I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The federal courts have jurisdiction of this action under 28 U.S.C. § 1331 and 31 U.S.C. §§ 3729-32 (2000). Venue was proper in the United States District Court for the Eastern District of Virginia (the "District Court") under *id*. § 3732, because at least one Defendant/Appellee transacted business in the District, and at least one act proscribed by *id*. § 3729 occurred in that District.

This Court possesses jurisdiction of this appeal under 28 U.S.C. § 1291 (2000). On February 20, 2007, the District Court issued and entered its Amended Final Judgment on all claims. On March 2, 2007, the Relators filed their timely Notice of Appeal.

II. STATEMENT OF THE ISSUES

A. Was there any evidence in the record (if needed) to support the jury's express, specific findings that the Defendants' false claims or records were "present[ed], or cause[d] to be present[ed], to an officer or employee of the United States Government or a member of the Armed Forces of the United States"?

B. Were false claims "present[ed], or cause[d] to be present[ed], to an officer or employee of the United States Government or a member of the Armed Forces of the United States" even if some of such officers, employees and members were detailed to the "Coalition Provisional Authority" in Iraq?

C. Did the trial court improperly exclude evidence of "presentment" from the trial record?

D. Did the trial court err in not enforcing partial summary judgment against the Defendants on the issue of whether Defendants' claims had been "present[ed], or cause[d] to be present[ed], to an officer or employee of the United States Government or a member of the Armed Forces of the United States"?

E. Did the trial court err in positing a "source of funds" requirement different from that stated in the False Claims Act and, in any event, are false claims actionable if such claims are paid with funds from the Development Fund for Iraq?

F. Was there evidence preventing summary judgment for Defendants under the Baghdad International Airport Contract?

III. STATEMENT OF THE CASE

This is the first case involving government contractor fraud in the War in Iraq to go to trial. After a four-week trial, the jury found that the Defendants had committed dozens of acts of fraud. The jury specifically found that the Defendants had "presented" false claims to officers or employees of the U.S. Government, *whether or not the "Coalition Provisional Authority" in Iraq was part of the U.S. Government*. The trial court nevertheless set aside the jury verdict, despite

acknowledging ample evidence of fraud, solely on this issue of "presentment." Before trial, the Court said that there were "undisputed facts in the record" establishing presentment; after the trial, the Court said that there were none. Appellants (and the U.S. Government) have maintained that the trial court misconstrued the "presentment" requirement, and disregarded evidence of presentment.

This appeal concerns the following statutory provision:

> (a) **Liability for Certain Acts –** Any person who—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; . . .
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .
>
> (c) **Claim Defined**. – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729 (2000).

On February 24, 2004, Appellants/Relators ("Relators") Robert J. Isakson, William "Pete" Baldwin, and DRC, Inc., filed this action. They sought money damages and civil penalties on behalf of the United States under the *qui tam* (whistleblower) provisions of the Civil False Claims Act, *id*. §§ 3729-33 (the "FCA"). Defendants were Custer Battles, LLC, and certain employees and affiliates. On October 6, 2004, the District Court ordered the Amended Complaint unsealed.[1] The Defendants were served on time.[2]

Count I of the Amended Complaint alleged false claims, in violation of FCA § 3729(a)(1). Count II alleged false statements, in violation of FCA § 3729(a)(2). Counts I and II primarily concerned two Iraq reconstruction contracts: Custer Battles's Iraqi Currency Exchange ("ICE") Contract, and its Baghdad International Airport ("BIAP") Contract.[3]

The Defendants sought dismissal of the Amended Complaint. They argued that

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[1] The United States elected not to intervene at that time, but it did participate later in the case.

[2] Efforts to serve three foreign defendants were unsuccessful; they did not participate in the subsequent proceedings below.

[3] Count III alleged FCA conspiracy in violation of FCA § 3729(a)(3); and Count IV alleged FCA retaliation against Relator Baldwin. In this appeal, the Appellants are not challenging the District Court's disposition of Count III. Count IV resulted in a money judgment in favor of Baldwin. Count IV, like Count III, is not a subject of this appeal.

they had presented their claims to the "Coalition Provisional Authority" ("CPA"), and that such claims were not actionable under the FCA, despite the fact that the claims had been submitted to and processed by U.S. Military employees, and paid with U.S. Treasury funds. The District Court converted the motions into motions for summary judgment, ordering limited discovery. The U.S. Government submitted extensive briefs and argued in Court against the summary judgment, endorsing the Relators' position that all of the submitted claims satisfied the literal terms of the FCA.

In an Opinion dated July 8, 2005, the District Court ruled that the *sources* of the U.S. Treasury funds that paid Defendants' fraudulent claims were "dispositive." (Joint Appendix ["JA"] 799 [July 8, 2004 Mem. Op. ["*DRC I*"] at 9].)[4] The sources of the U.S. Treasury funds that paid the ICE and BIAP claims were "Vested," "Seized," and Development Fund for Iraq ("DFI") Funds. The District Court ruled that claims for Vested and Seized Funds were actionable under the FCA, because those funds are U.S. funds (JA 831, 835), and that claims for DFI Funds were claims for Iraqi funds. (JA 836.) "Accordingly, any demands for payment from the DFI

[4] *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D.Va. 2005). Citations to *DRC I* (and later *DRC* decisions) are to the Joint Appendix.

were not 'claims' within the meaning of the FCA." (*Id.*)[5]

Drawing the line in this manner, the District Court determined that the first $3 million ICE Contract payment was from Seized Funds; that the remaining ICE Contract payments were from DFI Funds; and that the BIAP Contract payments were from Vested and Seized funds only. (JA 811-12.) As a result, the District Court narrowed the ICE Contract claims to false claims made in connection with the first $3 million payment, and it left the BIAP Contract claims intact.

The District Court concluded its opinion in *DRC I* by instructing:

> unless new facts come to light, this case will proceed primarily on a single issue: whether the claims for payment presented by defendants to the CPA were "knowingly false or fraudulent."

(JA 842.)[6] The parties then engaged in merits discovery.

After merits discovery, the Defendants filed motions for summary judgment on all Counts, which the District Court denied. The Defendants specifically argued – again – that there was no evidence of presentment; the Relators identified such

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[5] Both the Relators and the U.S. Government maintained that the FCA is triggered whenever a false claim is submitted to "an officer or employee of the United States Government," FCA § 3720(a)(1), and that because (*inter alia*) the United States provided or reimbursed at least a portion of the DFI money, FCA § 3729(c), the ownership of the funds was irrelevant.

[6] Notably, the lower court thus treated the "presentment" issue as resolved, leaving the issues of knowledge and falsity.

evidence; and the Court rejected the Defendants' argument.

Thereafter, the District Court bifurcated the case, severing the BIAP claims from ICE. The ICE claims were tried to a jury in February and March of 2006. The jury returned a detailed verdict for the Relators and against all Defendants for false claims (Count I) and false statements (Count II), enumerating dozens of acts of fraud.[7] The jury found that the Government had sustained a loss of $3 million, the maximum amount in the Court's jury instructions. Responding to detailed jury interrogatories, the jury stated that its verdict was the same *whether or not the CPA was a U.S. instrumentality*.

The Defendants then filed motions to overturn the jury's verdict as a matter of law, under Fed. R. Civ. P. 50. In an August 16, 2006 Opinion, the District Court granted the Defendants' motions with respect to Counts I and II. (JA 1527-49 [Aug. 16, 2006 Mem. Op.] ["*DRC II*"].)[8] Reversing its own decisions on Defendants' two summary judgment motions, and without discussing the trial evidence in any detail, the District Court ruled that there was no evidence that Defendants had presented (or caused to be presented) claims to any officers or employees of the United States or

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[7] The jury also returned a verdict on Count IV in Mr. Baldwin's favor, and the District Court entered judgment thereon.

[8] *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678 (E.D. Va. 2006).

members of the U.S. Armed Forces for payment or approval. (JA 1527-28.)

The Defendants then filed yet another motion for summary judgment on the BIAP matter, reiterating the arguments they had made (and the Court had rejected) at the close of discovery. In a February 2, 2007 Memorandum Order, the District Court reversed itself again, granting summary judgment in favor of the Defendants. (JA 1926 [Feb. 2, 2007 Mem. Op.] ["*DRC III*"].)[9]

On February 20, 2007, the District Court entered an Amended Judgment on all Counts. On March 2, 2007, the Relators filed their Notice of Appeal.

IV. STATEMENT OF THE FACTS

A. Summary Judgment on the "Source of Funds" Implicated by Defendants' Fraud.

As noted above, the Defendants moved to dismiss the Amended Complaint. They argued that the FCA was inapplicable, because their fraudulent claims supposedly were not paid with U.S. funds, and the CPA was not a U.S. instrumentality. The Court invited the United States to brief "whether the FCA applies to false claims made or presented to the CPA." The United States filed an extensive brief, detailing the sources of the U.S. Treasury funds that paid the false

[9] *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 472 F. Supp. 2d 787 (E.D. Va. 2007).

claims at issue (Vested, Seized, and DFI funds), and concluding that the FCA applies to all such claims presented to the CPA.

