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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

THE STATE OF HAWAI'I,
Ex. Rel.
MITCHELL KAHLE and HOLLY HUBER,

Plaintiffs/Relators,

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)

PLAINTIFFS/RELATORS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT BASED ON THE PUBLIC DISCLOSURE BAR FILED JANUARY 14, 2020; DECLARATION OF STEPHEN M. TANNENBAUM; EXHIBITS "1" TO "8"; DECLARATION OF MITCHELL KAHLE; EXHIBIT "A"; DECLARATION OF HOLLY HUBER; EXHIBITS "B"-"E"; CERTIFICATE OF SERVICE

Hearing Date: TBD
Time: TBD

Judge: Hon. Lisa W. Cataldo

No Trial Date Set

PLAINTIFFS/RELATORS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT BASED ON THE PUBLIC DISCLOSURE BAR FILED JANUARY 14, 2020

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I. INTRODUCTION

Plaintiffs/Relators, Mitchell Kahle and Holly Huber (collectively, "Relators"), by and through their counsel, Bickerton Law Group LLLP, hereby respectfully submit their Memorandum in Opposition to defendants One Love Ministries ("OLM") and Cavalry Chapel Central Oahu's ("CCCO")(together, "Defendants" or "the churches") Motion to Dismiss and/or for Summary Judgment based on the Public Disclosure Bar filed January 14, 2020 (the "Motion").

II. LEGAL STANDARDS

A. Assessments of Subject Matter Jurisdiction in False Claims Act Cases

While a Court – on a 12(b)(1) challenge to subject matter jurisdiction – may decide conflicting factual averments to determine whether it has jurisdiction and should proceed, it is a fine line that the Court must walk. Especially so in False Claims Act cases. As stated by the Eleventh Circuit Court of Appeals in *Morisson v. Amway Corp.*:

> We have cautioned, however, that the [] court should only rely on Rule 12(b)(1) "[i]f the facts necessary to sustain jurisdiction *do not implicate the merits of plaintiff's cause of action.*" *Garcia,* 104 F.3d at 1261 (emphasis added (in original)). If a jurisdictional challenge does implicate the merits of the underlying claim then:
>
> > **[T]he proper course of action for the [] court ... is to find that jurisdiction exists** and deal with the objection as a direct attack on the merits of the plaintiff's case.... Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits. This refusal to treat indirect attacks on the merits as Rule 12(b)(1) motions provides, moreover, a greater level of protection for the plaintiff who in truth is facing a challenge to the validity of his claim: the defendant is forced to proceed under Rule 12(b)(6) ... or Rule 56 ... both of which place great restrictions on the district court's discretion....
>
> *Id.* (quoting *Williamson v. Tucker,* 645 F.2d 404, 415–16 (5th Cir.1981)). We therefore must determine whether Appellees' motion to dismiss in this case implicated the merits of Appellant's FMLA action. **If it did, the district court should have treated the motion as a motion for summary judgment under Rule 56 and refrained from deciding disputed factual issues.**

Id., 323 F.3d 920, 925 (11th Cir. 2003) (bolding added).[1]

[1] *See also U.S. ex rel. Carter v. Halliburton Co.*, 973 F.Supp.2d 615 (E.D. Va. 2013). There, the court explained that a court may go beyond the allegations in the complaint and consider and decide facts from declarations and affidavits, *etc.*, relevant to subject matter jurisdiction, "`**unless** the jurisdictional facts are intertwined with the facts central to the merits of the dispute," in which case, leniency is the better and more pragmatic course (citing *United States ex rel. Vuyyuru v. Jadhav,* 555 F.3d 337, 348 (4th Cir. 2009))(emphasis added).

Where the defendants' jurisdictional challenge also implicates elements of the underlying cause of action – *i.e.,* where jurisdiction is inherently intertwined with the plaintiff's substantive claims for relief – such disputed issues of material fact should be resolved by the jury. *Morisson*, 323 F.3d at 926 (discussing *Sun Valley Gasoline, Inc. v. Ernst Enters.,* 711 F.2d 138, 139–40 (9th Cir. 1983)). This is precisely the case here. *Consider U.S. ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, fn. 10 (2018) (discussing that the level of government knowledge in a false claims act case is often directly relevant to a relator's claim for both subject matter jurisdiction and to potentially negate the necessary *scienter* required for an alleged FCA violation.), *aff'd*, 139 U.S. 1507 (2019).

Defendants argue that Relators must establish jurisdiction by a preponderance of the evidence. *See* Defendants' Memorandum ("Mem.") at 8. Thus, even if the question is not relegated to the trial on the merits as urged above (and below), and can instead be decided now on a preliminary motion, the burden Relators must meet is an easy one to satisfy:

> To 'establish by a preponderance of the evidence' means to prove that something is more likely so than not so. In other words, preponderance of the evidence means such evidence as, when considered and compared with that opposed to it has[,] more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true."

Murakami v. Maui County, 6 Haw. App. 516, 520, 730 P.2d 342, 345 (1986) (holding no issue with the above language provided as a jury instruction.), *aff'd*, 69 Haw. 43 (1987). Therefore, Relators must merely show that it is more likely than not that they were "original sources" of the claims and allegations contained the FAC. More likely than not usually translates into a 51% requirement.[2]

B. Hawaii'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:

[2] *See, e.g., In re OCA, Inc.,* 551 F.3d 359, 372 n. 41 (5th Cir. 2008) (defining preponderance of evidence standard as 51%); *Bittner v. Borne Chem. Co., Inc.,* 691 F.2d 134, 136 (3d Cir. 1982) (same); *Nat'l Lime Ass'n v. Envtl. Prot. Agency,*627 F.2d 416, 453 n. 139 (D.C. Cir. 1980) ("[T]he standard of ordinary civil litigation, a preponderance of the evidence, demands only 51% certainty.") *United States v. Banks,* 2015 WL 751953, at *12 (D. Kan. 2015) ("[A] party proves a fact by the preponderance if it establishes a 51% or greater likelihood that the factual claim is true."); *State v. Rizzo,* 266 Conn. 171, 204, 833 A.2d 363 (2003) (defining the preponderance standard as 51%).

