JAMES HOCHBERG #3686
700 Bishop Street, Suite 2100
Honolulu, Hawai'i 96813
Tel: (808) 534-1514
Fax: (808) 538-3075
Email: *jim@jameshochberglaw.com*

ERIK STANLEY #24326*
Alliance Defending Freedom
15192 Rosewood
Leawood, KS 66224
Tel: (913) 685-8000
Fax: (913) 685-8001
Email: *estanley@alliancedefendingfreedom.org*

DALE SCHOWENGERDT #25771*
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
Tel: (480) 444-0020
Fax: (480) 444-0028
Email: *dschowengerdt@alliancedefendingfreedom.org*
**Pro Hac Vice* Applications granted November 22, 2013

Attorneys for Defendants
ONE LOVE MINISTRIES and
CALVARY CHAPEL CENTRAL OAHU

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

THE STATE OF HAWAII, *Ex. Rel.* MITCHELL KAHLE and HOLLY HUBER, Plaintiffs, v. ONE LOVE MINISTRIES; CALVARY CHAPEL CENTRAL OAHU; DOE ENTITIES 1-50; JOHN DOES 1-50; and JANE DOES 1-50, Defendants.	CIVIL NO. 13-1-0893-03 VLC (Other Civil Action) **DEFENDANTS' ONE LOVE MINISTRIES AND CALVARY CHAPEL CENTRAL OAHU'S MOTION TO DISMISS FIRST AMENDED COMPLAINT FILED FEBRUARY 20, 2014; MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT FILED FEBRUARY 20, 2014; DECLARATION OF JAMES HOCHBERG; EXHIBITS "A" – "D"; NOTICE OF HEARING; CERTIFICATE OF SERVICE** Hearing Date: Tuesday, May 27, 2014 Time: 9:00 a.m Judge: Hon. Virginia L. Crandall TRIAL DATE: None presently scheduled

J:\Active Clients\ADF\2013 DOE False Claims Act Proceeding\Pleadings\2014-03-31Kahle_V_One_Love_Motion To Dismiss First Amended Complaint.Docx

DEFENDANTS ONE LOVE MINISTRIES AND CALVARY CHAPEL CENTRAL OAHU'S MOTION TO DISMISS FIRST AMENDED COMPLAINT FILED FEBRUARY 20, 2014

Defendants One Love Ministries and Calvary Chapel Central Oahu ("Defendants") file this Motion pursuant to HRCP 12(b)(1) and 12(b)(6) and in support of this Motion Defendants rely on the Memorandum of Law, Declaration of James Hochberg and Exhibits A-D, submitted herewith and state as follows:

1. Relators' Complaint is jurisdictionally barred by HRS §661-31 because the transactions and allegations in the Amended Complaint are substantially the same as those publicly disclosed and because Relators are not the original source of any of the transactions or allegations in the Amended Complaint (hereinafter referred to as the "Complaint").

2. Relators have failed to state a claim upon which relief can be granted because they have not alleged and cannot allege that there were any false claims by One Love or Calvary Chapel. Because the existence of a false claim is a necessary element of a False Claims Act Complaint, and because Relators' allegations, even if taken as true, demonstrate that no false claim exists (or can exist), their Complaint must be dismissed.

3. It is certain that Relators cannot allege a set of facts that would state a claim upon which relief can be granted under the False Claims Act. Thus, their Complaint must be dismissed with prejudice.

WHEREFORE, Defendants One Love Ministries and Calvary Chapel Central Oahu respectfully request that this Court dismiss the Complaint with prejudice.

Dated: Honolulu, Hawai'i, March 31, 2014.

JAMES HOCHBERG
Attorney for Defendants
ONE LOVE MINISTRIES and
CALVARY CHAPEL CENTRAL OAHU

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

THE STATE OF HAWAII, *Ex. Rel.* MITCHELL KAHLE and HOLLY HUBER, Plaintiffs, v. ONE LOVE MINISTRIES; CALVARY CHAPEL CENTRAL OAHU; DOE ENTITIES 1-50; JOHN DOES 1-50; and JANE DOES 1-50, Defendants.	CIVIL NO. 13-1-0893-03 VLC (Other Civil Action) **DEFENDANTS' ONE LOVE MINISTRIES AND CALVARY CHAPEL CENTRAL OAHU'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT FILED FEBRUARY 20, 2014;**

Table of Contents

Table of Authorities

Cases

Statutes and Rules

DEFENDANTS' ONE LOVE MINISTRIES AND CALVARY CHAPEL CENTRAL OAHU'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Introduction

The Relators in this case have filed a lengthy First Amended Complaint (hereinafter referred to as the "Complaint") but have still not stated a claim upon which relief can be granted. Their Complaint is jurisdictionally barred by the Hawaii False Claims Act and should be dismissed with prejudice.

The standard for a motion to dismiss is well settled. "A complaint should not be dismissed for failure to state a claim unless 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." *Wright v. Home Depot U.S.A., Inc.*, 111 Haw. 401, 406 (2006). In deciding a Motion to Dismiss, the court must "view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory." *Id.* Under this standard, Relators have failed to state a claim upon which relief could be granted.

Their Complaint is almost entirely based upon publicly disclosed information obtained from public records requests to the government and information gleaned from websites and other public sources. The scant amount of information that the Relators claim to have independent knowledge of is duplicative of publicly disclosed information. Under the Hawaii False Claims Act, the Relators are not the original source of any information that is not already publicly disclosed and so their Complaint must be dismissed.

I. The Complaint must be dismissed pursuant to the public disclosure bar of HRS §661-31(b).

Relators' Complaint is jurisdictionally barred because it is substantially the same as publicly disclosed information. Relators do not constitute an original source of any material that is independent of and materially adds to the publicly disclosed information used to allege information in the Complaint.

The "public disclosure bar" of the Hawaii FCA bars actions that are based on

material that has already been publicly disclosed. HRS § 661-31(b).[1] Specifically, the FCA states that:

> (a) 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(b) (emphasis added). The public disclosure bar is jurisdictional and the court is required to dismiss a lawsuit where the transactions or allegations alleged are substantially similar to publicly disclosed information. *See* HRS §661-31(b) ("the court *shall* dismiss....") (emphasis added); *see also Rockwell Intern. Corp. v. U.S. ex rel. Stone*, 549 U.S. 457, 468 (2007) (holding that the public disclosure bar under the federal FCA is a "clear and explicit withdrawal of jurisdiction" and thus was a matter of subject matter jurisdiction).

The "central inquiry" in the jurisdictional determination is "whether the publicly disclosed information could have formed the basis for a governmental decision on prosecution, or could at least have alerted law-enforcement authorities to the likelihood of wrongdoing." *U.S. ex rel. Oliver v. Philip Morris USA Inc.*, 949 F. Supp. 2d 238, 248 (D.D.C. 2013). "If the public disclosure could have alerted the government to the fraud, there is little value in permitting a private individual to sue, and the FCA accordingly deprives courts of jurisdiction to hear a qui tam action." *Id.* As one appellate court put it, "A public disclosure occurs when the critical elements exposing the transaction as fraudulent are placed in the public domain." *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 913 (7th Cir. 2009) (citations omitted).

The public disclosure bar is a threshold issue to be determined by the Court in two

---

[1] The language of state FCA and federal FCA public disclosure bar provisions is essentially identical. Compare HRS § 661-31(b) with 31 USC § 3730(e)(4); *see United States ex rel. Woodruff v. Hawaii Pacific Health*, 560 F. Supp. 2d 988, 997 n.7 (D. Haw. 2008) (Noting that courts "apply the same analysis for liability under the federal and state FCA" because the two acts are almost identical.).

different steps both of which are the burden of Relators to prove. First, the Relators must prove that the allegations or transactions are not substantially the same as those publicly disclosed under categories listed in HRS §661-31(b). Second, the Relators must prove that they are the "original source" of the information which is defined, in relevant part, as "an individual who... 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)(2).

Despite the inordinate length of their Complaint and accompanying exhibits, Relators' cannot meet their burden of proof that this Court has subject matter jurisdiction. The allegations are substantially the same as those publicly disclosed directly to government officials, in state reports, investigations, and by the news media. *See* HRS §661-31(b)(2) and (3). And Relators do not constitute an original source of any material.

As illustrated in Exhibit "A" attached to this Memo, ***all*** of the evidence relied upon by the Relators in their Complaint is either publicly disclosed information or is duplicative and adds nothing to the publicly disclosed information. There are ***no*** allegations or evidence in the Complaint that fall outside the public disclosure bar or of which Relators constitute an original source. ***All*** of the allegations and exhibits in the Amended Complaint, as described more fully below, are barred by HRS 661-31(b) and cannot form the basis of a *qui tam* action.

