IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA EX REL MURRAY P. FARMER, et.al.,	*
PLAINTIFFS,	*
VS.	* **CASE NO. 1:17 CV00470-KD-N**
THE REPUBLIC OF HONDURAS,et.al.,	*
DEFENDANTS.	*

SUPPLEMENTAL BRIEF

Comes now the Relators/Whistleblowers and files their supplemental brief before this Honorable Court as required by order issued January 16, 2020.

Respectfully submitted,

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EXHIBIT LIST

19. FARMER AFFIDAVIT 2

20. USAID LETTER OF COMMITMENT

21. USAID LETTER, NOT PART OF CONTRACT

22. SERPEC EMAIL

23. USAID LETTER TO CORDICA RE: PAYMENT

24. INTERVIEW OF CESAR BRAN

25. FHIS CERTIFIED PAYMENT TO USAID (PAY DRC)

26. OMITTED INTENTIONALLY

27. IBI PAYMENT & OBJECTIVES

28. FARMER EMAIL TO USAID INSPECTOR GENERAL

29. USAID ISSUED CERTIFICATE OF APPRECIATION TO DRC

30. USAID INVITATION TO BID, AMERICAN CONTRACTORS

31. JOHN MCAVOY AFFIDAVIT

32. SPECIAL OBJECTIVE GRANT AGREEMENT

33. HONDURAS DELEGATION OF AUTHORITY TO FHIS

34. IMPLEMENTATION LETTER FHIS REPRESENTS HONDURAS

35. LEGAL OPINON OF HONDURAN ATTORNEY GENERAL

FALSE CLAIMS ACT IS THE PROPER STATUTORY REMEDY

On January 16, 2020, this Court raised the issue if the False Claim Act is the appropriate statutory ground for liability of the Defendants. The False Claims Act imposes liability upon anyone that "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A), (B). The term knowingly is defined in 31 USC 3729 (b)(1)(A) (i)(ii)(iii) A "claim" is defined to include direct requests for government payment as well as reimbursement requests made to the recipients of federal funds under a federal benefits program. 31 U.S.C. § 3729(b)(2)(A); A claim under the False Claims Act requires a showing of the following elements:

(1) a false statement or fraudulent course of conduct;

(2) made with the scienter;

(3) that was material, causing;

(4) the government to pay out money or forfeit moneys due." *U.S. ex rel. Hendow v. University of Phoenix, 461 F.3d 1166 (9th Cir. 2006) Hendow, 461 F.3d at 1174.*

It is not enough to allege regulatory violations, United States ex rel. Hopper v. Anton , 91 F.3d 1261, 1266 (9th Cir. 1996) ; rather, the false claim or statement

must be the "*sine qua non* of receipt of state funding," Ebe i d ex rel. United States v. Lungwitz , 616 F.3d 993, 998 (9th Cir. 2010). We construe the Act broadly, as it is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." Hendow , 461 F.3d at 1170 (quoting United States v. Neifert-White Co. , 390 U.S. 228, 232, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968)). Such broad construction has thus given rise to a number of doctrines "that attach potential False Claims Act liability to claims for payment that are not explicitly and/or independently false." *Hendow , 461 F.3d at 1171*.

Materiality under the false Claim Act has been a topic of increasing scrutiny since the Supreme Court's decision in Universal Health Servs., Inc. v. United States (Escobar) , ––U.S. ––––, 136 S.Ct. 1989, 195 L.Ed.2d 348 (2016). There, Justice Thomas, writing for a unanimous court, explained that "[t]he materiality standard is demanding" and "cannot be found where noncompliance is minor or insubstantial." In evaluating whether a misstatement is material, "the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive." Most importantly for this case:

[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated,

and has signaled no change in position, that is strong evidence that the requirements are not material.

The approach to materiality, as adopted in *U.S. ex rel. Longhi v. U.S., 575 F.3d 458 (5th Cir. 2009)* is that "the FCA requires proof only that the defendant's false statements 'could have' influenced the government's pay decision or had the 'potential' to influence the government's decision, not that the false statements actually did so," the so-called "natural tendency test." The Supreme Court approved this standard in Escobar, writing that "the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt actual behavior of the recipient of the alleged of money or property," and "look[s] to the effect on the likely or misrepresentation."