(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.** [added boldfacing]

HRS § 661-31(c) (emphasis added) (Hereafter, HRS Chapter 661 is referred to as "the Statute.")

C. Law of the Case

The doctrine of law of the case applies to legal issues that have been decided either expressly or by necessary implication and forecloses reexamination of the same issue in the same case or proceeding unless overruled on appeal. *See Wong v. City and Cnty. of Honolulu*, 66 Hawai'i 389, 396, 665 P.2d 157 (1983)("'law of the case,' [] refers to usual practice of courts to refuse to disturb all prior rulings in particular case, including rulings made by judge himself [or herself].") (brackets and bracketed material added). *See also Chun v. Board of Trustees of Employees' Retirement System of the State of Hawai'i*, 92 Hawai'i 432, 441, 992 P.2d 127, 136 (2000) (quoting and relying on *Wong*, 66 Haw. at 396). **Where a ruling is undisturbed on appeal, the affirmed portion is law of the case not to be revisited by the appellant**. *Cain v. Cain*, 59 Haw. 32, 36, 575 P.2d 468, 472-73 (Haw. 1978).

III. FACTS – Hawaii's Community Use of School Facilities Program Has Legal Requirements: Fees are Mandatory, and Donations in Lieu of Rent Are Prohibited

Hawai`i State Law (HRS § 302A-1148), Administrative Rules (HAR Chapter 39-Fee Schedule), and policies (SP6110) of the Hawai`i State Department of Education ("DOE") set forth specific requirements and mandatory rental fees and utilities charges for Hawaii's Community Use of School Facilities program. They are **not** negotiable or changeable at the will of the schools or school officials. *See* Declaration of Holly Huber ("Huber Decl."), ¶¶ 7-10 and Exs. "C" and "D."

IV. LEGAL DISCUSSION

A. Those Portions of the Circuit Court's 2014 Rulings Regarding Post-Amendment Alleged HFCA Violations Were *Affirmed* by the ICA and Are Now Firmly Established Law of the Case regarding Jurisdiction.

As a crucial, initial matter, by their Motion, Defendants appear to improperly ask this Court to reconsider (and reverse) portions of its predecessor Court's prior rulings dated September 30, 2014 ("Order Granting in Part and Denying in Part Defendant's April 1, 2014 Motion to Dismiss") and October 14, 2014 ("Order Granting Relators' Motion for Reconsideration") (together, the Circuit Court's "2014 Orders").[3] These Orders held that Relators were original sources of the information in their First Amended Complaint filed February 20, 2014 ("FAC"[4]) and that the "public disclosure bar" in the HFCA did not apply to bar their claims. Defendants now attempt to have this Court reconsider all of its predecessor Court's prior rulings, including those affirmed.

On April 27, 2018, the Hawai`i Intermediate Court of Appeals ("ICA") rendered its Judgment on Appeal on Defendants' interlocutory appeal in the above-captioned matter relating to the HFCA. This Judgment was based on the Opinion of the ICA dated February 28, 2018 (the "ICA Opinion"). In a nutshell, the ICA ruled that: (1) the claims in Relators' FAC alleging wrongful acts and omissions by Defendants ***prior*** to the date of the HFCA's amendment on July 9, 2012[5] were to be reviewed under a standard akin to one applied on a HRCP Rule 12(b)(1) motion challenging subject matter jurisdiction, where the Court may consider facts extrinsic to the complaint (and discovery may be allowed regarding such facts) in making its original source/public disclosure bar determination, (2) while those acts and omissions by Defendants in the FAC occurring ***after*** the date of the July 2012 amendment must be reviewed under a different standard, that being one akin to a HRCP 12(b)(6) motion to dismiss. The FAC includes claims against Defendant ranging in time from March 22, 2007 to March 27, 2013 – *i.e*, both before and after amendment. Accordingly, when the Circuit Court previously assessed the FAC's claims pre-dating the HFCA amendment, it used the incorrect standard per the ICA Opinion, but for those claims

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[3] These Orders are attached to the accompanying declaration of Stephen M. Tannenbaum ("Tannenbaum Decl.") as Exs. "1" and "2," respectively, and the hearing transcript for the December 19, 2013 hearing on which they are based is attached as Exhibit "3".

[4] For ease of reference, the FAC is attached to the Tannenbaum Decl. as Ex. "4" but is referred to hereinafter simply as "FAC."

[5] The July 9, 2012 amendment to the HFCA changed the public disclosure bar (and original source exception thereto) from a preliminary subject matter jurisdictional issue to an affirmative defense, with different standards applicable to each, the new one recognizing legislative intent for a less strict approach.

post-dating the amendment, the ICA concluded, the Circuit Court used the correct standard, limiting its review to the well-founded pleadings in the complaint and its attachments.

Hence, those claims in the FAC which allege violations that occurred *prior* to the HFCA amendment on July 9, 2012 are to be reassessed under the first standard, where the ICA directed that extrinsic evidence could and should (have been) be considered by the trial court to determine whether Relators are "original sources" of their allegations in the FAC or if, instead, the public disclosure bar operates to bar those claims. Whereas, in connection with the claims in the FAC which allege violations that took place *on or after* July 9, 2012, the ICA held that the Circuit Court had **properly** relied solely on the well-pleaded allegations appearing in the FAC in rendering its 2014 Orders and in finding the Relators to have been original sources for subject matter jurisdiction purposes.[6] Hence, this is law of the case **on the issue of subject matter jurisdiction**.

This is crucial because, despite Defendants' present, apparent attempt at obtaining improper reconsideration of the entirety of the Circuit Court's 2014 Orders which found Relators to have been original sources, the only portion of that ruling that was disturbed on appeal was that portion of the 2014 Orders that dealt with the **pre**-amendment allegations of Defendants' wrongdoings. Defendants cannot now reargue a lack of subject matter jurisdiction for those claims based on wrongs occurring after the amendment, since that portion of the Court's 2014 Orders was not disturbed, *see* ICA Opinion at 19-20, and it is therefore established law of the case. To the extent Defendants are arguing something else – for example, a request for summary judgment on the merits under Rule 56 – their Motion is far from clear on that point, in fact, they do not state such anywhere (except in one passing, ambiguous reference in footnote no. 8 at Mem., p. 17). The entire third prong of Defendants' Motion and Section "III" of their Memorandum (to which Defendants dedicate the entirety of one half of one page) cannot be reconsidered vis-à-vis subject matter jurisdiction; and, as for summary judgment, Defendants do not meet their burden under HRCP Rule 56 and have made little attempt to do so. And if treated as a motion under Rule 56, disputed material facts predominate.