Thereafter, the District Court directed the United States to address whether the CPA was a U.S. instrumentality. The United States filed a supplemental brief, asserting that the CPA's status was unnecessary to render Defendants liable for fraud under the literal terms of the FCA, but nevertheless confirming that the CPA was, in fact, a U.S. instrumentality for FCA purposes. (JA 842.)

The summary judgment record clearly demonstrated that the CPA was a United States instrumentality:

(1) On April 16, 2003, the U.S. Army Central Command's General Tommy Franks "creat[ed] the Coalition Provisional Authority to exercise powers of government temporarily" (JA 794 & JA 415-16 [citing and quoting General Franks' "Freedom Message to Iraqi People"]);

(2) On May 13, 2003, U.S. Secretary of Defense Donald Rumsfeld appointed U.S. Ambassador L. Paul Bremer as the "head of the coalition provisional authority" (JA 795);[10]

(3) The United States and the "President w[ere] relying upon the CPA to ensure that U.S. goals in Iraq are achieved" (JA [Decl. L. Paul Bremer] 135); and

(4) On May 16, 2003, Mr. Bremer issued CPA Regulation Number One, in which he "promulgate[d]" that "[t]he CPA shall exercise powers of

[10] Previously, on May 9, 2003, President Bush had appointed Ambassador Bremer as Presidential Envoy to Iraq "reporting though," and "[s]ubject to the authority, direction and control of the Secretary of Defense." (JA 139.)

> government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration . . . ." (JA 795 & 626.)[11]

Consistent with these undisputed facts, all primary legal authorities refer to the CPA as a United States instrumentality. On November 6, 2003, President Bush signed the Emergency Supplemental Appropriations Act for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, 117 Stat. 1209, 1225 (2003). (JA 144 *et seq*.) This statute, and the Conference Report that accompanies it, explain that the Act funds the CPA "in its capacity as ***an entity of the United States Government***." *Id*. (JA 160. [emphasis added]); Conf. Rpt. 108-337, H.R. 3289 (Nov. 6, 2003), at 17.

Section 2208 further provided that:

> Any reference in this Chapter to the "Coalition Provisional Authority in Iraq" or the "Coalition Provisional Authority" shall be deemed to include ***any successor United States Government entity*** with the same or substantially the same authorities and responsibilities as the Coalition

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[11] On May 17, 2003, CPA Administrator Bremer asked the Federal Reserve Bank of New York to establish a DFI account. *(*JA 348.) After the creation of the CPA, in a May 22, 2003, Resolution, a U.N. Security Council Resolution alluded to the CPA when it "not[ed]" in the preamble a letter from the United States, the United Kingdom and Northern Ireland; and "recognized the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the 'Authority')." (JA 181.) Resolution 1483 further "notes the establishment of a Development Fund for Iraq," and "[n]otes further that the Development Fund of Iraq shall be disbursed at the direction of the" CPA. (JA 185.)

Provisional Authority in Iraq.

(JA 166. [emphasis added].)[12]

Congress later on several occasions characterized the CPA as a U.S. Government organization. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 1042(b)(2)(N), 118 Stat. 1811, 2050 (2004) (requiring the Secretary of Defense to report on "the coordination, communication, and unity of effort between the Armed Forces, the Coalition Provisional Authority, and other United States government agencies and organizations . . . ."); National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136 § 1203(b), 117 Stat. 1392, 1648 (2003) (requiring the Secretary of Defense to report on "[t]he relationship of Department of Defense entities, including . . . the office of the Coalition Provisional Authority").

As reflected in the United States briefs and argument, the record demonstrated unequivocally that: (a) by definition, Vested and Seized Funds were United States "money or property," and (b) the United States provided a portion of the DFI Funds,

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[12] In the same statute, Congress established and appropriated funds for a CPA Office of the Inspector General ("OIG"). P.L. No. 108-106, 117 Stat. 1209, 1234. (JA 169.) The purposes of the CPA OIG were to "provide for the independent and objective conduct and supervision of audits and investigations relating to the programs and operations of the [CPA]" and "prevent and detect fraud and abuse of such programs and operations." (*Id.*)

and also would have to reimburse such funds. Thus FCA § 3729(c) was satisfied, for all claims.

Presented with the foregoing, the District Court concluded as follows:

(1) the United States paid the Defendants' ICE Contract claims by U.S. Treasury check, U.S. Federal Reserve Bank wire transfers of U.S. currency, and "bricks" of U.S.-provided cash (JA 809-10, JA 837 n.81);[13]

(2) the source of the first ICE Contract payment ($3 million) was Seized Funds, and DFI Funds paid the remaining ICE Contract payments (JA 814);

(3) hundreds of million of dollars of U.S. Government funds (*i.e.*, Vested Funds) were provided to and included in the DFI Funds (JA 802-03);

(4) the United States controlled the so-called "Central Bank of Iraq" and the DFI Funds (JA 806); and

(5) the United States approved all disbursements of, and disbursed, the DFI funds (JA 809).

Disregarding the FCA's definition of "claim," FCA § 3729(c), however, the District Court ruled that the Defendants' FCA liability under the ICE Contract was limited to the first $3 million payment, not the DFI Funds. (JA 839.)[14]

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[13] In this connection, the District Court posited that the "form of payment or currency used to pay a request for payment is of no significance; it is the source and ownership of the funds that matters." (JA 837 n.81.)

[14] Since the BIAP Contract was funded by Vested and Seized funds, no such limitation applied to claims under the BIAP Contract. (*Id*.)

On the issue of "presentment," *i.e.*, the FCA's § 3729(a)(1) requirement that claims be "presented, or caused to be presented to an officer or employee of the United States Government or a member of the Armed Forces of the United States" for payment or approval, the District Court ruled that this requirement:

> ultimately presents no obstacle to FCA liability in this case because the undisputed facts in the record reflect that demands for payment from Seized and Vested Funds under both the BIAP and ICE contracts were presented to a member of the Armed Services before payment.

(JA 839-40). It should be noted that this ruling, on "undisputed facts," is *entirely inconsistent* with the Court's subsequent grant of judgment notwithstanding the jury verdict.[15]

B. Additional Pre-Trial Proceedings.

After the initial summary judgment ruling, the parties conducted and completed merits discovery. After merits discovery, the Defendants again filed motions for summary judgment. Those motions were denied. (JA 950-51.) Trial exhibit and witness lists were submitted.

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[15] It should also be noted that FCA § 3729(a)(2) (Count II), unlike FCA § 3729(a)(1) (Count I), states no presentment requirement. In ruling that Count II impliedly requires "presentment," the District Court followed *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 492 (D.C. Cir. 2004). (JA 840 n.84.) Other courts have held that Count II-type claims do not require presentment. *See United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610 (6th Cir. 2006). The Fourth Circuit has not yet addressed this issue. If there is no presentment requirement for Count II, then the J.N.O.V. was wrong for that reason alone.

On January 30, 2006, the District Court severed the ICE Contract claims from the BIAP claims, and set the ICE Contract claims for trial.

During a February 3, 2006, Pre-Trial Conference on the ICE claims, with the *DRC I* ruling that "undisputed facts" showed presentment (JA 839-40) in mind, Relators' counsel asked the Court whether it was necessary to adduce evidence at trial regarding: (1) the fact that the $3 million U.S. Treasury payment was drawn from Seized funds, and (2) presentment with respect to that payment:

> RC:[16] They [the claims] were submitted to, among other people, [U.S. Government employee and ICE Contracting Officer] Ms. Logsdon, and then passed on by Ms. Logsdon . . . .
>
> Court: And she has first-hand knowledge of that.
>
> RC: Yes. And she will be testifying. She passed them on to other people. I didn't want to trouble the jury with the information about to whom she passed them on. For instance —
>
> Court: Well —
>
> RC: People in Kuwait who were directly working for the Army.
>
> Court: Yes. Now it seems to me Mr. Douglas[17] that ought to be a matter of stipulation – or not?

(JA 959.)

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[16] "RC" refers to Relators' counsel.

[17] Mr. Douglas was co-counsel for the Custer Battles Defendants.

Despite the *DRC I* "undisputed facts" ruling on presentment, Defendants' counsel stubbornly refused any such stipulation. (JA 959-60.) Relators' counsel moved for partial summary judgment on this point, explaining:

> But what I wanted to try to clarify was that we would not have to call, lets say, witnesses from the 336 FINCOM [a U.S. Army unit that issued ICE Contract payments] in Kuwait to show what happened to the invoices after Ms. Logsdon received them and they were sent in for processing by the government. That was my concern. I don't want to have to put on all the evidence that the Court received from the government, which was entirely undisputed by the defendants when this issue was resolved. In effect, the government submitted what amounts to an administrative record on the issue of the submission of claims and presentment of claims to government officials. I don't want to trouble the jury with that.

(JA 964.).

The District Court then granted summary judgment on the issue that the $3 million U.S. Treasury check was paid from Seized Funds, and determined that the $3 million check itself was evidence of presentment. Specifically, the District Court ruled that the $3 million:

> did, indeed, come from Seized funds [but that] this doesn't absolve the plaintiff from showing other aspects of presentment, who got the claim, where did it go and so forth. . . . I am inviting you, Mr. Grayson, to present that [$3 million U.S. Treasury] check, and anything else that you can think.