A. The transactions and allegations in the Complaint are barred by HRS §661-31(b)(2) because they were publicly disclosed by the Relators and the Defendants when they were reported to the government officials responsible for managing the community use of school facilities program.

When the allegations or transactions of fraud in a *qui tam* action have been publicly reported to the government officials responsible for administering the program, that disclosure is considered public for purposes of the public disclosure bar. Specifically, the allegations or transactions are considered information publicly disclosed in a state report, audit, or investigation under HRS §661-31(b)(2).

In *United States v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999), the court held that FCA claims based on disclosure of information to a competent public official about an alleged false claim are jurisdisctionally barred, so long as the public

official had managerial responsibility for the claims being made.[2] The relator in *Bank of Farmington* alleged that the bank made misrepresentations to the Farmer's Home Administration (FmHA) about a loan guaranty in order to obtain coverage of the loan by the government when the loan defaulted. During the course of discovery in a private state court action over the loan default (not the *qui tam* action), the bank's misrepresentation was disclosed to the person at FmHA who had managerial authority over the loan guarantee.

The Seventh Circuit Court of Appeals held in *Bank of Farmington* that the information relator based her *qui tam* action on was publicly disclosed because it was disclosed during a public lawsuit to the employee at FmHA who had managerial responsibility over the loan program that was the subject of the *qui tam* lawsuit. The Court held:

> Disclosure of information to a competent public official about an alleged false claim against the government we hold to be public disclosure within the meaning of [the public disclosure bar] when the disclosure is made to one who has managerial responsibility for the very claims being made. This construction accords with a standard meaning of "public," which can also be defined as "authorized by, acting for, or representing the community." Disclosure to an official authorized to act for or to represent the community on behalf of government can be understood as public disclosure.

Bank of Farmington, 166 F.3d at 861. The court explained that: "The point of public disclosure of a false claim against the government is to bring it to the attention of the authorities, not merely to educate and enlighten the public at large about the dangers of misappropriation of their tax money." *Id.* Given this purpose of the public disclosure bar:

> Since a public official in his official capacity is authorized to act for and to represent the community, and since disclosure to the public official responsible for the claim effectuates the purpose of disclosure to the public at large, disclosure to a public official with direct responsibility for the claim in question of allegations or transactions upon which a qui tam claim is based constitutes public disclosure within the meaning of [the public disclosure bar].

---

[2] A portion of the *U.S. v. Bank of Farmington* case that is not relevant here was overruled by *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009). The portion cited has not been overruled.

Id. The Seventh Circuit distinguished the disclosure in *Bank of Farmington* from disclosure to just any government official, or to an official who had no managerial responsibility over the issue.

> The more open a disclosure is, the less any public official need be specifically informed. If it is sufficiently open, no official need be specifically informed. The more likely the competent official is to be apprised of the relevant facts by a disclosure, the less "public," in the sense of open or manifest to all, it need be. If the disclosure is made, as here, to precisely the public official responsible for the claim, it need not be disclosed to anyone else to be public disclosure within the meaning of the Act.

Id. Therefore, when the information that forms the basis of a *qui tam* action has been disclosed to a government official with managerial responsibility over the program at issue, it has been publicly disclosed and falls within the public disclosure bar.[3]

In this case, the information that formed the basis of the Relators' allegations was disclosed to the Department of Education and to the Board of Education by One Love Ministries and by the Relators themselves. On February 17, 2012, more than a year before filing the original lawsuit, Mitch Kahle sent an email to the Department of Education with a subject line that stated "Anomalies, Errors, Undercharges, Waivers." *See* Email trail of February 17, 2012, attached hereto as Exhibit "B".[4] The email stated:

> Our preliminary research has already uncovered numerous anomalies, errors, undercharges, and waivers in many of the Applications for Use of School Buildings, facilities, and Grounds (Form BO-1) obtained through our initial UIPA request (dated December 13, 2011).

---

[3] *Cf. U.S. ex rel. Rost v. Pfizer, Inc.*, 507 F.3d 720 (1st Cir. 2007) (holding the confidential disclosure to government official, without more, does not constitute public disclosure sufficient to trigger public disclosure bar). *Rost* is inapposite here. In that case, Pfizer made confidential disclosures of the information forming the basis of a *qui tam* action to the government. The disclosure triggered an investigation by the government of Pfizer. But there was no further disclosure to the public at all as there was in *Bank of Farmington* where the disclosure came during a public lawsuit.

[4] "When considering a motion to dismiss pursuant to HRCP Rule 12(b)(1) the trial court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction." *Yamane v. Pohlson*, 137 P.3d 980, 987 (2006) (internal marks omitted).

> To whom should we address inquiries for additional information and/or clarifications?

Exhibit "B" at page KH000058 (relevant portion highlighted). The email trail shows that it was copied to Kathryn Matayoshi, Superintendent of the Hawaii Department of Education as well as numerous other staff at the DOE. *See* Exhibit "B" at page KH000056 (relevant portion highlighted). This email shows that over a year before Relators ever filed this lawsuit, they voluntarily notified the DOE of the allegations or transactions underlying this *qui tam* action. That information was disseminated to numerous DOE officials who had managerial control over the facilities usage issue, including the Superintendent of the DOE herself. This email demonstrates that the allegations of errors, undercharging and improper waivers were publicly disclosed over a year before the original *qui tam* action was filed.

In addition, on June 29, 2012, almost nine months before the original action was filed, Mitch Kahle sent an email to the Chairperson of the Hawaii Department of Land and Natural Resources seeking copies of all approvals by the BLNR for use of school facilities by churches exceeding 12 consecutive months. *See* Exhibit "B" attached hereto. The email stated:

> We are specifically seeking records of use "for periods of use exceeding twelve consecutive months" that were approved by the BLNR at any time between July 2006 and June 2012. Based on a recent survey of BO-1 Applications, there appear to be as many as 137 churches holding regular weekly services in Hawaii public schools, where such use represents continuous use of school facilities exceeding 12 consecutive months. As many as 52 of these churches appear to have been using school facilities for 5 years or longer without interruption.

The email also contained the text of HRS §302A-1148 and HAR §8-39-4 which require BLNR approval for periods of use exceeding twelve consecutive months. *See* Exhibit "C". This email shows that the allegation that churches are using school facilities in violation of the law without BLNR approval, was publicly disclosed to the Department of Land and Natural Resources well in advance of the filing of the original action. The email response from the DLNR shows that the Land Division and the Board Secretary investigated internally in response to the email and could find no records. This was a public disclosure by the Relators that falls within the public disclosure bar because the

allegation as disclosed to a government official (the DLNR) who had managerial authority over that aspect of the community use of school facilities program.

Finally, on October 10, 2012, again months before the original *qui tam* action was filed in this Court, One Love Ministries sent a letter to the Superintendent of the Department of Education and the Chairman of the Board of Education wherein it discussed the hours it used the school facilities and the rate agreement it had been operating under since 2009. *See* Letter of October 10, 2012, attached hereto as Exhibit "D". This letter disclosed that One Love used school facilities for 6 hours every Sunday and attached the 2009 agreement that One Love had with the school it used that allowed it to pay no rental fees and only utility costs for use of the school facilities. The letter requested that the BOE and the DOE "return our rent to it's (sic) original level, per our contract." *See* Exhibit "D" at Page KH001121. The letter attached the "Use of Facilities/Bill Payment Agreement" signed by One Love and Christopher Daly, Vice-Principal of Kaimuki High School, that specifically states "Kaimuki High School will only charge One Love Ministries for utilities at the standard DOE rate and will not be charging One Love Ministries for use of the facilities." Exhibit "D" at Page KH001123. This letter constituted a public disclosure of the facts underlying Relators' *qui tam* action. The letter was sent several months prior to Relators' filing of this lawsuit and was sent to those with ultimate managerial authority over the community use of school facilities program.

The Relators' Complaint demonstrates the public disclosure that occurred by One Love's October, 2012, letter to the DOE and BOE. *See* Exhibit "D". Relators allege that "OLM repeatedly protested application of the appropriate charges, petitioning the BOE and DOE for rate reductions and requesting that their illegal and unauthorized 2009 *quid pro quo* agreement be honored." Comp. at ¶100 (underlined emphasis added). Relators also allege that "in a October 10, 2012 communication to the DOE/BOE that accompanied OLM's plea to have the illegal agreement honored, Gil Berger, Executive Director for OLM Outreach, admits to using school facilities for *six* hours every Sunday, not the five hours disclosed on the church's BO-1 Applications." Comp. at ¶101. Relators' own allegations demonstrate that well in advance of the filing of this lawsuit, the DOE and the BOE were aware of the substance of the original *qui tam* action.