[6] Attached to the accompanying Tannenbaum Declaration as Ex. "5"– for the ease and reference of the Court – is a chart that sets forth which claims in the FAC against which of each of the two defendant churches falls into the respective pre- and post- amendment periods and a very short description of the specific church event(s) to which the paragraph(s)/claims relate.

B. Defendants Also Failed To Follow the ICA's Explicit Directives and the Standard Practice of Courts Assessing FCA Jurisdiction

Defendants ignored the directive in the ICA Opinion that, upon remand and a subsequent anticipated, renewed motion by Defendants, Defendants were supposed to present to the Court: (i) each false claim that is challenged by Defendants as barred, to be assessed by the Court; (ii) the extent to which each is allegedly based on publicly disclosed information; (iii) Relators' direct and independent knowledge of such information (or lack thereof) underlying each claimed offending event; and/or (iv) how Relators' information provided the basis (or did not) for the investigation, hearing, audit, or report leading to the public disclosure, if applicable. *See* ICA Opinion at 20. Instead of doing a claim-by-claim analysis, however, with their present Motion, just as before, Defendants resort to wide-sweeping generalizations, a presentation of one or two examples, and painting Relators' activities (or alleged lack thereof) in broad brush-strokes, not specific to the church events and the many specifically alleged false filings, particular omitted uses, and behind-the-scene rate deals that are detailed in the FCA and discussed at length in Relators' depositions and discovery responses. **Yet this is precisely what the ICA ordered them to do.**

This is also standard procedure that courts follow in False Claims Act cases, per Defendants' own authorities. *See, e.g., U.S. ex rel. Boothe v. Sun Healthcare Group, Inc.*, 496 F.3d 1169, 1176 (10th Cir. 2007) (cited at Mem. at 9.) There, the Court of Appeals for the Tenth Circuit explained:

> … we hold that district courts should assess jurisdiction on a claim-by-claim basis, asking whether the public disclosure bar applies to **each** reasonably **discrete claim of fraud**. This is, of course, how federal courts traditionally assess challenges to their jurisdiction under Fed.R.Civ.P. 12(b)(1).

Id. (emphasis added.) Absent such, this Court cannot make the "specific factual findings" regarding each alleged violation stemming from each specific church event or usage that the ICA instructed this Court to make when deciding the renewed motion the churches wanted to bring upon remand. Thus, the ICA – in line with other courts doing the same exercise – envisioned a claim-by-claim[7] analysis by the Defendants, and an analogous detailed response by the Relators, as opposed to the approach Defendants have offered on this Motion. Based on Defendants' reliance (again) on vast over-generalizations, despite the explicit directions given by the ICA and their own cases, this Court should deny the Motion for this reason alone. At most, it can only assess those few alleged violations in the FAC that Defendants elected to specifically address.

[7] *See* Tannenbaum Decl., Exs. "5" and "8"

C. Relators Are Original Sources of the Pre-July 9, 2012 HFCA Violations

Defendants' jurisdictional challenge also implicates multiple elements of Relators' underlying causes of action, since they are intertwined with Relators' substantive claims for relief; therefore, any disputed issues of material fact should be resolved by the jury and not on this Motion. *See Morisson*, 323 F.3d at 926. Nevertheless, even if this Court elects to resolve the many disputed issues of material fact, the evidence adduced to date demonstrates that Relators must be deemed "original sources." This is because the claims set out in the FAC could not have been brought **but for** their added endeavors and independent investigation. This is what the Circuit Court found once before via its 2014 Orders, and nothing in the record leads to any other conclusion some 5-½ years later., after all of the onerous discovery served upon the Relators in the interim.

1. Defendants misstate the relevant law and statutory interpretation

Defendants' discussion of their legal authorities, in virtually all instances, (1) turns on the specific facts of those cases and is inapplicable and fully distinguishable, and/or (2) misstates the law, and in many cases, (3) actually supports Relators' opposition to the Motion. For instance, throughout their Motion, Defendants try to persuade this Court that any allegation set out in the FAC that in one form or another can be traced to or is "supported by" a public disclosure, no matter how attenuated, must be barred. *See, e.g.*, Mem. at 9. This is a misstatement of the law. For example, Defendants rely on *U.S. ex rel. Mateski v. Raytheon Co*., 816 F.3d 565, 573 (9th Cir. 2016) for such an oversimplification. *See id.* In that case, the Ninth Circuit Court of Appeals explained that as a matter of first impression, in determining whether an FCA action is precluded by prior public disclosures of alleged fraud, courts should **not** view FCA claims at the highest level of generality, so as to effectively wipe out *qui tam* suits that rest on genuinely new, material information added by a relator. *See id.,* 816 F.3d at 576. Furthermore, the *Mateski* Court reversed the district court's dismissal, concluding the relator's complaint there alleged fraud that was different in degree and specificity from any previously disclosed public information, and thus was not precluded by the FCA's public disclosure bar because the allegations in the relator's complaint offered specific examples of and a level of detail not offered by any publicly disclosed statutory sources. *See id.*, 816 F.3d at 578. The *Mateski* Court explained:

> A few examples from Mateski's lengthy Complaint suffice to demonstrate that his allegations are vastly more precise than the prior public reports… In contrast to these specific allegations, the prior public reports presented by Raytheon merely allege general problems involving mismanagement, technical difficulties, and noncompliance with contract and policy directives…. Even if, as Raytheon argues, the prior public reports provided "enough information to ... pursue an

> investigation" into *some* fraud … the prior reports could not have alerted the Government to the specific areas of fraud alleged by Mateski.