In *United States ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890 (9th Cir. 2017)*, the Ninth Circuit stated, "there are and must be boundaries to government tolerance of a supplier's failure to abide by its rules". The Ninth Circuit reversed dismissal under Rule 12(b)(6) for failure to state a claim, holding that questions of materiality remained even where the FDA had continued to pay for the drug.

There, the relator alleged that Gilead utilized an unapproved vendor in China for a critical component of its HIV drugs for at least two years before the FDA approved the vendor. On appeal, Gilead argued that the Government's continued payment for the drugs after revelation of the alleged FDA violations demonstrated

that "those violations were not material to its payment decision." The court rejected that argument at the pleading stage, finding that: (1) questions remained as to whether the approval by the FDA was itself procured by fraud; (2) there existed other potential reasons for continued approval that prevent judgment for the defendant on 12(b)(6); and (3) the continued payment came after the alleged noncompliance had terminated and "the government's decision to keep paying for compliant drugs does not have the same significance as if the government continued to pay despite noncompliance." The court also noted that as the parties dispute exactly what and when the government knew, calling into question its actual knowledge, the relator had "sufficiently plead[ed] materiality at this stage of the case."

Relators insist that Gilead's claims seeking payment for noncompliant drugs are a basis for liability under the False Claims Act for three reasons. First, Gilead charged the government for approved drugs, knowing that it had delivered unapproved "knock-offs" (factually false certification). Second, by selling its drugs to the government and causing others to seek reimbursement for them, Gilead implicitly certified that the drugs were approved for distribution when it knew otherwise (implied false certification). Third, Gilead lied to the FDA to secure approval of Chinese facilities, making them eligible for government payments (promissory fraud). The district court below rejected all three of relators' theories for recovery under the False Claims Act. First, the district court rejected relators'

formulation of a factually false theory based on the provision of nonconforming goods. As to relators' second and third arguments, the district court recognized claims brought under either an implied false certification or promissory fraud theory could be viable, but concluded that relators failed to state a claim under either one because they failed to allege Gilead made a false statement related to a material precondition for payment. The United States, while not taking a position on the merits of relators' claims, identifies in its amicus briefing two rulings by the district court as particularly significant to the government. First, it argues that the district court's dismissal of relators' nonconforming goods theory improperly limits liability under the False Claims Act. Second, it argues that the district court improperly rejected a promissory fraud theory where the fraud was initially directed at a non-payor agency. We address each of the relevant theories for recovery under the False Claims Act and conclude that relators state a plausible claim.

The cases cited above establish that the *False Claims Act 31 U.S.C. § 3729* is the proper vehicle for Relators to pursue a false claim in the name of the Government. The evaluation of the four elements required for a false claim in this case are as follows;

1. THE FALSE STATEMENT

This element is satisfied because the Honduran Government in multiple documents represented that FHIS was part of the Honduran government, Special Objective Grant Agreement, (Exhibit 4), Honduras represented to the United States that FHIS was a unit of the Government of Honduras, (Exhibit 32), Honduras would indemnify all contractors, (Exhibit 32), FHIS could sign on behalf of Honduras, (Exhibit 33), FHIS represented the ability and authority that could sign on behalf of Honduras, (Exhibit 33), Honduras Represented that FHIS was a Ministry of the Government of Honduras, (Exhibit 34), FHIS represented that it was a Ministry of the Honduran Government , (Exhibit 34) The Honduran Attorney General's Office represented that the Grant Agreement with USAID was binding upon Honduras (Exhibit 35), Honduras made false representations that FHIS was a part of the Honduran Government when it was clear that this relationship did not exist.

2. SCIENTER

This element is satisfied because the Honduran Government acknowledges fraudulent intent based upon the declarations of Juan Jose Urquizo and Juan Rendo Cano filed in the matter of *DRC, Inc. v. Republic of Honduras*, (Exhibit 12 & Exhibit 14) on or about May 14, 2014. The declarations clearly establish that the Honduran government acted with actual knowledge, deliberate ignorance or in reckless

disregard of the truth that FHIS was not a part of the Honduran Government. Cano declaration see paragraphs 10- 15 and Urquizo declaration see paragraphs 8-13.