Taken together, the emails from Relators and the letter from One Love constitute a public disclosure of the transactions and allegations underlying this action. The public disclosure occurred many months prior to the filing of this lawsuit and the public disclosures were made to those with ultimate managerial authority over the various issues of which Relators complain. Under the rationale of *Bank of Farmington*, the emails and letter attached hereto bring this case within the public disclosure bar such that it should be dismissed for lack of subject matter jurisdiction.[5]

In addition, these emails and the letter were obtained by Relators through a UIPA request. Even if this Court were to conclude that disclosure, made directly to the responsible government agents as insufficient under HRS §661-31()b), reliance upon information obtained through a UIPA request further bars this action as a public disclosure, as argued more fully below. These disclosures are different than what occurred in *Pfizer* where the defendant's confidentially disclosed information to the government official was not disseminated further. Rather, in the case at bar, the Relators and the Defendant not only disclosed the information underlying the *qui tam* action to the relevant government officials, but Relators also obtained the information through a UIPA request, which requires that this case be dismissed under the public disclosure bar.[6]

B. The transactions and allegations in the Complaint are substantially the same as those publicly disclosed in a state report.

The United States Supreme Court held that complaints based on information gathered from federal Freedom of Information Act (FOIA) requests are barred under the federal version of this rule (which is identical to the state version) because a FOIA submission constitutes a government "report". *See Schindler Elevator Corp. v. United States ex rel. Kirk*, __ U.S. __, 131 S. Ct. 1885, 1893 (2011) (holding that a "written

---

[5] One Love's letter of October 10, 2012, specifically apply to One Love and mandate dismissal of this case as to One Love. The Relators' emails detailed above apply to both One Love and Calvary Chapel and mandate dismissal as to both Defendants.

[6] In addition, Relators' site visits and "independent investigation" do not add anything to the publicly disclosed allegations and transactions as argued more fully in Section I.D, *infra*.

agency response to a FOIA request falls within the ordinary meaning of 'report.'"). In *Schindler*, the Supreme Court noted the "generally broad scope" and the "broad sweep" of the language in the public disclosure bar. *See id.* at 1891. Because the public disclosure bar was intended to be "wide reaching," it encompassed information obtained by relators in response to public records requests. *See also Graham Cnty. Soil & Water Cons. Dist. v. U.S. ex rel. Wilson,* 559 U.S. 280, 283 (2010) (holding same for state public records).

The Supreme Court's decision is consistent with lower federal court decisions, which have long barred FCA suits based on information derived from a freedom of information request. *See United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051 (10th Cir. 2004) ("[i]t is generally accepted that a response to a request under the FOIA is a public disclosure.") *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 55 (1st Cir. 2009) (agreeing with other circuits that responding to FOIA request is a public disclosure under the Act and complaints based on such information are barred under the FCA); *Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 175 (5th Cir. 2004) (similar); *United States ex rel. Mitstick v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376, 384-85 (3d Cir. 1999) (citing cases).

In *Schindler*, an employee working at a company that contracted with the federal government became suspicious that the company was not complying with federal law in the number of veterans it was hiring, and was then submitting falsified documents to cover it up. *Id.* at 1889-90. The employee's wife submitted freedom of information requests to the government, responses to which allegedly validated the employee's suspicions. *Id.* The employee then filed a *qui tam* action based on the federal FCA. *Id.* The Supreme Court found that the lawsuit was precisely the type of "'opportunistic' litigation that the public disclosure bar was designed to discourage. The Court held: "Although [the 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." *Id.* at 1894. The Court noted that if this type of opportunistic *qui tam* action were allowed, "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.* Thus,

the Court held that the action fell within the public disclosure bar.[7]

That is exactly what Relators have done here. Based on Relators' various and random suspicions that the schools were not complying with how the Relators interpreted state regulations, the Relators filed Uniform Information Practices Act ("UIPA") requests to receive the applications and other material related to churches' rental of school buildings. *See* Comp. at ¶23. They then filed the action based on those UIPA responses which they admit constitute publicly-disclosed information. *See id.* at ¶39 (describing "existing information of *publicly disclosed BO-1 Applications*" (emphasis added)).

A review of the information attached as exhibits to the Complaint reveals that the vast majority of the information is comprised of responses to the Realtors' UIPA requests. Exhibits 1a, 1b, 1c, 1d, 2a, 2b, 2c, 2d, and 8 are all information received in response to UIPA requests. This information includes the applications by the churches for use of school facilities, and various receipts for payments, as well as a use of facilities agreement between one of the churches and a school. In Exhibit "A" to this Memorandum, all of the allegations and evidence that the Relators rely upon is presented in a chart form that demonstrates just how heavily Relators rely upon the information obtained from UIPA requests.

Had it not been for the UIPA requests, Relators would have had no information upon which to base this lawsuit. This case is therefore similar to *Schindler* where the relator simply had suspicions as to what was occurring and sent out FOIA requests to gather information to file a *qui tam* lawsuit. Indeed, without the information gathered from the UIPA requests, Relators would not have had any basis to bring a *qui tam* lawsuit like this one because, as explained more fully below, Relators are not the "original source" of any information that is independent of and materially adds to the publicly

---

[7] This jurisdictional limit "is intended to bar 'parasitic lawsuits' based upon publicly disclosed information in which would-be relators 'seek remuneration although they contributed nothing to the exposure of the fraud.'" *U.S ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir.1993). "[I]f a third party first distributed information through any of the fora identified in § 3730(e)(4)(a) [the public disclosure bar], and a putative relator relied on that information in bringing a qui tam suit, a federal court lacks subject matter jurisdiction over the suit." *U.S. ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458, 463 (S.D.N.Y. 2002).

disclosed information they rely upon in this lawsuit.[8]

C. The transactions and allegations in the Complaint are substantially the same as those publicly disclosed by the "news media".

Courts are in agreement that information obtained through publicly available websites, including even those of private companies, constitutes "news media" for purposes of the public disclosure bar. In *U.S. ex rel. Green v. Service Contract Education and Training Trust Fund*, 843 F. Supp. 2d 20 (D.D.C. 2012), the court held that information obtained by the relator from the defendants' private website met the definition of information from "news media" and was prohibited by the public disclosure bar. The *Green* court noted the broad sweep of the public disclosure bar under the FCA and especially the term "news media," which courts "have construed... to include readily accessible websites." *Id.* at 32. The fact that the website was generally accessible to the public meant that it qualified as news media under the public disclosure bar even though it was directed to a select audience because of its subject matter. *Id.* at 32-33.

Similarly, in *U.S. ex rel. Repko v. Guthrie Clinic*, 2011 WL 3875987 (M.D. Pa. 2011), the court agreed "with those courts from other circuits that have found information contained on publically available websites can be public disclosures within the meaning of the FCA." *Id.* at *7. The court explained that:

> Generally accessible websites are available to anyone with an internet connection and a web browser, and access is not restricted. Though they are not traditional news sources, they serve the same purpose as newspapers or radio broadcasts, to provide the general public with access to information. They are easily accessible and any stranger to a fraud transaction could discover the relevant information on them.

Id. at *8.

Information available on websites does not have to be conspicuous or widespread

---

[8] Additionally, as described above, Relators obtained, through a UIPA request, One Love Ministries' self-disclosure of the information underlying this *qui tam* action. This is plainly a public disclosure that subjects the case against One Love to dismissal. Even if the Court were inclined to not find the One Love October, 2012, letter to be public disclosure when it was sent to several DOE and BOE officials, the fact that Relators obtained it through a UIPA request makes it sufficiently public disclosure to bring it within the public disclosure bar.

to fall within the "news media" portion of the public disclosure bar. *See U.S. ex rel. Oliver v. Philip Morris USA, Inc.*, 949 F. Supp. 2d 238, 247 (D.D.C. 2013). In *Philip Morris*, the relator relied upon an interoffice memorandum from Philip Morris as the basis for their FCA lawsuit. Philip Morris moved to dismiss by arguing that the interoffice memorandum had been posted on a searchable public database and thus fell within the "news media" portion of the public disclosure bar. The relator argued that "given the massive volume of the online databases, there was no realistic possibility that the disclosure would actually be seen and understood by the public." *Id.* (internal marks omitted). The court rejected that argument stating there was no requirement that the disclosure be conspicuous or widespread in order to be considered publicly accessible. *Id.* As long as the information appears on a publicly accessible website, it falls within the "news media" portion of the public disclosure bar.