Id. The *Mateski* Court then rejected the "partly based" standard, in light of that relator's significant, independent, material knowledge and because the claims in his complaint did not reflect those the defendant contended existed in the "public realm." *Id.* Thus, courts do not automatically (or regularly) translate "supported by" publicly disclosed information into a relator not being deemed an original source, as Defendants here would mislead this Court into believing. A relator providing independently obtained additional information is not the same as an opportunistic plaintiff who has no significant information to contribute and who merely piggy-backs on existing work product of others. That is not the case with Relators. *See* Huber Decl., Ex. "B"[8] and "E" (Resp. Nos. 66-67).

To get around this, Defendants piece together a chain of legal distortions and cite to cases that are 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 specific transactions in issue *plus* all of the necessary facts regarding the suspected *fraud,* and – with nothing more – they were then able to file a lawsuit that parroted the same publicly disclosed transactions and allegations. **Again, this is not that case.**

For instance, as with their prior motions, Defendants focus on *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S. Ct. 1885, 1893,179 L.Ed.2d 825 (2011) (*See* Mem. at 10). In *Schindler*, the Supreme Court resolved the split among the federal Circuits of whether responses to FOIA requests comprise "reports" on which a federal FCA action may not be based, holding the answer to be "yes." *Schindler*, however, dealt with a unique case where the relator, Kirk, (a dismissed, disgruntled employee of Schindler), made a FOIA request and received two 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' employment requirements necessary for the contracts and 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 the employment and reporting requirements for at least 5 years during which they had filed payment requests and had been paid. Kirk, putting A and B side-by-side, **both** obtained from

[8] Huber Decl., Ex. "B" is a chart compiled by the undersigned and Relator Huber listing occurrences in the transcripts of both Relators' depositions where they describe their independent efforts in obtaining, compiling, formulating and presenting their data to reach their specific conclusions about the Defendants' misuse and underreporting of Kaimuki High School and Mililani High School that went into the FAC.

the government, with nothing more, thus claimed all of the requests for payments from Schindler during those 5 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" to be deemed a valid 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 (brackets added). *See also U.S. ex rel. Davis v. Prince*, 753 F. Supp.2d 569, 579-80 (E.D. Va. 2011) (to defeat claim, 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 can be readily inferred). In the instant case, anyone could **not** have filed the FAC based on the very limited materials received from the State or (purportedly) reported by the news media, even if one includes the churches' websites, which one should not (discussed below). While a number Defendants' submissions and applications came from the State's UIPA responses, ***the facts and circumstances showing their falsity did not***. Thus, this case is not like *Schindler* or other cases cited by Defendants where the relators' investigation contributed little to the information giving rise to the eventual allegations of fraud.

Furthermore, Defendants misrepresent the cases they rely upon 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, their cited cases do not hold this; in fact, no case holds this. Rather, FCA 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 disclosed, barred information, and that the barred information must outweigh the independent knowledge, if any, obtained by the relator. For example, in *U.S. ex rel. Reagan v. E. Texas Med. Center Regional Healthcare System*, 384 F.3d 168, 174-76 and 177 (5th Cir. 2004), the Fifth Circuit held that the relator (the former director of a hospital who was claiming the hospital submitted false claims to Medicare and falsified regulatory compliance data) 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 (emphasis added), and later in the decision, as "**almost entirely**," *id.*, at 178 (emphasis added). Furthermore, *Reagan* explained 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 expressly in the opinion – that the only "independent" contribution she had offered was her personal 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 was present. *Id.*, at 178-79. The Court expressly noted the absence of any independent investigation or personal, direct, observations by that relator to add to the allegations and facts which were available from the public materials. *Id. U.S. ex rel. Grynberg v Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005) follows the same track as *Reagan* and 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 applicable to the present one is listed in *Reagan* at page 179 of that decision. *See, e.g., Cooper v. Blue Cross and Blue Shield of Florida Inc.,* 19 F.3d 562, 568 (11th Cir. 1994); *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn,* 14 F.3d 645, 657 (D.C. Cir. 1994), *rehearing denied. Consider also U.S. ex rel. Colquitt v. Abbott Laboratories*, 2012 WL 1081453, *23 (N.D. Tex. Mar. 30, 2012), *recons. denied* (Aug. 24, 2012), *aff'd*, 858 F.3d 365 (5th Cir. 2017). These cases also hold that the relators 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; *Springfield Terminal Ry. Co.,* 14 F.3d at 657; *Houck*, *Houck v. Folding Admin. Comm.*, 881 F.2d 494, 505 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1514 (1990).) Here, Relators' efforts, direct communications with schools, and other investigation translated into additional compelling facts and demonstrated new and undisclosed relationships between already disclosed facts, where that fraud might otherwise go unnoticed, and

which might have put a government agency 'on the trail' of fraud but did not. *Reagan*, 384 F.3d at 178 (brackets added). Thus, Relators should not be barred from bringing suit. *Id.*

Furthermore, *Reagan* and the other cases discussed above are fully in harmony with Defendant's cases, such as *Schindler.* 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," between the public information enumerating the transactions and the ultimate facts showing their falsehood. Here, on the other hand, Relators' intensive and independent investigation is the ***only*** thing that "bridged the gap" between the Defendants' assertions and reality. *See* Declaration of Mitchell Kahle ("Kahle Decl,"), ¶¶ 5-6. Thus, the argument that Relators would not have had any basis for alleging fraud in the FAC were it not for the UIPA requests, (and many other supposed public sources), misses the point. As stated above, to establish an FCA claim, **there must always first exist something *publicly filed* which is false**. **This follows because an FCA claim requires a false statement *to the government,* and government records are, with very few exceptions, always public records.** *See* HRS Chapter 92-F and HRS § 663-31(b). In this case, the documents produced in response to UIPA requests appear proper on their faces, offering little or nothing to alert one to fraud, and provide no suggestion of non-reported church events or behind-the-scenes deals and illegal (or unauthorized) agreements between churches and schools, such as those discovered by these Realtors. *See, e,g.,* Huber Decl., Ex. "E" at Resps. 66-67.