3. MATERIALITY

The Supreme Court in Escobar established a standard or test called the natural tendency test. This test examined the natural tendency of a false statement that could have influenced the government decision to pay or had the potential to influence the government's decision. The testimony of former Foreign Service officer John McAvoy, a twenty plus year veteran employee for USAID clearly demonstrates and establishes the false statement of Honduras. McAvoy testified on January 16, 2020, that if the fact that FHIS was not a part of the Honduran government had been disclosed at the time of the signing of any agreement, the agreement would never have been allowed to go forward. See McAvoy affidavit, (Exhibit 31), "…Only foreign Governmental institutions are eligible for Government to Government grant agreements as has been obligated by USAID with FHIS. In the time frame of 1998-2000 FHIS was never determined, nor did FHIS certify, to be a quasi-independent public agency. The Honduran Defendants certified that FHIS was a part of the Honduran Government, could bind the Honduran Government and represented the Government of Honduras. The Honduran defendants represented in all meetings and in all USAID eligibility documents that FHIS was the Government of Hondurans and could bind and represent the Government of Honduras. The type and make up

of a recipient is a material fact used by USAID to determine if the recipient is eligible for grant awards under USAID rules and regulations. These rules are known as the Automated Directive System (ADS). ADS. Section 350.1 of the ADS states: This chapter establishes standard provisions and other requirements for grants to foreign governments. This chapter does not apply to public international organizations or P.L. 480 agreements. ADS Section 350.3.1 states "A bilateral grant is a grant by USAID to a foreign government or a subdivision of it." 7.FHIS certified that it was a ministry of the government and a part of the government of Honduras. FHIS never made a certification that it was a quasi-independent public agency. If FHIS had ever indicated that it was a quasi-independent public agency or not a part of or subdivision of the Honduran government, it would have been ineligible for funding as a government to government grant. The Strategic Objective Grant Agreement (SOAG) was voted on by the Congress of Honduras indicating a further assurance that FHIS was a government ministry not an independent agency. MCAVOY AFFIDAVIT Exhibit 31.

4. GOVERNMENT TO PAY

Once again, if the fraudulent nature of the relationship between FHIS and Honduras was disclosed no payment would have been made by the U.S. Government. The false representation that FHIS was a part of the Honduran government totally influenced or had the "potential to influence" the decision to pay.

The relators, Murray Farmer, John McAvoy and Marco Zavala have presented a violation of 31 U.S.C. § 3729 action alleging false claims. Specifically, the theories of promissory fraud, factually false certification and implied false certification are premised on and support the simple and fraudulent misrepresentation that FHIS was part of the Honduran government.

GOVERNMENT ALLEGES RELATORS CLAIMS HAVE NO MERIT, GOVERNMENT HAS INCURRED NO DAMAGES

The Government argues that the Relators case has no merit because DRC, Inc. was damaged and not the United States. The Government claims USAID was unharmed citing *United States ex rel. Harman v. Trinity Indus. Inc., 872 F.3d 645 (5th Cir. 2017)* "Trinity". In Trinity the United States contracted directly with a contractor to produce guardrails which were installed in the United States.

The present case involves the factors where the United States issued hundreds of millions of dollars of Government to Government (G2G) grant money to an alleged Foreign Government in a foreign land where the United States received no tangible benefit. The Government intends to confuse this court misrepresenting how damages have been assessed by the courts when the Government receives no tangible benefit. The Eleventh Circuit has ruled that damages are all payments issued when the Government receives no tangible benefit.

In *United States v. Anghaie (11th Cir. 2015)* the contracts at issue were awarded through the Small Business Innovation Research (SBIR) and Small

Business Technology Transfer (STRR) programs. The statute establishing these programs provides that "[i]t is the policy of the Congress that assistance be given to small-business concerns to enable them to undertake and to obtain the benefits of research and development in order to maintain and strengthen the competitive free enterprise system and the national economy." *15 U.S.C. § 638(a)*. The government does not own the research it subsidizes through these programs or share in the profits from commercial applications. Instead, Congress expected beneficiaries to expand their research through privately funded sources after performing research for the government. 15 U.S.C. § 638(e).

This Court has never identified the precise benefit to government agencies of the SBIR and STTR programs. The district court therefore looked to two out-of- circuit decisions. The first also involved charges that a company lied when applying for an SBIR grant. *See United States ex rel. Longhi v. United States, 575 F.3d 458, 461-62 (5th Cir. 2009)*. The Fifth Circuit explained that the purpose of a research grant is to "award money to eligible deserving small businesses." Id. at 473. Because the company's fraud deprived the government of this benefit and the government received no tangible benefit from these contracts, that court affirmed damages based on the full amount of the contracts. See id.