The Relators specifically rely upon information that constitutes "news media" under the public disclosure bar. For example, as part of their "independent investigation," the Relators allege that they monitored the churches through "observation of their service broadcasts on television and online. Relators... made a complete search of the internet, monitoring and reviewing the various church websites (both current and archived), social media pages, videos, bulletins, magazines and advertisements." Comp. at ¶35. This information plainly falls within the public disclosure bar. It is all information from publicly accessible websites that anyone could have found by simply searching online.

Relators also attached to their previously dimissed Complaint in this matter, numerous printouts from church websites, including those that show service times, special event times, and set-up times on Sunday mornings. *See e.g.*, Exhibit 8d to original Complaint at page KH001033 (showing website page that announces One Love beginning set-up for Sunday services at 6 am). This information also falls within the public disclosure bar of HRS §661-31(b)(3). Relators cannot use this information to form the basis of their *qui tam* action.

D. Relators are not the "original source" of any information that is independent of and materially adds to the publicly disclosed allegations or transactions.

There is an exception to the public disclosure bar if Relators are an "original source" of the information, which does not apply here. *See* HRS § 661-31(b). To be an original source, the relator must have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and ... voluntarily provided the information to the State before filing an action under this part." HRS § 661-31(c)(2).[9]

Here Relators have no independent knowledge that materially adds to the publicly disclosed transactions at issue in the Complaint. Relators allege that they conducted an "independent investigation." They allege that their "investigation" consisted of the following actions:

> 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 each weekend, including the specific days, hours, activities and facilities and utilities that churches were using, in contradiction to reported times. First Amend. Comp. at ¶24.
>
> Communications directly with school principals and vice principals and on-site surveillance. *Id.* at ¶28.
>
> Designed and programmed a custom relational database to help analyze and review all 542 BO-1 Applications they obtained.... Created detailed spreadsheets to replicate the calculations, compare the facilities and hours assessed and the rates charged by each school, check for billing/payment errors, and track the number of Sundays in each month, school year and calendar year. *Id.* at ¶29.
>
> Relators also continually monitored the churches through observation of their service broadcasts on television and online. Relators signed up for church newsletters and email announcements, and made a complete search of the internet, monitoring and reviewing the various church websites (both current and archived), social media pages, videos, bulletins, magazines, and advertisements. *Id.* at ¶35.

---

[9] The requirement to voluntarily provide the information to the State before filing an action under this part refers to the requirement in HRS §661-25(b) that the relator bringing a *qui tam* action must serve a "copy of the complaint and written disclosure of substantially all material evidence the person possesses" on the State at the same time the complaint is filed under seal with the Court. This required voluntary disclosure is different than what the Relators did as argued in §I(A) above where they publicly reported the allegations or transactions underlying this action to the State in emails and letters months in advance of the filing of this lawsuit under seal pursuant to HRS §661-25(b).

This is the information that Relators claim "materially and significantly added to the existing information of publicly disclosed BO-1 Applications and other public sources of information about Defendants' claimed usage of Hawai'i schools, leading directly to the allegations herein." *Id.* at ¶39. But none of this information meets the definition of "original source" information under HRS §661-31(c).

The Relators' visits to the school did not yield information that was independent of nor did it materially add to publicly disclosed information about actual usage of school facilities by the churches. The information about the service times of the churches was publicly disclosed on the websites of the churches themselves. One Love Ministries publicly disclosed on its website that it began set-up on Sunday mornings at 6:00 am. *See* Exhibit 8d to original Complaint at page KH001033. One Love also publicly disclosed in a letter to the DOE and the BOE, as discussed above, that it used the facilities at Kaimuki High School for six hours every Sunday and that it had not been paying rental fees and only had been paying utilities charges since 2009. *See* Exhibit "C". The DOE and the BOE then publicly disclosed that information through their response to the Relators' UIPA request. Thus, the "personal visits" to the schools used by the churches yielded no information that was not already publicly disclosed.

Additionally, Relators' communications directly with school officials constituted UIPA requests which meet the definition of publicly disclosed material and cannot constitute original source information. *See* Section I.B, *infra*.

The Relators' custom designed database also does not meet the definition of original source information. This is primarily because all the database does is analyze publicly disclosed information received through UIPA requests that Relators admit fall within the public disclosure bar. *See* Comp. at ¶39. In *U.S. ex rel. Alcohol Foundation v. Kalmanovitz Charitable Foundation*, 186 F. Supp. 2d 458 (S.D.N.Y. 2002), the relators, to no avail, attempted to base a false claims act lawsuit on their personal analysis of information that was publicly disclosed. The court held that there was no dispute that the information on which the relator based its FCA lawsuit was gleaned from third parties' published articles which met the definition of publicly disclosed information under the public disclosure bar. *Id.* at 461. The relator argued that their allegations came from the perspective that their members brought to bear on the published articles that they spent

hundreds of hours compiling into a "mosaic" that comprised the False Claims Act lawsuit. *Id.* The court rejected that argument, holding that the public disclosure bar "was designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." *Id.* at 462. The court dismissed the action under the public disclosure bar.

The *Alcohol Foundation* case is applicable here. The Relators in this case allege that they conducted independent analysis of publicly disclosed information that proved fraud. But the "investigation" consisted entirely of pulling together publicly available information and analyzing it. This is something that anyone could have done. Relators should not be allowed to reap a potential financial windfall of a *qui tam* action for performing spreadsheets and calculations that anyone could perform of publicly disclosed information.

Overall, the public disclosure bar applies and mandates dismissal of this action with prejudice. "In tandem, the public disclosure bar and original source exception seek an optimal balance between encouraging suits by 'whistle-blowing insiders with genuinely valuable information' and discouraging claims by 'opportunistic plaintiffs who have no significant information to contribute of their own.'" *U.S. ex rel. Green v. Serv. Contract Educ. & Training Trust Fund*, 843 F. Supp. 2d 20, 30 (D.D.C. 2012). The Relators' lawsuit falls squarely on the "opportunistic" side of the equation. It is jurisdictionally barred and must be dismissed.

II. Relators' Complaint does not and cannot allege a false claim by One Love or Calvary Chapel.

The crux of the Complaint filed by the Relators is that One Love and Calvary Chapel violated Hawaii's False Claims Act by:

1. Falsely representing the length of time of their actual use.
2. Failing to disclose the full extent of their actual use.
3. Failing to pay rental fees and utilities charges actually owed.
4. Failing to obtain general liability coverage.
5. Connecting electrical lines to the school's system.

But even accepting Relators' vague and generalized allegations about these matters as true, neither One Love nor Calvary Chapel violated any law, nor did they present any false information in their applications to the school for use of school facilities. If there is

no submission of false information, then there can be no false claim. That is the case here.

A *qui tam* lawsuit cannot be used to police compliance with imprecise and vague regulations. When such imprecision exists, absent a false certification or a lie by a defendant, there is no false claim.

Additionally, government knowledge of the facts surrounding the alleged false claim facially establishes there is no false claim. And the allegations in the Complaint demonstrate that the government was fully aware of, and set the terms of the rental arrangements for One Love and Calvary Chapel.

A. Because the applications for use of school facilities were in compliance with the law, Relators have not stated a claim upon which relief can be granted.

Relators' Complaint alleges that One Love and Calvary Chapel submitted applications for use of school facilities that underreported the amount of time they actually used school facilities because they did not include set-up and tear-down time, or the time between services. *See* Complaint ¶42. But even accepting these generalized allegations as true, when comparing the applications by the churches to what was required under the applicable regulations, it is clear that the applications were in compliance with the law. "Evidence of an actual false claim is the *sine qua non* of a False Claims Act Violation." *U.S. ex rel. Carpenter v. Abbott Labs., Inc.*, 723 F. Supp. 2d 395, 403 (D. Mass. 2010). Because Relators have not, and cannot, allege a false claim, they have not stated a claim upon which relief can be granted.