(JA 997.)[18]

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[18] As explained below, the $3 million U.S. Treasury check (and substantial other evidence of presentment) later was admitted in evidence at trial. Yet the Defendants obdurately and nonsensically maintained that they somehow received

C. The ICE Trial.

The ICE claims went to trial. As the District Court later described it:

> Over the course of a twelve day trial the relators presented the testimony of 20 witnesses,[] and successfully moved for the admission of nearly 200 exhibits. Relators' theory of the case was that, in the summer of 2003, defendants Custer, Battles, Morris and others conceived of a plan to defraud the CPA whereby defendants would submit to the CPA invoices that falsely inflated Custer Battles's direct costs for work performed pursuant to a time and materials contract. In a time and materials contract the contractor, here Custer Battles, (i) is reimbursed for his direct costs, *i.e.*, labor and materials, and (ii) paid a fixed percentage of those direct costs, which is meant to cover the contractor's general and administrative expenses and provide a reasonable profit.

(JA 1528-29.)[19]

Specifically, "Relators presented a significant amount of evidence tending to prove that Custer Battles did indeed submit false and fraudulent invoices to the CPA for work performed under the ICE contract." (JA 1530.)

> [T]he evidence tended to prove, and the jury ultimately found, that the ICE contract was a time and materials contract that was meant to reimburse Custer Battles for its direct costs and paid it an additional 25% of its direct

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this $3 million U.S. Treasury check without ever presenting, or causing to be presented, any such request for payment or approval to any U.S. Government officer or employee, and the jury could not infer that they did.

[19] The Defendants submitted millions and millions of dollars in invoices from undisclosed affiliates that had no employees, had no bank accounts, had no assets, did no work, purchased nothing, and delivered nothing. (*E.g.*, JA 1435 [example of fabricated "subcontractor" invoice with forged signature] & JA 1355 [testimony confirming forgery of same].)

> costs; thus in total Custer Battles was entitled to receive 125% of its direct costs. [Trial]Ex. 13. According to relators, defendants hatched a scheme to create the appearance of higher direct costs by presenting falsely inflated invoices to the CPA from fictional subcontractors – purportedly providing services under the ICE contract. To prove this scheme, relators presented evidence that Custer Battles used these false invoices to (i) get reimbursed for costs it never actually incurred, and [also] thereby (ii) increase the base from which Custer Battles's 25% profit payment was calculated.

(JA 1529-30.)[20]

> The centerpiece of relators' case in chief was the testimony of relator Baldwin, Custer Battles's Iraq Country Manager throughout the relevant time period. Baldwin testified about his growing concerning over Custer Battles's billing practices on the ICE project. Specifically, Baldwin was concerned that the invoices, which were chiefly handled by Defendant Morris, and approved by Defendant Custer, were grossly overstated. Additionally, relators presented damaging documentary evidence that tended to support their allegations of fraud by defendant Custer Battles, including several invoices prepared by Custer Battles and presented to the CPA that contained suspiciously rounded figures. *See* [Trial] Ex[s]. 76, 77, 102. Even more damaging to Custer Battles, was a spreadsheet [JA 1449], left behind, allegedly by defendant Battles, at a meeting with CPA officials, which detailed both the "actual costs" of work done by Custer Battles and the much greater "invoiced" costs Custer Battles presented to the CPA. The disparity between "actual costs" and "invoiced costs" represented a profit to Custer Battles far in excess of the 25% figure called for by the contract. [Trial] Ex. 96A.

(JA 1530.)

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[20] As one example, the Defendants submitted a bill purportedly from a vendor called "Secure Global Distribution, Inc." and signed by "Tam Burch." (JA 1435.) Although the Government didn't know it at the time, Ms. Burch turned out to be Defendant Custer's personal assistant. At trial, she testified that the signature depicted as hers was a forgery. (JA 1355.)

The head of the ICE Program, General Hugh B. Tant, testified that the Defendants' work was:

> probably the worst I've ever seen in over 30 years of my time in the Army.

(JA 1051.) He added that, given the fact that Defendants Custer and Battles had attended the U.S. Army's Ranger school, their poor work was responsible for:

> breaking an old soldier's [*i.e.*, General Tant's] heart. . . . I felt these two men turned their backs on us, and it crushed me internally.

(JA 1060.)

Defendant Morris went so far as to invoke the 5th Amendment to avoid answering questions at trial:

> In addition to the testimony and documentary evidence they adduced, relators also benefitted from defendant Morris' refusal to answer certain questions put to him by relators' counsel. Specifically, the jury was instructed that it was permitted to draw an adverse inference from defendant Morris's refusal to answer, namely the inference that had Morris answered the questions, the answers would have been [un]favorable to defendants.

(*Id*.)

As for presentment, the District Court recognized that "***the trial record is replete with evidence that invoices and records were presented to CPA employees, including members of the United States Armed Forces detailed to the CPA.***" (JA 1538-39 [emphasis added].) This evidence of presentment included: ICE Contract provisions that conditioned the $3 million advance payment on submission of

documentation regarding expenditure of those funds for approval (JA 1990); the resulting claims for payment and approval, expressly addressed to employees of the United States (JA 1468, 1538 n.11); testimony of U.S. Government employees that they received these claims (JA 1095-96; JA 1203); testimony by such employees that they were in fact U.S. employees deployed to Iraq, and that their work on the ICE Contract was part of their U.S. Government employment (JA 1006-07, JA 1113-14 [Col. Kibby]); (JA 1071-74, 1095-96, 1110-11, 1121 [Logsdon]); (JA 1203, [Ottenbreit]); testimony on "how the invoices were processed," stating that the claims were forwarded to an active Captain in the U.S. Military in the Finance Office "responsible for disbursing payment" (JA 1204); evidence that the Finance Officer "Authorizing Official" was "Paul Hough," a Colonel in the U.S. Air Force (JA 1991); and the $3 million U.S. Treasury check signed by a U.S. Military Lieutenant Colonel and constituting payment of the claims (JA 1467).

Another presentment document admitted in evidence included the following November 19, 2003 e-mail from a Custer Battles employee to Defendant Battles:

> As for MX [ICE Contract], well what can I say...poorest run DOD [*i.e.*, U.S. Department of Defense] contract I've ever come upon .... most mom and pop stores would do a better job...I was involved in termination for default cases against Ks who did much better than CB has done . . . . and you don't keep invoicing as a secret and under the control of someone who isn't their [sic] all the time. . . . And I also don't want to/won't end up in some country club prison like Eglin for CB.... failure to disclose certain things

> can get you there....accidental or not its [a] close call on this one...talk more about that offline.....

(JA 1475-76.)

The District Court wrongly excluded even further evidence of presentment, including most of an internal Custer Battles report of "criminal fraud" under the ICE (a/k/a "MX" a/k/a "DoD") Contract. The Court excluded the following:

> Indicated in this report are enormous areas of discrepancies and irregularities that lend themselves to elements of criminal fraud. . . . [A] broader issue of criminal intent has become evident. . . . The documents are prima facie evidence of criminal activity and intent. . . . Further discussions and decisions concerning the MX Project should be coordinated through the corporate criminal defense attorney.

(JA 1508.) (*See* March 1, 2006 Tr. Trans. at 121).

The Court provided the jury with detailed interrogatories and a verdict sheet. (JA 1516 [Special Interr. and Verdict Form"].) On Counts I and II, the jury was required to decide whether the Defendants had presented false claims, first assuming that the CPA was a United States instrumentality, and alternatively assuming that the CPA was not a United States instrumentality. (JA 1516-17.) The jury answered "yes" with respect each and every Defendant, under both scenarios. (*Id*.)[21]

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[21] On September 30, 2004, the United States suspended all of the Defendants from "Government contracting and from directly or indirectly receiving the benefits of federal assistance programs." U.S. Dep't of the Air Force, MEM. IN SUPPORT OF THE SUSPENSIONS OF CUSTER BATTLES LLC ET AL. (Sept. 20, 2004) at 1. In its Suspension Memorandum, the United States found

D. Post-Verdict Motions for Judgment as a Matter of Law.

The Defendants filed motions under Fed. R. Civ. P. 50 for judgment as a matter of law. (JA 1532.) They argued (*inter alia*) that there was no evidence of presentment. (*Id.*)

Deciding the motions, the District Court recognized that:

> the trial record is replete with evidence that invoices and records were presented to CPA employees, including members of the United States Armed Forces detailed to the CPA. For example, Patricia Logsdon, the second contracting officer with responsibility for the ICE project, testified that she received copies of invoices from members of Custer Battles's ICE team also presented to the BearingPoint employees responsible for handling the CPA's payment of subcontractors [Feb. 16, 2006 Trial Test. of P. Logsdon at 145-46] and indeed, several invoices that the relators contend were fraudulent were addressed specifically to her [Trial Exs. 102, 113 & 123.] Similarly, Jeffrey Ottenbreit, an employee of BearingPoint who worked on the ICE project at the direction of CPA officials, testified that he received the allegedly fraudulent invoices from Ms. Logsdon or directly from Custer Battles and that it was his common practice to submit invoices to the CPA's Finance Office [staffed by U.S. Military personnel].