2. Relators are the original source of information that is independent of and which materially added to any publicly disclosed material.

Relators are original sources of the allegations in the FAC because they materially added to the publicly disclosed information, (in some cases nonexistent), as that term is defined under the Statute, through their copious independent efforts. In the FAC and detailed in their depositions, Relators added specific allegations supporting and explaining their efforts as original sources. *See* FAC, ¶¶ 21-40 and Huber Decl., Ex. "B." The new allegations include, but are not limited to: (a) Relators visiting schools on Friday afternoons and at various times on Saturdays and Sundays to observe and take photographs documenting churches' actual use of school facilities, including the specific days, hours, activities and facilities and utilities that churches were using, in contradiction to reported times, and to understand the churches' normal weekly practices and habits (FAC, ¶¶ 24, 28, 33 and 34 and Huber Decl. Ex. "B"); (b) direct communications with various staff at the schools questioning charges, hours, facilities, applicant organizations, and investigation into information

provided (*id.*, ¶ 28 and ¶ 30 and Huber Decl., Exs. "B" and "E"); and (c) renting out a number of facilities to assess varying rates being applied and charged (*id.*, ¶ 36 and Huber Decl., Ex. "B"). Defendants minimize all of Relator's independent efforts by ignoring the FAC's allegations and the record on these topics. *See* FAC, *passim,* Kahle Decl., Ex. "A" and Huber Decl., Exs. "B" and "E",

For example, Defendants altogether side-step the allegations in FAC ¶ 30 that, in May 2012, Relators sent 154 detailed requests for specific information and direct communication, by email, to school principals with questions relevant to particular applications made, used, and presented by churches, asking about: the size of specific school facilities, such as auditoriums and cafeterias; whether facilities were air- conditioned; if churches were in possession of keys to the school; if churches stored property at the school; the number of years the church has been using the school; and clarification of the terms, including days and hours of use, actual facilities used, rental fees and utilities charges. FAC, ¶ 30 and Huber Decl., Ex. "B". And more than half responded. *See id.*, ¶ 31 and Huber Decl., Ex. "B" and "E" (*see, e.g.*, Resps. 66-67). These detailed queries were necessary because the information was not available from the publicly disclosed BO-1 Applications or the DOE. Upon learning of Relators' communications with school principals, however, the DOE demanded that all future information requests be directed to the Superintendent's office and instructed principals to stop communicating with Relators, *see id.*, ¶ 32 and Tannenbaum Decl., Ex. "6" (Huber Tr.) at 75:21-76:4, underscoring just how "**non-public**" the information really was.

In spite of the DOE's hindering response, Relators continued their investigation for another 8 months, visiting school campuses to observe/photograph churches' activities and to personally document churches' actual use of buildings, facilities, grounds, parking lots, storage and extensive use of lighting, sound, production, video and other technical equipment, including personal visits to OLM at Kaimuki High School and CCCO at Mililani High School. *See id.*, ¶ 33 and Huber Decl., Ex. "B." Defendants' criticism that Relators never attended *in person* (*i.e.*, inside the facility) a worship service or event held by the churches (*see* Mem. at 11 and 17) is neither here nor there. Relators did not wish to trespass, and were able to compile their independent claims as original sources without having to enter the sanctums of the churches during prayer or related activities. This does not negate their independent source status; it merely indicates their respect and decorum.

After the information gathering phase, Relators then audited over 40 churches using public schools, including Defendants, evaluating hours and facilities *actually* used for regular services and extra events and calculating payments. *See* Huber Decl., Ex. "B." Based on the information they obtained directly through communications with the schools, *see* Huber Decl., Ex. "E" (Resps. 66-

67), and their independent, on-the-ground investigation, Relators, designed and programmed a database and spreadsheets to calculate amounts each church was paying for *claimed* use, compared to the amounts each church should have paid based on *actual* use, detailing hourly rental fees and utilities charges, as well as, facilities used but not claimed, including parking lots, grounds and storage. *See id.*, and FAC, ¶ 34. *See also, e.g.,* Huber Decl., Ex. "E" (Huber's 2nd Rog Resps.)(Resps. 66 and 67: discussing, for example, communications between Relators and Mililani High school staff informing them of information not otherwise known to anyone, **such as that the fees actually being charged to and paid for by CCCO had been unilaterally lowered by the principal**).

As previously noted with numerous examples and evidence, Relators' determined churches' *actual* facilities usage **only** through on-site observations and investigation into sources not deemed "public sources" under the Statute. See Huber Decl., Ex. "B." The allegations of the FAC and the discovery to date shows that Relators are not relying on UIPA-produced public reports to copy their allegations and refashion them into a legal complaint. What Relators derived through public BO-1 Applications were simply the details of Defendants' *claimed* uses of school facilities and utilities, not their *actual* use. Relators became original sources once they obtained knowledge that was ***independent of*** and ***materially added to*** (*i.e.*, was different from) the publicly disclosed allegations or transactions. HRS § 661(c)(emphasis added). The publicly disclosed BO-1 forms, invoices, receipts and proofs of payment that Relators obtained through UIPA, by themselves, did not shed any light on the massive fraud that was occurring in a reverse false claims scheme – that over 40 churches were (i) under-reporting their usage of Hawaii schools, (ii) not reporting usage **at all**; and/or (iii) reporting use (sometimes accurately, sometimes not), but negotiating rates below those set by the DOE directly with persons working at the schools.

All of the above instances of the independent efforts of Relators supporting the claims in the FAC, and many more, are summarized in a chart attached to the Huber Declaration as Ex. "B," which rebut the claims in Def. Mem., pp. 10-19.

3. The FAC's violations are *not* substantially the same as those publicly disclosed in any State report or other source in the Statute.

Throughout their memorandum, Defendants also wrongly assert that the "public disclosure ban" means that any bit of information that has been publicly disclosed by anyone through any medium disqualifies Relators as independent sources. This is incorrect. "Publicly disclosed" under the Statute **does not** mean information floating about in the general public. This error (or misrepresentation) is one made regularly by defendants in False Claims Act cases. To fit within the

ban, the "public information" must have emanated from one of the three specific sources set forth in the Statute in Section 551-31(b). While documents produced in response to Hawaii UIPA requests admittedly fall within the scope, those documents, *in this case*, provided nothing more than a first step in a long process and would not, could not, and did not evidence the FAC's specific claims.