1. The "Use" of school facilities.

Use of school facilities by outside groups is governed by Hawaii Administrative Rules §8-39-01 through §8-39-14 ("Rules"). The Rules specify generally that "Applications for the use of buildings, facilities, or grounds shall be submitted in writing in accordance with the department's rules." *See* §8-39-2. The Department of Education has promulgated a "Standard Practice" document that specifies how the Rules should be applied. *See* SP 6110. These practices state that a proposed user must:

> Complete and submit the Application for Use of School Buildings, Facilities, or Grounds (Form BO-1)... at least 10 working days prior to the

date of use to the school.

SP 6110(5). Therefore, all that is required is for a proposed user of school facilities to submit an application for "use" of the school facilities. There is no further guidance given in the Rules or in SP 6110, and there is no definition of the term "use." There is no requirement that "use" encompass set-up and tear-down time. Nor is there a requirement that "use" encompass the time in between events that are held on the same day. Once the application is completed, the principal either approves or rejects it and assesses the applicable fees. *See* SP 6110(5)(B). The principals at issue did just that and the churches paid the assessed rates.

"Imprecise statements or differences in interpretation growing out of a disputed legal question are not false under the FCA. In short, the claim must be a lie." *U.S. ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 986 (E.D. Wis. 1998) (internal citations omitted). Likewise, "[a]n FCA relator cannot base a fraud claim on nothing more than his own interpretation of an imprecise contractual provision." *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 378 (4th Cir. 2008). That is what the Relators attempt to do in this case, basing their allegations on terms in the applicable regulations and rules that are imprecise and can be reasonably interpreted differently.

In *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996), the relator brought a FCA lawsuit claiming that the cost allocation used by the defendant for payment for building a dam was false because the defendant was required by law to use a different cost allocation. *See id.* at 1477. But the court noted that the cost allocation was subject to differing interpretations.

> How precise and how current the cost allocation needed to be in light of the statute's imprecise and discretionary language was a disputed question within the Corps. Even viewing Hagood's evidence in the most favorable light, that evidence shows only a disputed legal issue; that is not enough to support a reasonable inference that the allocation was false within the meaning of the False Claims Act.

Id. The same is true in this case where the applicable regulations and policies are imprecise and open to differing reasonable interpretations. If the Churches did not violate the regulations in the first place, then there can be no false claim. The lack of precision in defining the term "use" cannot form the basis of a *qui tam* lawsuit.

2. *General liability insurance and electrical lines connected to the school.*

The same is true regarding Relators' allegations that the churches did not obtain general liability coverage and that they inappropriately connected electrical lines to the school facilities. Regarding general liability insurance, HAR §8-39-7(d) only requires the purchase of such insurance for "carnivals, fairs, and non-department sponsored athletic events which involve large crowds or greater risk, or both, for personal injury to participants due to the type of activity...." The 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 this definition. There is no absolute requirement that churches or all Type III users obtain general liability insurance. Instead, the principals exercised their discretionary decision-making authority granted to them under the Rules, and decided that the use by the churches did not meet the definition of an event requiring general liability insurance. The allegations in the Complaint that somehow the churches submitted a false claim because they failed to obtain general liability insurance is patently false.

Relators' allegations concerning the supposed prohibition on connecting electrical lines to the school system is similarly false. HAR 8-39-7(f) only prohibits connection of electrical lines to the school's system for "carnivals, fairs, and other large activities." But the principals never required the churches to comply with this prohibition, if indeed One Love and Calvary Chapel actually connected electrical lines to the school's system. Plaintiffs have not and cannot point to any false claim by the churches where they falsely represented their usage to the principals. The fact that the government exercises discretion in how to enforce a particular law cannot form the basis for a FCA lawsuit when there is no false claim at all. Indeed, Relators never even allege that the churches made a false claim regarding electrical lines.

Overall, Relators' Complaint shows that One Love and Calvary Chapel submitted the applications for use of the school facilities for requested future dates and times and that the principals of the respective schools exercised their discretion in setting the rental charges and the conditions of the rental. Relators' disagreement with how the principals of each school set the rates or conditions for use does not translate to a false claim by the

churches. Instead, even accepting the allegations of the Complaint as true, all Relators have shown is that One Love and Calvary Chapel paid what the school required them to pay. That is, quintessentially, not a false claim.

Even assuming *arguendo* the *principals* of the schools were somehow not following the Rules or SP 6110 in setting the rates for use of the school facilities, such a decision still cannot constitute a false claim by the *churches*. "FCA liability does not attach to violations of federal law or regulations... that are independent of any false claim." *Gagne v. City of Worcester*, 565 F.3d 40, 48 (1st Cir.2009), This is true because "the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations. The FCA is a fraud prevention statute; violations of [agency] regulations are not fraud unless the violator knowingly lies to the government about them." *U.S. ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 932 (S.D. Tex. 2007) (citing *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1019 (7th Cir.1999)); *see also United States ex rel. Hopper v. Anton,* 91 F.3d 1261, 1266 (9th Cir.1996) (stating that violations of laws, rules, or regulations alone do not create a cause of action under the FCA). In addition, "where disputed legal issues arise from vague provisions or regulations, a [defendant's] decision to take advantage of a position cannot result in his filing a 'knowingly' false claim." *Id.* The churches truthfully filled out the applications for use, the school principals set the rates, and the churches paid the amounts due. That is not fraud. That is not a false claim. *See e.g., Lum v. Vision Service Plan*, 104 F. Supp. 2d 1237 (D. Haw. 2000) (finding no falsehood in bills submitted to the government and stating: "[t]he False Claims Act attaches liability to false and fraudulent claims for payment, not to underlying activity that is allegedly fraudulent. Accordingly, violations of laws, rules, or regulations alone do not create False Claims Act liability." *Id.* (internal citations omitted)); *see also U.S. ex rel. Raynor v. National Rural Utilities Co-Op Finance*, 690 F.3d 951 (8th Cir. 2012) dismissing *qui tam* action because relator could not show that his preferred accounting method was required by law and that the accounting method used by the defendant was in violation of the law).

The fact that the Relators in this case disagree with the interpretation of either the churches or the school principals cannot form the basis of a false claims lawsuit. There is no false claim when a person takes a position on a regulation or law that is open to

reasonable interpretation. This is true regardless of how vehemently Relators believe that interpretation to be wrong. In short, Relators have not and cannot allege a false claim by the churches.

B. Government knowledge of the facts negates any false claim.

There is no false claim when the government is aware of the facts forming the basis of the alleged false claim. "Since the crux of an FCA violation is intentionally deceiving the government, no violation exists where relevant government officials are informed of the alleged falsity, thus precluding a determination that the government has been deceived." *U.S. ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 932 (S.D. Tex. 2007); *see also United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir.1991) (holding that the government's prior knowledge of an allegedly false claim vitiates a FCA action); *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 327 (9th Cir.1995) (same).

That is the case here where, as described above, the BOE, the DOE, and the BLNR were all aware of the transactions and allegations of this lawsuit well before the lawsuit was ever filed. There cannot be a knowing defrauding by the Defendants when the government knows all the relevant facts. *See e.g., U.S. ex rel. Durcholz v. FKW*, 189 F.3d 542 (7th Cir. 1999) (holding FCA lawsuit was barred because the allegations were that the government was defrauded by the activities that its agents ordered the defendant to accomplish); *see also U.S. ex rel. Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 809 (N.D. Utah, 1988) (holding that that there can be no FCA liability "where the government knew, or was in possession at the time of the claim, of the facts that make the claim false.").

Conclusion

Defendants respectfully request that this Court dismiss this case with prejudice.

Dated this 31st day of March, 2014.

James Hochberg
Attorney for Defendants
ONE LOVE MINISTRIES and
CALVARY CHAPEL CENTRAL OAHU

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

THE STATE OF HAWAII, *Ex. Rel.* MITCHELL KAHLE and HOLLY HUBER, Plaintiffs, v. NEW HOPE INTERNATIONAL MINISTRIES dba Oahu South Foursquare Church and/or New Hope Oahu, Hawaii Kai Community Foursquare Church and/or New Hope Hawaii 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 J:\Active Clients\ADF\2013 DOE False Claims Act Proceeding\Pleadings\Kahle_V_New_Hope_Declaration Of Hochberg 2014-03-31.Docx	CIVIL NO. 13-1-0893-03 VLC (Other Civil Action) **DECLARATION OF JAMES HOCHBERG; EXHIBITS A-D,**

DECLARATION OF JAMES HOCHBERG, ESQ.