(JA 1538-39.) Nevertheless, said the District Court:

> *DRC I* explained that the presentment requirement could not be satisfied by presentment to a United States government employee or officer where the employee or officer is not working in his or her official U.S. capacity:

"adequate evidence" that the Defendants "conspired to defraud the CPA by circumventing profit restrictions of the ICE contract." *Id.* ¶ 16 at 2-3 (emphasis added). After the trial verdict, the United States formally debarred the Defendants from all Government contracting. *See* http://www.epls.gov/epls/search.do?vindex=1&page=1&text=Custer+Battles& status=current.

> "[I]t cannot be said that the presentment requirement is satisfied as long as a false claim is presented to a person who happens to be an employee of the United States government, without respect to whether that person is acting in his or her capacity as a U.S. government employee. To be sure, if a contractor submitted a false claim to a U.S. government employee for remodeling her kitchen, the presentment requirement would not be satisfied. *Thus, if the CPA was not a U.S. entity, then those U.S. employees detailed to the CPA were acting in their capacity as officers of the CPA, not as employees of the United States government*."

(JA 1536) (emphasis in original).

The FCA § 3729(a)(1) presentment requirement is satisfied not only by "present[ing]" claims, but also by "caus[ing]" such claims to be presented. In this context, the District Court acknowledged its ruling in *DRC I* "that any false claim presented to the CPA necessarily would 'cause' the Army to release funds to CPA contractors." (JA 1540.) Peculiarly, however, the Court noted that *DRC I* also had stated that this "does not foreclose the possibility that a different result might obtain as more facts are adduced at trial." (JA 1540 [citing *DRC I* at JA 842]). Although no "more facts" had been adduced (and the Court identified none), the District Court stated that the Relators did not "heed this advice." (JA 1541.)[22] The Court also

[22] In this connection, the Court quoted a colloquy between the District Court and Relators' counsel at the February 2, 2006 pre-trial conference on the need to show presentment (JA 1541 n.12 [citing Feb. 2, 2006 Tr. at 12 & 31]), but then omits reference to the Court's *subsequent* ruling that Seized Funds were the source for the $3 million U.S. Treasury check payment, and that this check was evidence of presentment.

omitted reference to the remainder of the supposed "unheeded advice," *i.e.*, that "unless new facts come to light, this case will proceed primarily on a single issue: whether the claims for payment presented by defendants to the CPA were 'knowingly false or fraudulent'." (JA 842.)

The District Court stated that whether or not the CPA was a United States entity was dispositive on the issue of presentment, and ruled that:

> although the CPA was principally controlled and funded by the U.S., this degree of control did not rise to the level of exclusive control required to qualify as an instrumentality of the U.S. government. *See Rainwater*, 356 U.S. at 592-94. In fact, the evidence clearly establishes that it was created through and governed by multinational consent.

(JA 1543.) This was directly contrary to the U.S. Government's own analysis of the CPA in its brief and oral argument, including the repeated references to the CPA as a U.S. instrumentality in statutory law.

Concluding that the CPA was not a U.S. instrumentality, the District Court found that the U.S. officers and employees who had received the fraudulent claims for payment and approval could not be treated as such under the FCA, because their U.S.-ordered deployment somehow negated their status as U.S. officers or employees. (JA 1543.) Therefore, the District Court granted the Rule 50 motions with respect to the jury's verdict on Counts I and II, on presentment alone. (JA 1527-28, 1538.)

To summarize, for this ruling to be sustained, all of the following would have to

be true:

- the CPA is not a U.S. instrumentality;

- Ms. Logsdon (and other U.S. Government employees to whom the Defendants submitted claims) was as a matter of law, in the Court's terms, "remodeling her kitchen" (JA 1536) rather than performing work as a U.S. Government employee while serving in Iraq;

- there was no evidence that Ms. Logsdon and others passed their claims on to U.S. Government employees who did not work with the CPA, even though the Court itself had found "undisputed facts in the record" that they did (JA 839-40); and

- the presentment requirement, which appears only in FCA § 3729(a)(1) (false claims), applies to false statements under FCA § 3729(a)(2).

Appellants submit that none of these is true.

E. The BIAP Contract Claims.

The District Court denied the Defendants' motion for summary judgment against the BIAP claims. Then, with no new evidence, arguments or law before it, the District Court granted summary judgment against these claims.

The Amended Complaint alleged fraudulent inducement and false billing under the BIAP Contract. The gist of the BIAP scheme was that by the time Custer Battles signed the "definitized" BIAP Contract on August 31, 2003, requiring 138 personnel, it already was on the job and short-staffing it, and had every intention that it would continue to do so. After Custer Battles signed the definitized contract, it lied to the

CPA by claiming full staffing. (JA 103-19.)[23]

These allegations were amply established in evidence. For example, on August 1, 2003, with Custer Battles already on the job but thirty days before executing the definitized BIAP Contract, Custer Battles' BIAP Contract Manager Duke Whittington explained that he needed approximately 100 additional employees to conform to BIAP Contract requirements. (JA 1690.) On August 2, 2003, Defendant Custer responded that: "I am VERY concerned that you are asking for an additional 100+ personnel to perform this effort. The bottom line is that you are not going to get them . . . ." (JA 1689.)[24]

The Defendants deliberately understaffed the BIAP Contract, in order to double-bill these employees under other paying work. Custer Battles Operations Manager Greg Walker, who serves as a police officer in Oregon, observed:

> 5. . . . Custer Battles reassigned BIAP Contract personnel to the Bearing Point, Inc. contract prior to and after my arrival. With respect to the ICE Contract, BIAP personnel were hurriedly reassigned to support

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[23] Contracting Officer Logsdon and Inspector General Richard Ballard both understood the BIAP Contract to require 138 personnel. (JA 1742; JA 1669.) The Defendants also understood the requirement for 138 staffers. (JA 1697-1701); (JA 1682 [Defendant Custer's October 13, 2003 letter to Ms. Logsdon and Mr. Trent, claiming to provide 138 personnel].)

[24] On August 5, 2003, still almost four weeks before Ms. Logsdon executed the BIAP Contract, Custer explained the deliberate BIAP understaffing – "***this saves us $200k over the next year***." (JA 1694 [emphasis added]).

short fuse demands regarding this new project. . . .

> 6. The understaffing of the BIAP Contract was not temporary or inadvertent. It was Custer Battles' routine and intentional corporate practice to utilize BIAP essentially as a manpower pool to staff its other paying projects. Mr. Custer and Mr. Battles were both aware and encouraging of this practice.

(JA 1685.)

Custer Battles Employee Relations Manager Luke Kingree confirmed that it "sometimes hired security contractors for the [BIAP] Contract, had them sign contracts (Form 1099s) stating that they would be working at BIAP, but then rarely, if ever, assigned them to work at BIAP. Instead, these contractors would often go straight to other Custer Battles' contracts . . . ." (JA 1687.)

The Defendants went to great lengths to deceive the Government regarding actual BIAP Contract staffing. For example, in their October 13, 2003, BIAP Contract update to Contracting Officer Logsdon, Ambassador Darryl Trent and others, the Defendants falsely stated that they had completed the "[f]eat of recruiting, mobilizing, equipping and training a 138-person force." (JA 1682.)[25]

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[25] On November 13, 2003, Custer Battles Manager Don Ritchie reported to Defendants Custer, Morris and others that Contracting Official Edward McVaney "keeps pushing me for the manpower chart and work schedules. I told him that Scott [Custer] was re-evaluating that." (JA 1696.) On November 18, 2003, Mr. Ritchie internally circulated revised manpower charts revealing (consistent with Defendant Custer's earlier orders) substantially less than 138 personnel assigned to the BIAP Contract. (JA 1697-1701.) He did not provide the charts to

The contracting authorities characterized the Defendants' performance under the BIAP Contract as, *inter alia*: "unresponsive"; "uncooperative"; "incompetent"; and "deceitful/manipulative," and characterized the Defendants themselves as "war profiteers." (JA 1702-03.) Custer Battles' BIAP work was so poor that contracting authorities initiated the default termination of Custer Battles' BIAP Contract.[26]

Facing a U.S. Department of Defense attempt to audit the BIAP Contract, which could have revealed the Defendants' staffing fraud, on October 22, 2003, Custer Battles' staff internally discussed the need to "populate" the "very weak" BIAP Contract personnel files retroactively, "because of a potential audit of the BIAP [C]ontract." (JA 1706-09.)[27]

McVaney.

[26] This poor performance was linked expressly to fraud in the inducement. As one senior contracting official, Mr. Frank Willis, stated: "I began to question why and how Custer Battles, LLC was awarded the BIAP Contract. . . . I believed the problems of Custer Battles, LLC's competence were sufficiently grave that the BIAP Contract should be terminated." (JA 1592.)

[27] In an October 28, 2003 e-mail, Defendant Custer instructed his staff to refuse to speak to the U.S. Military's Inspector General in Iraq, Colonel Richard F. Ballard. He also directed them to use Custer Battles armed guards physically to block Inspector General Ballard from entering the Custer Battles facility, and they did so. (JA 1709; JA 1674 [Ballard Decl.].) In a November 9, 2003 e-mail, Inspector General Ballard reported regarding the Custer Battles BIAP Contract that "[a] formal audit would ***likely conclude fraud*** . . . ." (JA 1730 [emphasis added]).