Nor do Defendants explain how Relators could have gleaned from UIPA documents and/or anything else they claim to be a public disclosure within the meaning of the Statute, Defendants': (1) use of facilities not included on BO-1 applications; (2) excessive use of school utilities such as electricity, air-conditioning, water and sewer (*see* FAC, ¶¶ 53, 59, 86, 118 and 163 and Huber Decl., Ex. "B"; (3) direct links to the school's power sources for electrical and other utilities (FAC, ¶¶ 42, 54, 118, 146 and 163 and Huber Decl., Ex. "B"); (4) failure to have installed independent meters monitoring same (FAC, ¶¶42, 54 and 59 and Huber Decl., Ex. "B"); (5) use of school parking lots (FAC, ¶¶ 42, 47, 55, 82, 88, 138, 149b and 153 and Huber Decl., Ex. "B"); (6) use of external storage containers on campus (FAC, ¶¶ 77, 116 and 120 and Huber Decl., Ex. "B"); (7) use of storage areas inside the schools (FAC, ¶ 117 and 162 and Huber Decl., Ex. "B"); (8) permanent connections for sound, lighting, internet and other technical equipment inside the schools (FAC, ¶ 85 and Huber Decl., Ex. "B"); (9) possession of-keys to the schools for at-will direct access at times for which no applications had ever been submitted (*see* FAC, ¶ 110 and Huber Decl., Ex. "B"); and (10) over-capacity crowds that often attended certain weekly services and special events, such as Christmas Eve and Easter Services (FAC, ¶¶ 78 and 83 and Huber Decl., Ex. "B"). Nor do Defendants explain how it was or could be "publicly disclosed" by any UIPA response or other public disclosure (within the meaning of the Statute) that CCCO held at least **18** events at Mililani High School during the relevant period for which **no** BO-1 Applications were submitted and no evidence or invoices or payments or other worldly proof exists? *See* FAC, ¶¶ 168(a), 168(c), 168(e)-(t) and Huber Decl., Ex. "B". (The list could go on, but Relators are limited to 20 pages, and Defendants have not seen fit to comply with the ICA's transaction-by-transaction mandate).

Accordingly, Relators are (1) independent sources of the information in the FAC, and (2) the producers of such information that materially adds to the publicly disclosed facts regarding the transactions for both the pre- and post-amendment claimed violations. *See* HRS § 661(c).

4. The allegations in the FAC are not substantially the same as those publicly disclosed by the "news media."

Defendants' statements that Relators specifically rely upon information from the church websites and that Relators' information is all information gleaned from publicly accessible websites

that anyone could have found by simply searching online, thereby improperly forming the basis of their *qui tam* action, are false and unsupported. Defendants, more importantly, wrongly assert their church websites fit within the defined categories of "public information} under HRS § 661(c). *See, e.g.,* Mem at 12-17 and 20. While some courts have found that publicly available information on *certain* websites may *at times* be deemed publicly disclosed for the purposes of *qui tam* actions, Hawai'i has not, and in those cases that have, the websites were **dissimilar** in nature – (largely incontrovertible government and scholarly sources) – to that of the churches, here. *See, e.g., United States ex rel. Nowak v. Medtronic, Inc.*, 2011 WL 3208007, *45 (D. Mass., July 27, 2011) (regarding filings on FDA website); *United States ex rel. Jones v. Collegiate Funding Services*, 2010 WL 5572825, *31 (E.D. Va. Sept.21, 2010) (SEC filings on SEC website), aff'd, 469 Fed.Appx. 244 (2012); *In re Natural Gas Royalties Qui Tam Litigation,* 467 F.Supp.2d 1117, 1155 (D. Wyo.2006) (published trade journals, educational materials, seminar papers, instruction manuals and established newspaper articles), 467 F.Supp.2d 1117 (D. Wyo.2006), aff'd 562 F.3d 1032, (10th Cir. 2009), cert. denied, 130 S.Ct. 301 (2009); *U.S. ex rel. Alcohol Foundation, Inc. v. Kalmanovitz Charitable Found., Inc.,* 186 F.Supp.2d 458, 463 (S.D.N.Y. 2002) ("information in scholarly or scientific periodicals"…), *aff'd* 53 Fed.Appx. 153, *cert. denied*, 540 U.S. 949 (2003); *United States ex rel. Rosner v. WB/Stellar IP Owner, L.L.C.,* 739 F.Supp.2d 396, 407 (S.D.N.Y.2010) (New York City agency website with city administrative reports); *United States ex rel. Brown v. Walt Disney World Co.,* 2008 WL 2561975, at *4 (M.D. Fla. June 24, 2008) (Wikipedia), *aff'd,* 361 Fed.Appx. 66 (11th Cir. 2010) (*per curiam*), *cert. denied*, 560 U.S. 953 (2010).

Tellingly, not a single reported state or federal case exists where a religious institution's website is considered a public source for the purposes of a state *or* federal False Claims Act. No matter, Defendants' websites do not provide the information necessary to bring the claims in the FAC.

5. The FAC alleges in detail numerous pre-amendment false claims by OLM and CCCO, for which Relators were original sources, as supported by discovery adduced to date.