I, James Hochberg, declare as follows:

1. I am an attorney representing Defendants One Love Ministries and Calvary Chapel Central Oahu in this action.

2. Attached as **Exhibit A** is a true and accurate copy of a chart prepared by counsel for the Defendants, summarizing all of the allegations and evidence relied upon by the Relators in their Amended Complaint filed February 20, 2014. As illustrated in Exhibit "A", ***all*** of the evidence relied upon by the Relators in their Amended Complaint is either publicly disclosed information or is duplicative and adds nothing to the publicly

disclosed information. There are ***no*** allegations or evidence in the Amended Complaint that fall outside the public disclosure bar or of which Relators constitute an original source. ***All*** of the allegations and exhibits in the Amended Complaint, as described more fully in the foregoing Memorandum, are barred by HRS 661-31(b) and cannot form the basis of a *qui tam* action.

3. Attached hereto as **Exhibit B** is a true and accurate copy of an email string dated February 17, 2012, between Relators and Susan H. Kitsu, Director of the State of Hawaii Department of Education Civil Rights Compliance Office, which was part of the information that Relators served on the State of Hawaii when they filed the original Complaint.

4. Attached hereto as **Exhibit C** is a true and accurate copy of an email string dated June 20, 2012 through June 29, 2012, between Relators and William J. Aila, Jr. and Deborah Ward, of the Department of Land and Natural Resources, which was part of the information that Relators served on the State of Hawaii when they filed the original Complaint.

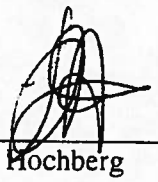
5. Attached hereto as **Exhibit D** is a true and accurate copy of a letter dated October 10, 2012, from Gill Berger, Executive Director, One Love Ministries/Outreach to Ms. Kathryn Matayoshi, Superintendent Hawaii State Department of Education, and Mr. Don Horner, Chairperson at Large, Hawaii Board of Education, which was served on the State of Hawaii with Relator's Complaint as part of Exhibit 8d.

6. Exhibits A-D are available to the court for consideration as part of this Motion filed under Rule 12(b) without converting it to a Motion for Summary Judgment, in order to resolve factual disputes concerning the existence of jurisdiction pursuant to the

Yamane vs. Pohlson, 137 P.3d 980, 987 (2006), the authority cited in footnote 4 of the Memorandum filed herewith.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 31, 2014, at Honolulu, Hawai'i.



James Hochberg

EXHIBIT "A"

EXHIBIT "A"

Evidence Relied upon by Relators	Why the Evidence is Barred
Relators' personal research of laws and rules governing use of school facilities – Amend. Comp. at ¶25	Barred because laws and rules governing use of school facilities are publicly disclosed information accessible to anyone. Therefore, they constitute publicly disclosed information under HRS §661-31(b)(2) or (3) (state legislative report) (website information that is publicly accessible)
Relators' personal visits to schools on Friday afternoons and various times on Saturdays and Sundays to observe and take photographs – Amend. Comp. at ¶¶24, 28, 33 Exhibit 9	Barred because this information does not meet the definition of "original source" information. It is not independent of and does not materially add to the publicly disclosed allegations or transactions. The service times, set-up times and special event times were all publicly disclosed on the churches' websites which constitute publicly disclosed information under HRS §661-31(b)(3). *See e.g.*, Relators' Initial Complaint at Exhibit 8d at Page KH001033 (publicly announcing set-up time of 6 am on One Love Ministries website); *see also* Exhibit 8d to Initial Complaint at Page KH001019 & KH001111 (announcing service times of One Love Ministries); Exhibit 8e to Initial Complaint at Page KH001280 (announcing calvary Chapel service times); Exhibit 8d to Initial Complaint at Pages KH 001033 & KH001040 (announcing special events and other service times for One Love)
Relators' personal review of minutes of the Hawaii State Board of Education – Amend. Comp. at ¶25	Barred because Minutes of Hawaii State BOE are public information accessible to anyone. Therefore, they constitute publicly disclosed information under HRS §661-31(b)(2) or (3) (state report or hearing) (website information that is publicly accessible)
Relators' UIPA requests – Amend. Comp. at ¶¶27	UIPA responses are publicly disclosed information under HRS §661-31(b)(2). *See* Memo in Support of Defendants' Motion to Dismiss First Amended Complaint at §I(B).
Relators' communications directly with school principals and vice-principals – Amend. Comp. at ¶28, 30	These communications were all done by UIPA requests for more information. UIPA responses are publicly disclosed information under HRS §661-31(b)(2)

EXHIBIT A

Relators' calculations, "custom relational database", spreadsheets – Amend. Comp. at ¶28, 29, 34	Barred because these calculations were based on information barred under the public disclosure bar as either publicly disclosed or as information that does not constitute "original source" information. *See U.S. ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458 (S.D.N.Y. 2002) (barring relators' calculations based on their analysis of publicly disclosed information).
Relators' monitoring of churches through observation of their service broadcasts on television and online – Amend. Comp. at ¶35	Barred because church websites, TV broadcasts, and other publicly available internet sites are publicly disclosed information under HRS §661-31(b)(3) (publicly available websites and broadcasts constitute information publicly disclosed by the "news media")
Relators' "complete search of the internet, monitoring and reviewing the various church websites (both current and archived), social media pages, videos, bulletins, magazines and advertisements – Amend. Comp. at ¶35	Barred because church websites and other publicly available internet sites are publicly disclosed information under HRS §661-31(b)(3) (publicly available websites constitute information publicly disclosed by the "news media")
Relators rented school facilities, filled out applications for facilities use, and paid rental and utilities charges – Amend. Comp. at ¶36	Barred because rental of school facilities is publicly available to anyone and thus constitutes publicly disclosed information. In addition, this information adds nothing to the publicly disclosed allegations or transactions and so is barred by HRS 661-31(c) because it does not meet the definition of "original source" material.
Exhibit 1a - 1d of Amended Complaint consist of BO-1 Applications by One Love Ministries and receipts and checks for payments. All information in these exhibits was obtained by Relators in response to UIPA requests	UIPA responses are publicly disclosed information under HRS §661-31(b)(2)
Exhibit 1e of Amended Complaint are Relators own spreadsheets that they compiled	Barred because these calculations were based on information barred under the public disclosure bar as either publicly disclosed or as information that does not constitute "original source" information. *See U.S. ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458 (S.D.N.Y. 2002) (barring relators' calculations based on their analysis of publicly disclosed information).
Exhibit 2a-2d of Amended Complaint consist of BO-1 Applications by Calvary Chapel and receipts	UIPA responses are publicly disclosed information under HRS §661-31(b)(2)

and checks for payments. All information in these exhibits was obtained by Relators in response to UIPA requests	
Exhibit 2e of Amended Complaint are Relators own spreadsheets that they compiled	Barred because these calculations were based on information barred under the public disclosure bar as either publicly disclosed or as information that does not constitute "original source" information. *See U.S. ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.,* 186 F. Supp. 2d 458 (S.D.N.Y. 2002) (barring relators' calculations based on their analysis of publicly disclosed information).
Exhibits 3-7 are laws, regulations, and policies governing the Department of Education and the community use of school facilities program	Barred because laws and rules governing use of school facilities are publicly disclosed information accessible to anyone. Therefore, they constitute publicly disclosed information under HRS §661-31(b)(2) or (3) (state legislative report) (website information that is publicly accessible)
Exhibit 8 is the Use of Facilities Bill / Payment Agreement between One Love Ministries and Kaimuki High School obtained by Relators through UIPA request	UIPA responses are publicly disclosed information under HRS §661-31(b)(2) *See also* One Love letter to DOE and BOE of October 10, 2012, reporting this agreement to DOE/BOE officials with management responsibility over the community use of school facilities program. Attached to Memo in support of Motion to Dismiss as Exhibit "C".
Exhibit 9 to the Amended Complaint are pictures taken by Relators of Kaimuki High School on July 8, 2012.	Barred because this information does not meet the definition of "original source" information. It is not independent of and does not materially add to the publicly disclosed allegations or transactions. The service times, set-up times and special event times were all publicly disclosed on the churches' websites which constitute publicly disclosed information under HRS §661-31(b)(3). *See e.g.,* Relators' Initial Complaint at Exhibit 8d at Page KH001033 (publicly announcing set-up time of 6 am on One Love Ministries website); *see also* Exhibit 8d to Initial Complaint at Page KH001019 & KH001111 (announcing service times of One Love Ministries); Exhibit 8e to Initial Complaint at Page KH001280 (announcing calvary Chapel service times); Exhibit 8d to Initial Complaint at Pages KH 001033 & KH001040 (announcing special events and other service times for One Love)