Yet on February 2, 2007, without addressing this evidence, the District Court granted summary judgment in favor of the Defendants, finding: (1) no evidence of any false statements; (2) that if false statements were made, they were not made with actual knowledge, reckless disregard or deliberate indifference; and (3) that if the Defendants knowingly made false statements, the false statements were not material. (JA 1926 [Feb. 2, 2007 Mem. Op.] ["*DRC III*"]).

V. SUMMARY OF THE ARGUMENTS

A. *Was there any evidence in the record (if needed) to support the jury's express, specific findings that the Defendants' false claims or records were "present[ed], or cause[d] to be present[ed], to an officer or employee of the United States Government or a member of the Armed Forces of the United States"?*

Yes. As the District Court recognized, "the trial record is replete with evidence that invoices and records were presented to CPA employees, including members of the United States Armed Forces detailed to the CPA." The invoices were forwarded for payment or approval to an active officer in the U.S. Military, who did not work with the CPA. The U.S. Treasury check that paid the $3 million, which was in evidence, necessarily demonstrates payment and approval by an officer or employee of the United States. Therefore, the trial record contained ample evidence of presentment. By ruling otherwise, particularly in the context of a Fed. R. Civ. P. 50

motion to overturn the jury's verdict, the District Court erred.

B. *Were false claims "present[ed], or cause[d] to be present[ed], to an officer or employee of the United States Government or a member of the Armed Forces of the United States" even if some of such officers, employees and members were detailed to the CPA in Iraq?*

Yes. There is no factual or legal basis whatsoever for the notion that an officer or employee of the United States should somehow be "deemed" not an officer or employee of the United States, simply because he or she is deployed overseas (in a war zone). This notion is flatly contrary to the plain language of the FCA. If (as here) the person in question is a U.S. officer or employee, the courts have no authority to judicially "deem" him or her otherwise. Moreover, though it is unnecessary to ascertain whether the CPA was an entity of the United States, the evidence and law also clearly demonstrates it was.

C. *Did the trial court improperly exclude evidence of "presentment" from the trial record?*

Yes. The District Court wrongly excluded from evidence Defendant admissions about their "DoD" contract billing as "criminal fraud" exhibiting "criminal intent."

D. *Did the trial court err in not enforcing partial summary judgment against the Defendants on the issue of whether Defendants' claims had been "present[ed], or cause[d] to be present[ed], to an officer or employee of the United States Government or a member of the Armed Forces of the United States"?*

Yes. The Court found "undisputed facts" in the record establishing presentment.

The District Court ruled that "unless new facts come to light, this case will proceed primarily on a single issue: whether the claims for payment presented by defendants to the CPA were 'knowingly false or fraudulent'." No new facts came to light. When the Defendants sought to reopen the issue, the District Court stated that the $3 million U.S. Treasury paid to the Defendants was evidence of presentment. The check was admitted in evidence at trial. Yet in *DRC II* the District Court entirely disregarded the "undisputed facts" and the U.S. Treasury check as evidence of presentment. The District Court repeatedly altered and otherwise failed to apply its own law of the case. It thereby prejudiced the Relators, both before and after trial. E. *Did the trial court err in positing a "source of funds" requirement different from that stated in the False Claims Act and, in any event, are false claims actionable if such claims are paid with funds from the DFI?*

A claim paid with U.S. Treasury funds (as all claims here were) is actionable under the FCA. The FCA does not require the United States and relators to investigate U.S. Treasury funds, to trace the chain of sources of those funds. No court has ever required this before; the case law is replete with decision that reject this; and such a rule would be unmanageable for the courts, the U.S. Treasury and litigants. Even if the Defendants' claims had been paid directly with DFI Funds rather than Treasury funds, the U.S. Government provided a portion of the DFI Funds, which satisfies FCA § 3729(c). The DFI included hundreds of millions of dollars U.S.

funds. Further, the fraudulent dissipation of those funds impacted the public fisc by necessitating "reimbursement," *i.e.*, correspondingly increasing the burden on U.S. taxpayers to achieve the United States's stated goal to reconstruct Iraq.

F. *Was there evidence preventing summary judgment for Defendants under the BIAP Contract?*

Yes. As recounted above, there is ample evidence that the Defendants had no intention to provide the required 138 security personnel, that they deliberately did not do so, that they lied and claimed that they did, that they double-billed BIAP staff under other contracts, and that BIAP Contract performance suffered as a result. The District Court's ruling simply disregarded substantial evidence of the wrongdoing.

VI. ARGUMENT

A. Standard of Review.

Different standards of review apply to issues in this appeal. Most significantly, the District Court overturned the jury's verdict under Fed. R. Civ. P. 50. This Court reviews *de novo* the granting of a Fed. R. Civ. P. 50 motion, *Chaudhry v. Gallerizzo,* 174 F.3d 394, 404-05 (4th Cir. 1999). It views the evidence in the light most favorable to the non-movants (here, the Appellants). *Malone v. Microdyne Corp.*, 26 F.3d 471, 472 n.1 (4th Cir. 1994). The Appellants here are "entitled to the benefit of all inferences which the evidence fairly supports, even though contrary inferences

might be drawn." *Jacobs v. College of William & Mary,* 517 F. Supp. 791, 794 (E.D. Va. 1980), *aff'd*, 661 F.2d 922 (4th Cir. 1981). A "[c]ourt should not attempt to substitute its judgment for the jury." *Id.* "The district court should 'accord the utmost respect to jury verdicts and tread gingerly in reviewing them'." *DRC, Inc. v. Custer Battles, LLC*, No. 06-1591 (4th Cir. May 16, 2007) (citing *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996)). "'Judgment as a matter of law is proper [only] when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment'." *Chaudry*, 174 F.3d at 405 (citing *City of Charlotte*, 93 F.3d at 1249).

This Court reviews *de novo* the District Court's legal rulings, such as its ruling that the FCA is inapplicable to fraudulent claims paid with U.S. Treasury funds from a DFI account. *United States v. Perkins*, 363 F.3d 317, 320 (4th Cir. 2004). To the extent that decisions below involved legal conclusions based upon factual determinations, this Court examines the District Court's factual findings for clear error, viewing the evidence in the light most favorable to the Appellants. *Id*.; *Roe v. Doe*, 28 F.3d 404, 407-08 (4th Cir. 1994).

This Court also reviews *de novo* the District Court's summary judgment ruling on the BIAP claims. *Laber v. Harvey*, 438 F.3d 404, 415 (4th Cir. 2006). Summary judgment is appropriate only if "the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The BIAP evidence must be construed in the light most favorable to the Appellants. *Anderson v. Liberty-Lobby, Inc.*, 477 U.S. 242, 255 (1986).

B. Discussion of the Issues.

1. Statutory Framework.

The relevant statutory provisions, *i.e.*, FCA § 3729(a)(1), (a)(2) & (c), are set forth above. As noted above, the "presentment" element appears in FCA § 3729(a)(1), but not in § 3729(a)(2).

To establish a *prima facie* case under FCA § 3729(a)(1), the evidence must show: (i) a "claim"; (ii) that is "knowingly . . . false or fraudulent"; and that is (iii) "present[ed], or cause[d] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States . . . for payment or approval." *Id*. "[T]here is no requirement that the government have suffered damages as a result of the fraud." *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 n.7 (4th Cir. 1999).

2. Issues.

A. *Was there any evidence in the record (if needed) to support the jury's*

express, specific findings that the Defendants' false claims or records were "present[ed], or cause[d] to be present[ed], to an officer or employee of the United States Government or a member of the Armed Forces of the United States"?

After hearing from over twenty witnesses, and reviewing several hundred exhibits admitted in evidence, the jury reached a verdict that each of the Defendants had committed dozens of acts of fraud, with presentment, in violation of FCA §§ 3729(a)(1) and 3729(a)(2). The jury specifically stated, in response to jury interrogatories, that its verdict was the same whether or not the CPA was an entity of the United States. The District Court overturned the verdict, ruling that there was no evidence of presentment. Therefore, the issue is whether, construing the evidence in the light most favorable to the Appellants (*Microdyne*), there is any evidence from which one might at least infer (*Jacobs*) that the Defendants' fraudulent claims were "present[ed], or cause[d] to be present[ed], to an officer or employee of the United States Government or a member of the Armed Forces of the United States." FCA § 3729(a)(1).

The District Court also ruled that a violation of FCA § 3729(a)(2) requires presentment. (JA 1537.) As noted above, there is a split of authority on whether FCA § 3729(a)(2) requires presentment, and the Fourth Circuit has not ruled on this issue. In recently holding that there is no such requirement, the Sixth Circuit

explained its refusal to follow the D.C. Circuit's *Totten* decision as follows:

> We disagree with the *Totten* court's interpretation of the FCA for several reasons. One, the plain language of subsections (a)(2) and (a)(3) simply does not require that a claim must be presented to the government to be actionable. Congress could have chosen to include the presentment language of subsection (a)(1) in other parts of the FCA and did not. The Supreme Court has consistently counseled against attributing the same meaning to different language in the same statute. *See Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 452 [] (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted); *Russello v. United States,* 464 U.S. 16, 23[ ] (1983) ("We refrain from concluding [ ] that the differing language in two subsections has the same meaning in each."). Moreover, reading presentment into subsection (a)(2) would give it almost the same meaning as subsection (a)(1), rendering the latter largely superfluous.

