerning the alleged FCA violations). Relators, in the Complaint, which must be taken as true, *Wong*, 111 Hawaii at 476, clearly allege that the State had no knowledge of Defendants' scheme. *See* Complaint, ¶¶ 31, 35.

3. The Complaint States Its Fraud Claims as Required by Rule 9(b).

As here, where Defendants attack the Complaint claiming that its allegations lack the particularity required by Rule 9(b), this Court should consider the exhibits attached to the Complaint to assess Defendants' contention. *Adams Respiratory Therapeutics, Inc.*, 255 F.R.D. at 446-47; *Tellabs, Inc.*, 551 U.S. at 322; *Haralson*, 724 F.Supp.2d at 84 and fn.1 ("A court may consider exhibits attached to

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requirements are **definite and fixed** with specific dollar amounts and defined categories, and therefore are the polar opposite of "vague."

the Complaint on a motion to dismiss," here, in Rule 9(b) context.); *Cali, LLC*, 426 Fed. Appx. at 38-39; *Amini*, 259 F.3d at 502–03. Relators' need not relist each and every one of Defendants' false statements and the "who," "what," "where" and "when" of the alleged false claims in the body of their Complaint, when they are contained in the exhibits and are directly referenced and incorporated in each specific paragraph relevant to each Exhibit. *See* Complaint, Exs. 6(d)-(e) and ¶ 20, 7(d)-(e) and ¶ 21, 8(e)-(d) and ¶ 22, 9(d)-(e) and ¶ 23.

And to the extent that the allegations and exhibits are not clear enough, the proper remedy is leave to amend not dismissal. *Koehler*, 209 F.3d at 138; *Old Republic Ins. Co.*, 170 F.R.D. at 374; 5A Wright & Miller § 1300; 5A Fed. Prac. & Proc. Civ. § 1296. This is equally true for FCA cases. *Pecanic*, 2013 WL 774177 at *8-9; *Wall*, 778 F.Supp.2d at 719; *Center for Diagnostic Imaging*, 787 F.Supp.2d at 1222 and 1225; *Ellsworth*, 2011 WL 1871225 at *4; *Polansky*, 2009 WL 1456582 at **3-4 and *11. Accordingly, any dismissal ordered by the Court should be with leave to amend.

4. The Inclusion of Doe Defendants Is Irrelevant to the Other Defendants Named Herein for Rule 9(b).

Regarding the Doe defendants, the inclusion of whom Defendants claim is fatal to the Complaint, Mem. at 19, the cases that Defendants cite hold that Rule 9(b) is not satisfied regarding Doe defendants when they are simply pleaded nominally without further discussion of their actions or roles in the alleged scheme; those cases, however, dismissed the fraud claims only against such unidentified parties as insufficient under Rule 9(b). It must be noted that federal courts have no Rule like HRCP Rule 17, which expressly allows pleading against Doe defendants. Moreover, those federal cases Defendants cited did not in any way touch upon, let alone dismiss, the claims against, the *named* defendants against whom specific allegations had been leveled. Defendants' argument on this point, therefore, is a red herring and bears no relation to OLM or Calvary.

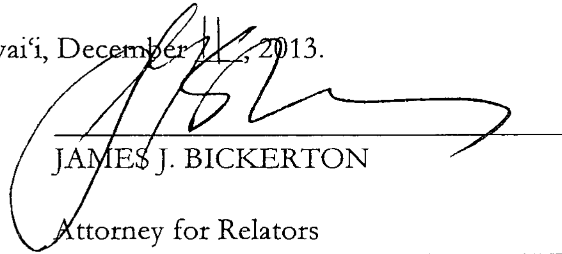
5. The Complaint States a Claim for Conspiracy To Violate the FCA.

Count III of the Complaint sets forth each and every of the elements for a claim for conspiracy to violate Hawaii's FCA, *see* Memo at 3-4, and at 10, fn.4, *see* Complaint, ¶¶ 36-37, with the substantiating allegations appearing in paragraphs 16-27 which must be taken as true on this Motion and sufficiently state the cause of action. *Wong*, 111 Hawaii at 476.

V. CONCLUSION

For all of the above reasons, Defendants' Motion to Dismiss should be denied. If the Court agrees that the Complaint fails to state a claim or requires greater particularity of its fraud allegations, leave to amend should be granted.

DATED: Honolulu, Hawai'i, December 12, 2013.



JAMES J. BICKERTON

Attorney for Relators
MITCHELL KAHLE and HOLLY HUBER

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

THE STATE OF HAWAIʻI, *Ex. Rel.* MITCHELL KAHLE and HOLLY HUBER Plaintiffs, *v.* NEW HOPE INTERNATIONAL MINISTRIES dba Oahu South Foursquare Church and/or New Hope Oahu, Hawaiʻi Kai Community Foursquare Church and/or New Hope Hawaiʻi Kai, and New Hope Christian Fellowship Kapolei and/or New Hope Kapolei; 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 VLC (Other Civil Action) **CERTIFICATE OF SERVICE**

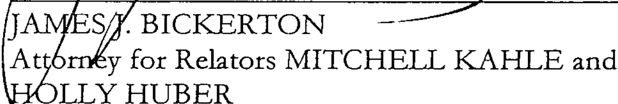
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was duly served upon the following on the date indicated below and by the method indicated:

JAMES HOCHBERG, ESQ. 745 Fort Street Mall, Suite 1201 Honolulu, Hawaiʻi 96813	[X] VIA HAND DELIVERY [ ] VIA U.S. MAIL, POSTAGE PREPAID

Attorney for Defendants
ONE LOVE MINISTRIES
and CALVARY CHAPEL CENTRAL OAHU

DATED: Honolulu, Hawaiʻi, December 11, 2013.



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