Relators meticulously drafted their FAC, breaking down the allegations on a violation-by-violation, church-by-church basis; further broken down by specific violations in regard to (i) regular weekly services, (ii) extra church events and (iii) continuing violations (24/7). Defendants elected not to address each of them, in violation of the ICA mandate and the cases cited above stating that such is the proper approach on a jurisdictional challenge. Nevertheless, Relators first set out the general scheme employed by the churches and the facts common to both Defendants, *see* FAC at ¶¶ 21-59, and then pleaded specific allegations against each of the two Defendants, referring to BO-1 Application forms attached as exhibits whenever possible. *See id.*, ¶¶ 60-175. The nature of claims

for each church is summarized below and in greater detail in Tannenbaum Decl., Ex. "8". The allegations and all of the discovery taken thus far show the claims in the FAC emanating from the Relators' independent efforts and not from any barred source.

a. Defendant OLM

In connection with OLM's weekly regular use of Hawai'i schools, Relators pleaded that specific BO-1 applications for use of Kaimuki High School facilities, (FAC at ¶ 64 and Ex. 1(a) at KH000858-859[9] and ¶ 67 and Ex.1(c) at KH000860-861), omitted the church's use of the school's air-conditioned auditorium, multiple classrooms, grounds, storage and parking lots. Notably, the forms at KH000858-859, dated March 8 and 9, 2011 request facilities use for "Indefinite–Sundays," which happens to be in violation of HAR § 8-39-4 and HRS § 302A-1148, but which does not present a false claim violation in and of itself and was not pleaded as one (but discussed below).

Further, Relators explained in detail in their depositions how OLM's weekly set-up, holding of pre- and post-services events, conducting of services, and breakdown and clean-up, did not match the times and facilities listed on BO-1 applications. FAC ¶¶ 73-104 and Tannenbaum Decl., Ex. "8" and Huber Decl., Ex. "B." Through their investigation, Relators determined that OLM's actual use of Kaimuki High School facilities each week – set-up, band rehearsal, church services, post-service events, tear-down and clean-up – far exceeded the hours and facilities the church requested in their BO-1 Applications. The FAC, ¶¶ 73-104, details OLM's extensive usage and the greatly reduced rates they paid – or in many cases the lack of any payments at all. These reduced and non-payments were the result of an illegal quid pro quo agreement. Relators' investigation prompted Kaimuki High School to begin charging the church more for rent and utilities. In September 2012, Kaimuki High School began enforcing the rules and more closely applying the Fee Schedule when they assessed charges totaling $2,497.30 per Sunday, representing a 687% increase from $239.32 per Sunday. OLM complained to the Superintendent and the Board of Education, asking them to enforce their illegal agreement. OLM stopped using school facilities when denied their special considerations. (*See* exhibits from Kaimuki Relators Report – Kahle Decl., Ex. "A" – at KH00847 spreadsheet, KH000896-KH000962 BO-1s and worksheets, and KH001120-KH001122 letter of complaint.) This shows a *lack* of government approval.

[9] Two BO-1 Applications in Exhibit 1(a) to the FAC, KH000858-KH000859, request use of the school for "Indefinite—Sundays" for the 2011 *calendar* year, thereby, spanning two separate school years (the 2010-11 school year, July 1, 2010 – June 30, 2011, and the 2011-12 school year, July 1, 2011 – June 30, 2012). For consistency of organization and to minimize confusion, despite spanning two school years, these documents were included in FAC Exhibit 1(a) only.

In connection with OLM's special events which were never applied for and/or under-reported and/or underpaid or never paid, the FAC set forth a list with **27 separate and distinct special events**,[10] most of which involved more than one violation of the Statute. *See* FAC, ¶¶ 107(a)-(cc) and Tannenbaum Decl. Ex. "8" (which differentiate between those events) (1) where BO-1 Applications were filed but left off certain *facilities* that were used, or (2) ones which requested usage for less than the full *time* of actual use, and (3) those where the church simply used the school's facilities and never applied for or paid for usage. *See id.* No public material exposed these; only their efforts did. Relators, furthermore, listed a number of other specific repeat and continuing violations, such as overarching quid pro quo agreements for reduced charges in those rare instances where they were actually assessed. *See, e.g.,* FAC, ¶¶ 115-127, Tannenbaum Decl. Ex. "8", Huber Decl., Ex. "E" (Resps. 66-67). OLM does not meaningfully address these allegations in terms of how Relators were not original sources, for example, how anyone would have known of these but for Relators' direct communications with the schools or direct observations, to which they testified in their depositions and explained in their discovery responses.

b. <u>Defendant CCCO</u>

For CCCO, like OLM, Relator's FAC itemized the false claims/reverse false claims in connection with weekly services and also for special events and continuing violations. In connection with CCCO's weekly use of Hawai'i schools, Relators pleaded numerous specific violations, all of which cannot and should not need to be repeated herein. As examples, however, Relators pleaded that during the entire relevant period, for each and every Sunday CCCO used Mililani High School; however, CCCO knowingly failed to pay for 5.5 hours of full and actual use of buildings, grounds and parking lots, including rents, utilities, charges and other associated, for its regular, weekly Sunday usage, and knowingly benefited from discounts, undercharges, waivers, unreported uses, and illegal *quid pro quo* agreements in that regard[11]. *See* FAC, ¶¶ 140-160 and Tannenbaum Decl., Ex. "8" and Huber Decl., Ex. "E" (Resps. 66-67).

In connection with CCCO's special events which were never applied for and/or under or unreported and/or underpaid or never paid for, Relators set forth a list with at least **20 separate and distinct events**, many comprising multiple violations. Regarding CCCO's various special

[10] *See* Tannenbaum Decl., Exhibit "5" (summary).

[11] Relators' investigation prompted Mililani High School to begin charging the church more for rent and utilities, and the school began more closely applying the DOE fee schedule. *See* Kahle Decl., Ex. "A" at KH 001241 and KH001256.

events that were never applied for, never subsequently reported and never paid for, CCCO knowingly omitted to include on all of its applications for Relevant Period, the church's use of portions of Mililani High School's (i) cafeteria, (ii) classroom, (iii) parking lots and (iv) grounds, and used such facilities for extra pre- and post- services events and special seasonal, social and holiday events and services, and failed to pay: (a) rent, (b) utilities or (c) other costs and charges, and/or failed to correct or notify anyone of the discrepancy or pay for the additional usage after each instance and erroneous invoice or bill payment. FAC, ¶¶ 168(a)-(t) and Tannenbaum Decl., Ex. "8". *See also* FAC, ¶ 170 (regarding other unknown but believed-to-have-occurred events and services). As with OLM, CCCO failed to meaningfully and specifically explain how these specifically alleged instances of violations of the Act set out in the FAC and summarized in Huber Decl., Ex. "B" emanate from barred sources or disqualify Realtors as original sources.