Sanders, 471 F.3d at 616. If this Court agrees with *Sanders*, then the FCA § 3729(a)(2) verdict here must be reinstated, for that reason alone.

As to FCA § 3729(a)(1), the District Court recognized, "the trial record is replete with evidence that invoices and records were presented to CPA employees, including members of the United States Armed Forces detailed to the CPA." (JA 1538.) This evidence of presentment included:

- the ICE Contract modification that conditioned the advance payment on Custer Battles submission of documentation of corresponding expenditures (JA 1990):
- the associated claims addressed to employees of the United States (JA 1468, 1538 n.11);

- testimony of the U.S. employees that they received the claims (JA 1095-96; JA 1203);

- testimony of those employees that they were U.S. employees deployed to Iraq, and that their work on the ICE Contract was part of their U.S. Government employment (JA 1006-07, JA 1113-14 [Col. Kibby]); (JA 1071-74, 1095-96, 1110-11, 1121 [Logsdon]); (JA 1203, [Ottenbriet]);

- testimony on "how the invoices were processed," stating that the claims were forwarded to an active Captain in the U.S. Military in the Finance Office "responsible for disbursing payment" (JA 1204), and evidence that the Finance Officer "Authorizing Official" was "Paul Hough," a Colonel in the U.S. Air Force (JA 1991); and

- the $3 million U.S. Treasury check, signed by a U.S. Military Lieutenant Colonel, constituting payment of the claims (JA 1467).

Hence, the trial record contained direct evidence that the Defendants presented or caused the presentment of their fraudulent claims to officers or employees of the United States for payment or approval. As discussed below, the case law makes it clear that the "detailing" of such staff is irrelevant under the FCA.

The District Court alternatively ruled that there was no evidence of presentment because the $3 million U.S. Treasury check was an "advance payment." (JA 1541.) Yet the ICE contract modification that granted the advance payment expressly conditioned the advance payment on submission of documentation of the expenditure of those funds, for approval. (JA 1990.) Hence the subsequent invoices and documentation necessarily were submitted not only for approval, but explicitly also

for the $3 million payment. (JA 1119 Lines 308 [Oct. 4, 2003 invoice was submitted for $3 million payment]); (JA 1154 [Custer Battles, LLC was required to submit invoices for the $3 million]). An FCA false claim can be a claim "for payment" or for "approval." FCA § 3729(c). These were both.

The fact that the Appellees received the payment before supposedly spending it on the ICE Contract requirements is of no legal significance under the FCA. For example, in *United States v. Intrados/Intern. Management Group*, 265 F. Supp. 2d 1, 9-10 (D.D.C. 2002), the defendant received provisional payments under a cost reimbursement provision. It then submitted a falsified "Incurred Cost Submission ["ICS"]," which was supposed to be based upon the actual costs it incurred, and which was to be reconciled against the provisional payment. In denying defendant's motion to dismiss, the court ruled that:

> The ICS may not be a demand for money but, according to the plaintiff, the ICS contains detailed claims for reimbursement to justify claims for the 1994 contract year. Thus, . . . defendants' ICS could be a false record or statement used to induce government payment and . . . such a statement would be proscribed by the FCA.

Id. (citations omitted).

Even in the more restrictive context of assessing criminal liability for a false claim under 18 U.S.C. § 287 (2000), the "advance" status of a payment is entirely irrelevant. *United States v. Duncan*, 816 F.2d 153, 155 (4th Cir. 1987), concerned a

criminal false claim under 18 U.S.C. § 287. The defendant sought a false $796 credit against a government advance payment issued to him. At trial, the jury found that Duncan had not paid $796 cash for the airfare, but instead utilized a United Airlines Mileage Plus Program free ticket certificate.

On appeal, Duncan took virtually the same position adopted by the District Court here, contending: "that the ticket voucher is not a 'claim' under Section 287 since the voucher was submitted to reduce his liability for advanced funds and not for payment of money or property owed to him by the government." *Id.* at 155. Rejecting this argument, the Fourth Circuit held that:

> [T]he ticket voucher submitted by appellant was a request for a credit against his accountability for advanced funds. If . . . the voucher was a request for reimbursement, it is clear that it would be a "claim." Criminal liability under Section 287 cannot turn on accounting methods. . . . Therefore, we hold that a voucher for reduction of liability for advanced funds is a "claim" under Section 287.

Id.[28]

This holding, *i.e.*, that liability does not turn on "accounting methods," is particularly apt in an FCA case. Over 60 years ago, the U.S. Supreme Court established in a seminal FCA case that the FCA "does not make the extent of [its] safeguard [of the public fisc] dependent on the bookkeeping devices used for their

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[28] The Court overturned the conviction on the basis of an improper jury instruction on a different issue. *Duncan*, 816 F.2d at 155.

distribution." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943).

In sum, under the FCA, *Intrados*, *Hess* and *Duncan*, as well as under the specific language of the ICE Contract and the substantial evidence of presentment, the District Court's overturning the jury's verdict was error.

B. Were false claims "present[ed], or cause[d] to be present[ed], to an officer or employee of the United States Government or a member of the Armed Forces of the United States" even if some of such officers, employees and members were detailed to the CPA in Iraq?

Because the ICE Contract claims were submitted to officers and employees of the United States for payment and approval, there was no reason for the Court to address the "issue" of whether the deployment of U.S. employees to the CPA somehow rendered them non-U.S. officers and employees. This is hardly a case where Contracting Officer Ms. Logsdon was merely "remodeling her kitchen," (JA 1536), as the District Court analogized it. This needless inquiry by the District Court led to the wrong conclusion.

As *DRC II* recognized, the evidence that Ms. Logsdon, Colonel Kibby (who signed the ICE Contract) and the others were U.S. employees was undisputed. Ms. Logsdon specifically testified that the U.S. Army deployed her to Iraq; that she remained a U.S. Army employee throughout her tenure in Iraq; and that her work on the ICE Contract was part of her work as an employee of the U.S. Army. (JA 1071-

74, 1095-96, 1110-11, 1121.) Her legal authority, the Contracting Officer's "warrant," was issued by the United States, not the CPA. (JA 200.) By contrast, there was no evidence that Ms. Logsdon or the others were employed or paid by any other entity, including the CPA; and no evidence that their work on the ICE Contract was part of such (non-existent) other employment, much less exclusively pursuant to such other (non-existent) employment. The fact that these U.S. officers and employees were "detailed" to Iraq does not change any of this evidence, as the Government also indicated in its briefs below.

Having needlessly deemed it necessary to ascertain whether the CPA was an entity of the United States because of Ms. Logsdon's purported association with it, the District Court then reached the wrong answer to that question. As set forth above, the U.S. Government created and administered the CPA. The head of the CPA was appointed by the U.S. Secretary of Defense, to whom he reported. Legislation enacted by Congress and signed by the President repeatedly characterized the CPA as an instrumentality of the United States. Congress established and appropriated funds for the CPA Inspector General. (JA 169.) The Armed Services Board of Contract Appeals also has recognized that the CPA was created and administered by the United States. *E.g.*, *Appeal of Waller*, A.S.B.C.A. No. 55010, 2006 WL 280635, 06-1 BCA ¶ 33187 (Jan. 31, 2006) (citing *DRC I*).

Inexplicably, the District Court concluded instead that "the evidence clearly establishes that the CPA was created through and governed by multinational consent." *DRC II* at 17. The evidence and primary legal authorities clearly established otherwise. Thus, the District Court erred here as well.

C. Whether the trial court improperly excluded evidence of "presentment" from the trial record?

As discussed above, the Defendants themselves understood the ICE (or "MX") Contract to be a "DoD" (*i.e.*, U.S. Department of Defense) contract. Yet the District Court refused to admit in evidence the bulk of Custer Battles's internal report admitting "criminal fraud" and "criminal intent" (JA 1508) under this "DoD" contract. This evidence clearly was admissible under Fed. R. Evid. 801(d)(2). The District Court thereby excluded evidence that was probative of presentment.

D. Did the trial court err in not enforcing partial summary judgment against the Defendants on the issue of whether Defendants' claims had been "present[ed], or cause[d] to be present[ed], to an officer or employee of the United States Government or a member of the Armed Forces of the United States"?

In *DRC I*, the District Court ruled that presentment "ultimately presents no obstacle to FCA liability in this case because the undisputed facts in the record reflect that demands for payment from Seized and Vested Funds under both the BIAP and ICE contracts were presented to a member of the Armed Services before payment."

(JA 839-40.) It further ordered that "unless new facts come to light, this case will proceed primarily on a single issue: whether the claims for payment presented by defendants to the CPA were 'knowingly false or fraudulent'." (JA 842.)

No new facts ever came to light. Under the law of the case, the case should have proceeded solely on the issue of whether the Defendants' claims were knowingly false. Trial exhibits and witness lists were prepared on that basis.

There never was any reason for the District Court to depart from its ruling in *DRC I* that presentment was established by the "undisputed facts in the record." Doing so prejudiced the Relators.