Exhibit 10 to the Amended Complaint is a 1986 Attorney General opinion.	Barred because laws and rules governing use of school facilities are publicly disclosed information accessible to anyone. Therefore, they constitute publicly disclosed information under HRS §661-31(b)(2) or (3) (state legislative report) (website information that is publicly accessible)

EXHIBIT "B"

X-IronPort-Anti-Spam-Result:
AoIAAKSIPk/YUvoTkWdsb2JhbABDglGuX4EVAQEBAQkLCwcUBSIPgWYBAQEEDwE5DB4GDgILBwoDAQ
IGAQELHAIFEAQEAgUgCQgGEgEWh3OrAwGLCASIWmmCKgMFBggBARMBBwIFAoNiGgofAwMBBAMEB
QQBBAOCSWMEjROCV4VNixOHeYEvBQQ
X-Env-Sender: Susan_Kitsu/MAC/HIDOE@notes.k12.hi.us
X-Originating-IP: [165.248.247.160]
X-StarScan-Version: 6.5.5; banners=notes.k12.hi.us,-,-
X-VirusChecked: Checked
To: Mitch Kahle <MitchKahle@hcssc.net>
Cc: Holly Huber <hollyjhuber@gmail.com>,
Kathryn_Matayoshi/SUPT/HIDOE@notes.k12.hi.us,
Ronn_Nozoe/SUPT/HIDOE@notes.k12.hi.us,
Presley_Pang/SUPT/HIDOE@notes.k12.hi.us,
Sandra_Goya/SUPT/HIDOE@notes.k12.hi.us,
Justin_Takaki/CRC/HIDOE@notes.k12.hi.us
Subject: Re: Anomalies, Errors, Undercharges, Waivers
X-KeepSent: 74726248:5DCAD161-0A2579A7:0066D842;
type=4; name=$KeepSent
From: Susan_Kitsu/MAC/HIDOE@notes.k12.hi.us
Date: Fri, 17 Feb 2012 08:47:22 -1000
X-Nonspam: None

Mr. Kahle,

Mr. Nozoe's email address is Ronn_Nozoe@notes.k12.hi.us.

The request for any additional documents, will require a new request stating specifically the document(s) you wish to inspect and/or copy.

However, if your inquiry is for clarification of information on information that you already received from the department, that may be coordinated through the Principal of the specific school that you are reviewing. Please feel free to contact the Principal directly.

Thank you,
susan kitsu

Susan H. Kitsu
Director
State of Hawaii
Department of Education
Civil Rights Compliance Office
P.O. Box 2360
Honolulu, Hawaii 96804
808.586.3321 or via relay

From: Mitch Kahle <MitchKahle@hcssc.net>
To: Susan_Kitsu/MAC/HIDOE@notes.k12.hi.us,
Cc: Holly Huber <hollyjhuber@gmail.com>
Date: 02/17/2012 08:19 AM
Subject: Re: Anomalies, Errors, Undercharges, Waivers

Exhibit "B"

Thanks Susan,

Do you have Mr. Nozoe's email?

Is it necessary to file a UIPA request simply to clarify numbers (amounts, dates, times, etc.) on applications (Form BO-1) that we have already requested and received?

It seems that may be facing a bureaucratic quagmire as I can already foresee hundreds of additional requests, sometimes simply to clarify unreadable handwriting on a form.

How should we address these requests for clarification on forms we have already received?

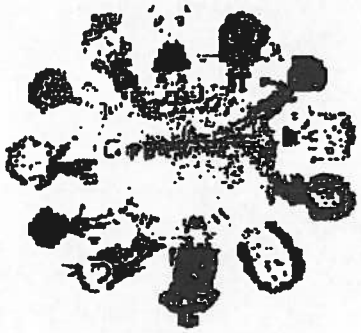
Please advise,

Mitch Kahle

Mr. Kahle,
All Uniform Information Practices Act (UIPA) requests, under HRS 92F, should be made through Deputy Superintendent Ronn Nozoe's office.

Once the Deputy Superintendent's staff log in your official UIPA request, they will assign the matter to my office to execute the request and gather and review information for your inspection and/or copying.

Thank you,
susan kitsu



Susan H. Kitsu
Director
State of Hawaii
Department of Education
Civil Rights Compliance Office
P.O. Box 2360
Honolulu, Hawaii 96804
808.586.3321 or via relay

From: Mitch Kahle <MitchKahle@hcssc.net>
To: Susan Kitsu <susan_kitsu@notes.k12.hi.us>,
Cc: Holly Huber <hollyjhuber@gmail.com>
Date: 02/17/2012 07:52 AM
Subject: Anomalies, Errors, Undercharges, Waivers

Friday, February 17, 2012

Aloha Susan,

Our preliminary research has already uncovered numerous anomalies, errors, undercharges, and waivers in many of the Applications for Use of School Buildings, Facilities, and Grounds (Form BO-1) obtained through our initial UIPA request (dated December 13, 2011).

To whom should we address inquires for additional information and/or clarifications?

Please advise.

Sincerely,

Mitchell Kahle
Hawaii Citizens for the Separation of State and Church
1519 Nuuanu Ave., #154
Honolulu, Hawaii 96817
Phone: 524-4040
Email: mitchkahle@hcssc.net
Web: www.hcssc.net

***

EXHIBIT "C"

To: Mitch Kahle <MitchKahle@hcssc.net>
Subject: Re: UIPA REQUEST 6/20/2012
From: DLNR@hawaii.gov
Date: Fri, 29 Jun 2012 15:32:10 -1000
X-Nonspam: None

Dear Mr. Kahle,
This is to both acknowledge and respond to your UIPA request of June 21, 2012 (please see attachments).

According to our Land Division and Board Secretary, DLNR does not have any records of applications or requests from the DOE between July 2006 and June 2012 for approvals by the Board of Land and Natural Resources (BLNR) as required under HRS §302A-1148 for "use of school facilities and grounds" and HAR Chapter §8-39-4(b) "Approvals," "for periods of use exceeding twelve consecutive months."

Thank you for your patience pending our review and response.

Respectfully,
Deborah Ward,
Department of Land and Natural Resources
Public Information Office
Honolulu, HI 96813
Phone: (808) 587-0320
Fax: (808) 587-0390

Mitch Kahle <MitchKahle@hcssc.net>

06/27/2012 08:19 AM

To

"William J. Aila Jr." <dlnr@hawaii.gov>,

cc

Subject

UIPA REQUEST 6/20/2012

Wednesday, June 27, 2012

UIPA REQUEST FOR PUBLIC INFORMATION

Wednesday, June 20, 2012

Mr. William J. Aila Jr.
Chairperson
Department of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl St.
Honolulu, HI 96813
Ph: (808) 587-0400
dlnr@hawaii.gov

Dear Chair Aila, Jr.,

This is a formal request for public information covered under the Uniform Information Practices Act

Exhibit "C"

(HRS §92F). We are seeking the following public records in the general public interest.

Please provide copies of any and all approvals of the Board of Land and Natural Resources (BLNR) as required under HRS §302A-1148 "use of school facilities and grounds" and HAR Chapter §8-39-4(b) "Approvals." See HRS and HAR text copied below.

We are specifically seeking records of use "for periods of use exceeding twelve consecutive months" that were approved by the BLNR at any time between July 2006 and June 2012. Based on a recent survey of BO-1 Applications, there appear to be as many as 137 churches holding regular weekly services in Hawaii public schools, where such use represents continuous use of school facilities exceeding 12 consecutive months. As many as 52 of these churches appear to have been using school facilities for 5 years or longer without interruption.

We respectfully request a waiver of all fees in the public interest, as HCSSC is a public advocacy group which is conducting a survey of the use of public schools in the general public interest.

Please advise as to when and where the requested BLNR approval documents will be made available for our inspection.

Sincerely,

Mitchell Kahle
Hawaii Citizens for the Separation of State and Church
1519 Nuuanu Ave., #154
Honolulu, Hawaii 96817
Phone: 524-4040
Email: mitchkahle@hcssc.net
Web: www.hcssc.net

***

HRS §302A-1148 Use of school facilities and grounds. All public school buildings, facilities, and grounds shall be available for general recreational purposes, and for public and community use, whenever these activities do not interfere with the normal and usual activities of the school and its pupils. Any other law to the contrary notwithstanding, the department shall adopt rules under chapter 91 as are deemed necessary to carry out the purposes of this section and may issue licenses, revocable permits, concessions, or rights of entry to school buildings and grounds for such periods of use as deemed appropriate by the department. All such dispositions, including those in excess of fourteen days, need not be approved by the board of land and natural resources; provided that approval by the board of land and natural resources shall be required when the dispositions are for periods in excess of a year. [L 1996, c 89, pt of §2; am L 2010, c 190, §3]

HAR Chapter §8-39-4 Approvals.