Furthermore, in the FAC, Relators listed a number of other specific repeat and continuing violations which CCCO committed, such as uses of portions of schools without known application. *See, e.g.,* FAC, ¶¶ 161-163 and Tannenbaum Decl., Ex. "8" and Huber Decl., Ex. "B." Again, CCCO has failed to address the bulk the deposition testimony in the record of Relators' direct observations.

6. Nor was there "government knowledge of the facts," such that falsity and *scienter* are negated.

Defendants also argue that the FAC fails to state a viable claim for violation of the Statute by either church because the government purportedly had knowledge of the violations and, therefore, the government cannot be deemed to have been deceived. Thus, per this theory, there can be no false claim. *See* Mem. at 9-10. As discussed above, this directly intertwines jurisdiction and the merits, thereby rendering many of Defendants' arguments inappropriate for present determination.

To address this argument, Defendants contend, for instance, that because a principal agreed to reduce (or negate) school fees below those set by the DOE, there can be no fraud because the government cannot defraud itself. *See* Mem. at 9. However, no evidence exists that the State Superintendent or anyone at the DOE/BOE's upper levels had knowledge of the improper actions of those school employees conspiring with the Defendants at the time. **Only knowledge by persons at such <u>higher</u> levels, in some cases, may provide a defense.** It is black-letter law that: "Notice of violation to 'low level government officials' is insufficient to avoid liability under the False Claims Act." *See 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), *Hagood,* 929 F.2d at 1421; and *U.S. ex rel. Kreindler v. United Technologies Corp.,* 985 F.2d 1148 (2d Cir.1993)).

Thus, Defendants' reliance on *U.S. ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 545 (7th Cir. 1999), at Mem. at 9-10, is misplaced. Moreover, *Durcholz* specifically explains and cites cases that hold for the proposition that the government's knowledge is not a bar to a FCA claim, if the knowledge is incomplete or acquired too late in the process. *See Durcholz*, 189 F.3d at 545 (citing *United States v. Incorporated Village of Island Park,* 888 F.Supp. 419, 442 (E.D.N.Y.1995)).

Nor have Defendants offered an explanation as to how the government would have been able to even have knowledge of (1) events taking place or additional facilities being used by the churches **for which no BO-1 Application was ever submitted**, or (2) where an application was submitted, but it grossly understated the amount of time or the scope of facilities to be used (or both), or (3) where, for example, the church has keys to the school and used public school facilities at will without first obtaining permission or making payment for come-and-go usage not in connection with any given special event. With regard to CCCO, all of the evidence to date shows that **only two** of CCCO's 20 various special events were applied for, and another 18 were apparently never applied for and/or under or unreported and/or underpaid or never paid for. FAC, ¶¶ 168(a)-(t). Thus, how "the government" would have had knowledge of these undisclosed, unapplied-for, reverse false claims remains unstated and unknown at this juncture.[12] In such a case, it is likely the information did *not* go beyond the co-conspirators. Discovery on this issue is still needed. *See* April 28, 2018 ICA Opinion at p. 19 ("… the Circuit Court may determine that it is necessary to provide *Relators* with the opportunity for discovery on matters relevant to the Churches' jurisdictional challenge.") (Emphasis added.)

D. Defendants' References to the Factual Record Do Not Support Dismissal or Partial Summary Judgment in Their Favor

The majority of the references to the Relators' testimony overlooks how such facts undercut their theories on this Motion. For example, on page 3 of their Memorandum, they reference Defendants' Exs. F and G, which, rather than demonstrate the good nature and generosity of Defendants, show special arrangements negotiated by the churches directly with the schools of which no one in the upper levels of government or the public knew, and demonstrate the extent of Relators' significant efforts. *See* Huber Decl., Exs. "C" and "D". For example, Defendants' Ex. F is an email sent by Relator Huber requesting information directly from schools and includes answers from school staff in response to Huber's questions—specific information obtained by Relators from

[12] *See* Tannenbaum Decl., ¶ ¶ 11-15, regarding the need for additional discovery and an evidentiary hearing.

direct communications and not from publicly available documents or records. And Defendants' Ex. G is a compilation of unreadable, B0-1 Applications for CCCO's use of Mililani High School, which were the mere jumping-off point for Relators' significant, independent efforts to obtain and calculate ***the true*** amounts and scope of CCCO's actual usage, as opposed to the indecipherable and false figures and amounts set out on those forms. Exs. F and G, strongly support that the allegations in the FAC do not appear in any publicly disclosed documents as defined by the Statute.[13]

E. Relators Are Also Original Sources of the Post-July 9, 2012 HFCA Violations

Defendants' Motion, in cursory fashion, also argues that the Relators' post-amendment claims must fail. *See* Motion, point 3 and Memo, Section III. However, to these claimed violations, Defendants dedicate one-half of one page. *See* fn. 8 and Mem. at 20. They do not identify or discuss any of the alleged violations or why or how the Relators are not original sources. They simply state, in effect, for all the same reasons stated vis-à-vis the pre-amendment claims, they fail as original sources pursuant to the post-amendment, looser standard. Except for their footnote 8, it is not clear under which rule they are moving. If it is a Motion for Judgment on the Pleadings under Rule 12, it is law of the case, since Relators were already deemed original sources per the Circuit Court's 2014 Orders under Rule 12. If, instead, it is supposed to be a Rule 56 argument, Defendants have not carried their burden; summary judgment on post-amendment claims should not be granted.

For the above reasons, Relators should be deemed original sources for all pre- and post-amendment violations of the HFCA alleged in the FAC, and Defendants' Motion should be denied.

DATED: Honolulu, Hawai`i, April 1, 2020.

/s/ Stephen M. Tannenbaum
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[13] The rest of their references to the record are largely a smear campaign against Relators which do not raise material issues of fact relevant to the Motion. For example, that Relators are long time-activists and supporters of separation between church and state, or that they have been involved in over 100 church and state separation cases over the past 20 years, or that Mr. Kahle has been on local Hawai`i news and is proud of his enforcing the constitutional separation between church and state, *see* Mem. at 3, are all irrelevant..