E. Did the trial court err in positing a "source of funds" requirement different from that stated in the False Claims Act and, in any event, are false claims actionable if such claims are paid with funds from the DFI?

The District Court erred in ruling that claims paid ultimately from DFI Funds are not actionable under the FCA. "As in all cases involving statutory construction, 'our starting point must be the language employed by Congress' . . . and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used'." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (internal citation omitted). Here, the FCA defines the term "claim" to "include[]" cases where the "United States Government provides [or reimburses] any portion of the money or

property which is requested or demanded." FCA § 3729(c). As *DRC I* concluded, the Defendants' claims under the ICE contract were paid by U.S. Treasury check; by Federal Reserve Bank of New York wire transfers; and by bricks of U.S. cash sent from the Federal Reserve Bank of New York to Iraq (where they were handed over to the Defendants). (JA 809-10, JA 837 n.81.) Each of these qualifies as "United States Government . . . money." FCA § 3729(c). The United States therefore "provide[d] any portion [and indeed it provided all] of the money or property requested or demanded." *Id*.

This should have ended the matter. Yet the District Court erroneously ruled that it was not the payment of the claims with U.S. money, but rather the "source" of this money that was "dispositive" of the issue of whether the United States "provide[d] any portion of the money or property." (JA 799.)[29]

Until now, the courts uniformly have rejected the proposition that the FCA requires litigants to investigate and ascertain the sources of any U.S. money that pays claims. As an general matter, the U.S. Supreme Court has held that the FCA applies to "all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White*, 390 U.S. 228, 232 (1968), citing

[29] Oddly, the District Court conceded that a requirement to "trace the chain of title" of funds "would necessarily involve rewriting the definition in § 3729(c)." (JA 838.) Yet this is exactly what the District Court proceeded to do.

CONG. GLOBE, 37th Cong., 3d Sess., 952-58 (1863); *Rainwater v. United States*, 356 U.S. 590, 592 (1958). It "reach[es] any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." *Hess*, 317 U.S. at 544-45. The FCA also "reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *Neifert-White*, 390 U.S. at 233. "[T]he Court has consistently refused to accept a rigid, restrictive reading [of the FCA], even at the time when the statute imposed criminal sanctions as well as civil." *Neifert-White*, 390 U.S. at 232.

More specifically, as noted above, the U.S. Supreme Court has refused to "make the extent of [the FCA's] safeguard [of the public fisc] dependent on the bookkeeping devices used for their distribution." *Hess*, 317 U.S. at 544. Hence the FCA does not impose, and the courts have never before imposed, a requirement to trace the source of the U.S. money. *Id*.

For example, in *United States ex rel. Campbell v. Lockheed Martin Corp.*, 282 F. Supp. 2d 1324 (M.D. Fla. 2003), Defendant Lockheed's claims under a Foreign Military Sales ("FMS") contract were to be paid by the U.S. Government with funds provided by Saudi Arabia, Greece and Bahrain. Lockheed sought summary judgment, contending that the FCA "is not implicated where the United States acts merely as a

fiduciary to disburse third-party property and its own funds are not at risk." *Lockheed*, 282 F. Supp. 2d at 1338-39.[30]

The court rejected this argument, because "United States Government . . . money" was being paid. Consistent with the Supreme Court's directives in the cases discussed above, the court reasoned that, "in construing the FCA it is important to keep in mind the history and purpose of the statute." *Lockheed*, 282 F. Supp. 2d at 1341. Applying the FCA against this background, the court rejected "Lockheed's reliance on the 'ultimate' source of the funds for payment [a]s merely an attempt to have this Court delve into irrelevant levels of accounting." *Id.*, citing *Hess*.

In *United States ex rel. Hayes v. CMC Electronics, Inc.*, 297 F. Supp. 2d 734 (D.N.J. 2003), the defendant sold radios to Saudi Arabia under the FMS program. As noted, under the FMS program, the President may sell defense items procured by the U.S. Government to a foreign country if it covers the entire cost of the item sold. *Hayes*, 297 F. Supp. 2d at 736. The defendant in *Hayes* submitted claims to an official of the United States, but the claims ultimately were paid by Saudi Arabia. Relying on this fact, the defendant argued that there existed no possibility that its claims could harm the United States financially.

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[30] By definition, FMS contracts "assure the United States Government against any loss on the contract." *Lockheed*, 282 F. Supp. 2d at 1341, citing 22 U.S.C. § 2762(a) (2000).

The Court rejected the defendant's argument, because:

> the fact that the Government used funds obtained from Saudi Arabia does not mean that the Government suffered no actual damages due to the Defendant's false claim.

Hayes, 297 F. Supp. 2d at 739. It outlined some of the myriad manners by which the defendant's fraud might harm the United States:

- "The fact that the Saudi Government provided the funds that the U.S. used to purchase the radios cannot obviate the fact that the U.S. Government overpaid for the radios by reason of the false invoices." *Hayes*, 297 F. Supp. 2d at 737-38.

- "[T]he U.S. government is likely to be required to reimburse the Saudi government for the loss sustained by the Saudi government." *Id*. at 738.

- "The Government suffered damage to the integrity of the contracting process." *Id*.[31]

- "It is possible that Saudi Arabia will have less money to spend on other defense needs, thereby forcing the U.S. to increase its expenditures by a like amount to obtain the same level of global security." *Id*.

- "Even if the false claim had thus far resulted in only the potential for loss to the U.S. Government, this would be sufficient for a cause of action under the

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[31] This is supported by Congress' concern, expressed in connection with its 1986 amendments to the FCA, about protecting the integrity of Government programs even in the absence of any direct harm to the federal fisc. *See* S. Rep. No. 99-345, at 3, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5268 ("The cost of fraud cannot always be measured in dollars and cents . . . . [F]raud erodes public confidence in the Government's ability to efficiently and effectively manage its programs. Even in cases where there is no dollar loss . . . the integrity of quality requirements in procurements is seriously undermined"). Certainly, this is true in the context of the reconstruction of Iraq.

FCA." *Id.*[32]

Disregarding this unbroken line of cases that the Relators and the Government had cited to the District Court, *DRC I* sought to distinguish the FMS cases on the ground that those cases involve two separate transactions: one with the United States, and a second between the United States and a "foreign nation." (JA 827-28.) Yet assuming *arguendo* that the CPA was a "foreign nation," the same type of transactions occurred here. The claims were paid with U.S. Treasury funds. Then there was debit against the DFI account in the Federal Reserve Bank of New York, and a recording on the books of the CPA's so-called "Central Bank of Iraq." If the CPA were a foreign nation (and it was not), then a foreign nation ostensibly would bear the ultimate payment burden (just as in the FMS cases). The applicability of the FCA is even clearer in this case, however, because unlike the Greek funds in *Lockheed* or the Saudi funds in *Hayes*, the so-called "Iraqi funds" spent here were: (1) controlled by the United States; (2) used to supplement the Unites States's funding of Iraq's reconstruction by appropriated, Vested and Seized funds; and (3)

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[32] Other courts have taken it for granted that the FCA applies to claims that ultimately are paid by foreign governments under the FMS program. *See United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1034 (6th Cir. 1994); *United States ex rel. Oliver v. Gyro House*, 11 Fed. Appx. 773 (9th Cir. 2001); *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 533 (9th Cir. 1997); *United States v. Napco Intern., Inc.*, 835 F. Supp. 493, 494 (D. Minn. 1993).

expended to "ensure that U.S. goals in Iraq are achieved." (JA [Decl. L. Paul Bremer] 135).

FCA decisions outside of the FMS context also reject the notion that the FCA is applicable only if the U.S. Government alone bears the loss. *United States ex rel. Bly-Magee v. California*, 236 F.3d 1014 (9th Cir. 2001), for instance, alleged false claims by the State of California, for Federal Rehabilitation Act funds. Under the Rehabilitation Act, "funds allotted to but not used by one state are given to another state." *Id*. at 1017. The District Court dismissed the action, because "the allegedly misappropriated funds would 'never revert to the federal treasury'" and the relator therefore "could not allege injury to the federal government and thus could not state a claim upon which relief could be granted." *Bly-Magee*, 235 F.3d at 1017. The Court of Appeals reversed, because:

> If Bly-Magee proved her claim of theft, the resulting damage initially would go to the federal government even if the federal government would then be obligated to reallocate these funds to another state.

Id. Similarly here, the recovery initially would go to the Federal Government, which paid the Defendants' fraudulent claims with its own U.S. money, even though the payments might (or might not) then be credited to the DFI.

The case law is replete with other examples of claims actionable under the FCA seeking U.S. Treasury funds for which the ultimate "source" is not the United States.

See, *e.g., U.S. ex rel. Rahman v. Oncology Associates*, *P.C.*, 198 F.3d 502, 512-13 (4th Cir. 1999) (Federal Supplementary Medical Insurance Trust Fund); *United States v. Raymond & Whitcomb Co.*, 53 F. Supp. 2d 436 (S.D.N.Y. 1999) (U.S. Postal Service).