(a) For periods of use not exceeding twelve consecutive months:

(1) Applications for Type I, II, and III uses shall be filled out by applicant and shall be approved or disapproved by the school's principal or a designee;

(b) For periods of use exceeding twelve consecutive months, all applications shall be initially processed by the school and final approval given by the land board of the department of land and natural resources. [Eff. 11/17/84; am and comp JUN 22, 1996] (Auth: HRS §302A-1112) (Imp: HRS §§302A-1112, 302A-1148)

*** end ***

EXHIBIT "D"

SUPT. _____

DEP. _____

ASST. _____

one love ministries

Taking the Word of God to the people of God, to show the Love of God

October 10, 2012

Ms. Kathryn Matayoshi, Superintendent
Hawaii State Department of Education
1390 Miller St.
Honolulu, HI. 96813

Mr. Don Horner, Chairperson at Large
Hawaii Board of Education
PO Box 2360, Honolulu, HI. 96804

Re: One Love Ministries/Kaimuki High School

First, let me thank you for your commitment to achieving quality education for Hawaii's children and youth. We greatly appreciate your leadership.

I am writing regarding the escalation in facility usage fees we have experienced in recent weeks. The increase applied to our use of Kaimuki High School has made it economically unfeasible for us to continue so we are forced to seek alternative locations to meet.

Attached is the contract under which we had been charged usage fees through Spring, 2012. When these monthly fees are applied to our one-day-a-week rental, the total was approximately $[illegible] $1,000 per month. We were notified on August 22, 20[illegible] rental charges would increase to approximately $[illegible].00 per month, with no increase in usage, effective Sept[illegible] 2012.

Exhibit "D"

We do understand that reasonable increases may be necessary as rising costs for utilities, school expenses are a reality. The percentage of increase levied is simply not realistic. Few, if any non-profit organizations are able to afford this rent structure. Again, let me remind you that we use the facility one day per week, for 6 hours.

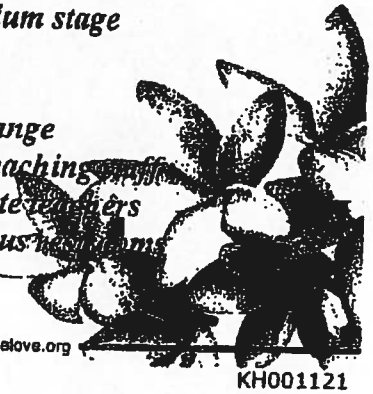
We are requesting your consideration to return our rent to it's original level, per our contract, for the balance of the school year as an interim solution. This will allow both DOE, and One Love Ministries to pursue realistic, legal and amenable options. We are available to discuss in person if that will facilitate a solution.

Churches, and non-profit community organizations support the goals of DOE's Comprehensive Student Support Services (CSSS) in so many ways. The departure of these organizations from the schools will undermine, and contradict the goals of CSSS.

One Love Ministries supports Kaimuki High School in many aspects of the schools activities:

- *mentoring of students*
- *providing landscaping, maintenance of the campus*
- *donation of golf carts, security carts*
- *removal of graffiti every week*
- *sponsorship, execution support of Senior grad night*
- *replacement of the floor of the auditorium stage*
- *re-wiring of A/V within the auditorium*
- *painting the interior of the auditorium*
- *construction, donation of an archery range*
- *donation of materials, supplies to the teaching staff*
- *partnering to provide qualified substitute teachers*
- *investing in remodeling of all the campus restrooms*

and more.



KH001121

Churches and other community organizations are key implementers of many of the Department of Education's CSSS. The loss of these key partners will have a negative impact on students, faculty and families.

If we are forced to move out of Kaimuki High School both organizations will suffer. Please do not let that happen.

We would appreciate a prompt review of our request as we will be forced to cancel our rental of Kaimuki High School on November 1, 2012 , unless we receive your acceptance of our interim proposal.

Gill Berger

Gill Berger, Executive Director, One Love Ministries/Outreach

CC: Raymond L'Heureux, Assistant Superintendent, Office of School Facilities and Support Services

USE OF FACILITIES BILL/PAYMENT AGREEMENT

This agreement is made and entered between Kaimuki High School and One Love Ministries.

In consideration of the covenants and conditions hereinafter set forth, Kaimuki High School and One Love Ministries agrees as follows:

1. SERVICES

Kaimuki High School shall allow One Love Ministries to utilize the Auditorium/Cafeteria and classrooms upon availability.

2. TERM

This agreement will commence on the date of January 1, 2009 and will replace the agreement established on April 1, 2006. Kaimuki High School may terminate One Love Ministries use of the facilities at any time without further obligation. Kaimuki High School will not refund any monies if the Auditorium, Cafeteria, or classrooms are not available, as One Love Ministries will not be charged for it.

3. PAYMENT

Kaimuki High School will charge One Love Ministries for the utilities charges as follows: $82.66 per hour for 2 hours each Sunday for the Auditorium, $9.10 per hour for 5 hours each Sunday for the Cafeteria, and $.95 per hour for 5 hours for each classroom being used. This rate reflects the current DOE fee schedule, and is subject to change. Should the rate change, a new agreement will be made. Kaimuki High School will bill One Love Ministries quarterly. Payments will be made by One Love Ministries within 21 days of receipt.

4. RECIPROCAL AGREEMENT

One Love Ministries has agreed to provide Kaimuki High School with services to enhance the school each quarter. In return, Kaimuki High School will only charge One Love Ministries for utilities at the standard DOE rate and will not be charging One Love Ministries for the use of the facilities.

1/22/09 — One Love Ministries Date

1/22/09 — Christopher Daly, VP Date

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

THE STATE OF HAWAII, *Ex. Rel.* MITCHELL KAHLE and HOLLY HUBER, Plaintiffs, v. NEW HOPE INTERNATIONAL MINISTRIES dba Oahu South Foursquare Church and/or New Hope Oahu, Hawaii Kai Community Foursquare Church and/or New Hope Hawaii 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) **NOTICE OF HEARING**

NOTICE OF HEARING

TO: JAMES J. BICKERTON
STEPHEN M. TANNENBAUM

BICKERTON LEE DANG SULLIVAN MEHEULA, LLLP
Topa Financial Center, Fort Street Tower
745 Fort Street, Suite 801
Honolulu, Hawai'i 96813

Attorneys for Relators
MITCH KAHLE and HOLLY HUBER

MICHAEL S. VINCENT
Deputy Attorney General
State of Hawaii – Department of Attorney General
425 Queen Street
Honolulu, HI 96813

NOTICE IS HEREBY GIVEN that the undersigned has filed with the above-entitled Court the motion attached hereto, for hearing before the Honorable

Virginia L. Crandall, in her courtroom at 777 Punchbowl Street, Court Room 11, Honolulu, Hawai'i 96813 on _____

at ____ o'clock ___.m., or as soon thereafter as may be heard.

Dated: Honolulu, Hawai'i, March 31, 2014.

_____
James Hechberg
Attorney for Defendants
ONE LOVE MINISTRIES and
CALVARY CHAPEL CENTRAL OAHU

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 31st day of March, 2014, a copy of Defendants' One Love Ministries and Calvary Chapel Central Oahu's Motion to Dismiss First Amended Complaint Filed February 20, 2014; Memorandum of Law in Support of Motion to Dismiss First Amended Complaint filed February 20, 2014; Declaration of James Hochberg; Exhibits "A" – "D"; Notice of Hearing; Certificate of Service, was served upon the following parties, in the manner indicated below:

JAMES J. BICKERTON — *Via Hand Delivery*
STEPHEN M. TANNENBAUM
BICKERTON LEE DANG SULLIVAN MEHEULA, LLLP
TOPA Financial Center, Fort Street Tower
745 Fort Street, Suite 801
Honolulu, Hawaii 96813

Attorneys for Relators
MITCHELL KAHLE and HOLLY HUBER

MICHAEL S. VINCENT — *Via Hand Delivery*
Deputy Attorney General
State of Hawaii
Department of Attorney General
425 Queen Street
Honolulu, Hawai'i 96813

DATED: Honolulu, Hawai'i, March 31, 2014.

JAMES HOCHBERG
Attorney for Defendants
ONE LOVE MINISTRIES and
CALVARY CHAPEL CENTRAL OAHU