In the face of all this case law, the District Court's reliance primarily on the 81-year-old case of *United States v. Cohn*, 270 U.S. 339 (1926), clearly illustrates its error. In *Cohn*, the "money or property" was not U.S. Government money or property, but rather duty-free cigars sent from the Philippines to a private party. Defendant Cohn lied in order to obtain the release of the cigars from U.S. Customs, and he was indicted for doing so. The Supreme Court held that one who lies in order to obtain non-dutiable commercial merchandise is not asserting a claim upon or against the U.S. Government. *Id*. at 345.

There are three key distinctions between *Cohn* and this case. First, the Defendants' claims here were paid by U.S. Treasury funds, not by a private importer's duty-free cigars. Second, the United States has an interest in U.S. Treasury funds, but not in a private importer's duty-free property. Third, here the United States controlled not only its U.S. Treasury funds, but also the DFI and the so-called

"Central Bank of Iraq."[33]

On the last point, courts addressing the FCA have held that "the diversion of resources from a private entity created to advance federal interests has effects similar to those of diversion of resources directly from the Treasury." *United States ex rel. Wood v. American Institute in Taiwan*, 286 F.3d 526, 532 (D.C. Cir. 2002), quoting *Galvan v. Federal Prison Industries*, 199 F.3d 461, 462 (D.C. Cir. 1999). Such fraud forces the United States to increase expenditures by a like amount to achieve the same goals, meaning that the U.S. Government "reimburses" part of the funds within the meaning of the FCA. *Wood*, 286 F.3d at 532; *Hayes,* 297 F. Supp. 2d at 738.

In *Wood*, the issue was whether fraud against the American Institute in Taiwan, a private entity created to advance Federal interests, might harm the United States financially. The Court said yes, because financial harm against the Institute:

> would have one of two consequences for the government: either the government would have to make up the loss (as Wood says it did with respect to the $5.3 million in allegedly embezzled funds), or it would have to adjust its relations with the "people on Taiwan," as the Act makes the Institute the sole entity through which the United States conducts such relations.

Wood, 386 F.3d at 532. Here, similarly, the United States's reconstruction of Iraq through its Armed Forces and the CPA has been undertaken to "advance federal

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[33] *Cohn* also was a criminal case proceeding under a statute with language very different from FCA Section 3729(c).

interests," and the dissipation of DFI funds intended to assist in such reconstruction "has effects similar to those of diversion of resources directly from the Treasury." *Wood*, 286 F.3d at 532.

Finally, under FCA Section 3729(c), claims "include" requests for payment or approval whenever the United States provides or reimburses "any portion" of the money or property. Vested Funds are U.S. Government money, and the United States transferred hundreds of millions of dollars of that U.S. Government money into the DFI account that it was administering and spending. Therefore, even if it were necessary to examine the sources of the funds for the ICE Contract payments, the undisputed answer to the statutory question of whether the United States provided "any portion" of the money is "yes." The District Court dismissed this additional dispositive fact by casually stating that "[o]nce the Vested Funds were transferred to the DFI, the United States relinquished control of these funds and they ceased to be United States government property." *DRC I* at 48. It cited no legal authority whatsoever for this sweeping conclusion (much less the implied corollary that the Government's providing a portion of the funds no longer is relevant under the FCA),

and there is none.[34] The District Court erred in preventing FCA recovery of payments from DFI Funds, and the case should be remanded to accomplish this.

F. Was there evidence preventing summary judgment for Defendants under the BIAP Contract?

As discussed in more detail in the "Facts" section above, the summary judgment record on the BIAP Contract fraud included substantial and largely undisputed evidence of fraud. This included internal Custer Battles documents both before and after the "definitized" contract was signed laying out the scheme; affidavits from Custer Battles employees who witnessed or participated in the fraud; damning statements from the BIAP Contracting Officer and Inspector General; and contemporaneous documentation of the short staffing and double-billing. The BIAP officials characterized the Defendants as "war profiteers." (*Id*.) Despite this evidence, and *without even addressing it* in its opinion, the District Court ruled that there was no evidence of false statements; no evidence of "knowledge" (actual knowledge, reckless disregard or deliberate indifference); and no evidence that any false statements were material. (JA 1926.)[35] The District Court erred.

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[34] To the contrary, the District Court's own opinion in *DRC I* explained that the United States controlled the DFI.

[35] The District Court *completely ignored* this competent evidence, and instead focused on disputed testimony by two persons (Hatfield and Gould) who admit they were *not even in Iraq* during most of the period of performance of the

The Relators asserted two BIAP Contract theories under Count I (false claims): fraudulent inducement of the BIAP Contract award, and the submission of false claims under the BIAP Contract. The fraudulent inducement variety of FCA § 3729(a)(1) violation occurs when a defendant lies in order to obtain a government contract. *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d at 778; *see also United States ex rel. Wilkins v. North Am. Const. Corp.*, 173 F. Supp. 2d 601, 637 (S.D. Tex. 2001) (reviewing fraudulent inducement cases in which "the false statements were material because a reasonable agency would have acted differently in the absence of the fraud"). The Defendants' representation in the definitized BIAP Contract that they intended to provide the 138 security personnel fraudulently induce the award. *E.g.*, *United States ex rel. Mail v. Oakland City University*, 426 F.3d 914, 2005 WL 2665600 (No. 5-2016), *2 (7th Cir. 2005) (university would be liable under the FCA if it knew about an agency rule barring the university from paying recruiters, but told the agency that it would comply nonetheless); *United States ex rel. Willard v. Human Health Plan of Texas, Inc.*, 336 F.3d 375, 386 (5th Cir. 2003) (an intent not to perform coupled with prompt, substantial nonperformance may demonstrate fraud in the inducement). In addition,

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BIAP Contract, and therefore are incompetent under Fed. R. Evid. 602 to testify about such performance. (JA 1937.)

the BIAP claims themselves were false because they constituted representations that the 138 security personnel were being provided.

The evidence enumerated above is ample (indeed unrebutted) evidence of falsity. As for knowledge,[36] Defendants' Operation Manager at the time (among others), stated that the "understaffing of the BIAP Contract was not temporary or inadvertent. It was Custer Battles' routine and intentional corporate practice to utilize BIAP essentially as a manpower pool to staff its other paying projects. Mr. Custer and Mr. Battles were both aware and encouraging of this practice." (JA 1685.) This constitutes evidence of actual knowledge, reckless disregard or deliberate indifference.[37] The District Court's ruling that there was no such evidence was erroneous.

Finally, there was ample evidence that the false statements were material. Materiality depends on "whether the false statement has a natural tendency to agency

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[36] The FCA defines the term "knowingly" broadly, as "actual knowledge," "deliberate ignorance" or "reckless disregard." FCA § 3729(b). "[N]o proof of specific intent to defraud is required." *Id*.

[37] The Defendants' efforts to prevent – and indeed physically to bar – Inspector General Colonel Ballard from auditing the Defendants' BIAP Contract files is consistent with the facts that demonstrate the Defendants' "knowledge." Significantly, the if the Defendants really believed that they lacked knowledge of the falsity, they very easily could have filed declarations to that effect. Their failure to do so is revealing.

action or is capable of influencing agency action." *Harrison*, 176 F.3d at 785. Here, *the Contracting Officer who awarded the August 31, 2003 BIAP Contract* swore under oath that the BIAP Contract required 138 persons, and she expected them to be provided (as did the Inspector General). The Contracting Officer, who is the person most competent to testify on materiality because she awarded the BIAP definitized contract,[38] therefore found the staffing to be material. The very notion that the number of personnel to be provided under a personnel contract is "immaterial" is nonsensical. If anyone should have received summary judgment, it was the Relators.[39] Yet the District Court found no evidence of materiality. It therefore erred.[40]

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[38] Unlike Hatfield or Gould, neither of whom had legal authority to award any contract. (*Cf*. JA 200-05.)

[39] The allegedly contrary statement by Hatfield might create, at worst, a disputed issue of fact, but as noted above Hatfield was not the Contracting Officer possessing legal authority to award the definitized BIAP Contract, and Hatfield was not even in Iraq for most of the period of BIAP Contract performance.

[40] *DRC III* ruled that the evidence was not encompassed by the allegations in the Amended Complaint. This was incorrect. The Amended Complaint alleged an initial contract starting in June of 2003 (JA 103-04), the price of the definitized version in August 2003 (JA 104); and the performance of the contract throughout "July through September of 2003 (and additional months thereafter)." (JA 105.) The Amended Complaint therefore alleges a contract extending from June through September of 2003 and thereafter. The fraudulent inducement occurred on August 31, 2003, when Defendant Custer executed the "definitized" version of the BIAP contract, as well as in the subsequent invoices.

VII. CONCLUSION

Appellants respectfully ask the Court:

1. To reverse the District Court's decisions in *DRC I* and *DRC II*; to reinstate the jury's verdict; to direct the District Court to enter an Order specifying actual damages in the full amount of all payments under the ICE contract; and to enter an FCA Amended Judgment for three times such actual damages, plus statutory penalties, and reasonable attorneys' fees and costs.

2. To reverse and vacate *DRC III*, and remand the BIAP matter for summary judgment in favor of the Relators, or for trial.

3. To assess the costs of this appeal against all the Defendants, jointly and severally.

VIII. REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument on all of the issues presented in this appeal.

Respectfully submitted,

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