The district court also looked to *United States v. Sci. Applications Int'l Corp.*, *626 F.3d 1257 (D.C. Cir. 2010)*, which involved allegations that a company

made false statements to the Nuclear Regulatory Commission. Id. at 1263. The district court had awarded the government damages in the full amount of the payments made to the company. Id. at 1264. The D.C. Circuit held that "the government will sometimes be able to recover the full value of payments made to the defendant, but only where the government proves that it received no value from the product delivered." Id. at 1279. Remanding on the damages calculation, it noted that "where the defendant fraudulently sought payments for participating in programs designed to benefit third-parties rather than the government itself, the government can easily establish that it received nothing of value from the defendant and that all payments made are therefore recoverable as damages." Id.

The district court did not abuse its discretion by calculating damages based on the entire amount the government paid to the Anghaies. The evidence shows that the government would not have paid the Anghaies at all but for their fraud. Therefore, the difference between what the government paid and what it would have paid in open, fair, and competitive bidding was the full amount of the contract payments. Although this loss amount must be offset by any benefit conferred to government, the district court did not err in finding that the government received no benefit. The purpose of SBIR and STTR funding is to "assist small-business concerns to obtain the benefits of research and development performed under Government contracts or at Government expense." 15 U.S.C. § 638(a), (b)(2). The Anghaies lied about why

they deserved this funding. Their fraud deprived the government of the benefit of funding deserving and eligible research. The government is entitled to damages for this harm. U*nited States v. Anghaie, No. 15-10454, at *9-11 (11th Cir.2015)*

As in the case above the Honduras Defendants lied about FHIS' eligibility in order to obtain funds destined for (G2G) Grants and deprived the United States of the benefit of funding eligible Honduran agencies which would properly guarantee, manage, and pay for the works. The United States has a duty to deliver honest services to its Citizens and the defendants deprived U.S. Citizens of that and more.

The United States did not enter into a contract with FHIS as represented by the Government (U.S. MTD docket 55-1 p14) motion to dismiss , the United States entered into a (G2G) Grant Agreement with Honduras and received nothing of value therefore according to the Eleventh Circuit damages are all payments made to FHIS. In the motion to dismiss on (U.S. MTD docket 55-1 p14) the Government states:

> "in the Government's view, therefore, FHIS has made no misrepresentations the United States regarding its ability to contract with USAID. The element of falsity, integral to any cause of action under the FCA, is simply and fatally lacking. Also, USAID's intention to continue its relation with FHIS with actual knowledge of the facts alleged in the qui tam likely weighs heavily against Relators ability to satisfy the materiality element of FCA liability. *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645 (5th Cir. 2017) agency's "unwavering position" that defendant was eligible to receive federal funds was fatal to the materiality element of the relator's case."

The above is evidence of ***"FRAUD and LIES"*** in that it is surreal that the Government investigation would represent that USAID is continuing its relationship

with FHIS while FHIS was officially dissolved into a new Honduran Agency IDECOAS by Honduran Congressional decree dated February 22, 2014 (Exhibit 19 Farmer Affidavit 2 Attachment 1), Discovery may prove that Honduras acted in anticipation of a negative ruling by Judge Friedman, it's very coincidental that FHIS was dissolved just months before Judge Friedman's ruling.

USAID is falsely representing to this court that it continues to fund FHIS, which is an impossibility considering FHIS ceased to exist as of February 22, 2014 when the Honduran Congress created IDECOAS. All FHIS assets and employees were officially transferred to IDECOAS (Exhibit 19, Farmer Affidavit 2) Attachment 1) and now FHIS is a dwindling department inside IDECOAS. It is important to mention that the Honduran Congress did not endow IDECOAS with separate legal personality, which was at the center of Judge Friedman's ruling (Exhibit 19 Farmer Affidavit 2).

Shortly after the present case was unsealed on September 15, 2019 the Honduran Congress voted to amend IDECOAS from Agency to a formal Honduran Secretary of State agency, the timing is suspicious as it appears this decision was made to avoid liability under the present false claims act case (Exhibit 19, Farmer Affidavit). It is impossible for USAID to state that there are no damages to the United States because it has made the decision to continue using FHIS, while the

Friedman FHIS no longer exists anymore so, therefore, USAID's decision to continue its relationship with IDECOAS/FHIS is moot as to the materiality argument and begs the question as to USAID's motives and decisions as to whether they are genuine.

It appears the Government performed a poor investigation. When the Government was questioned on the $100,000.00 payment to FHIS for attorney fees regarding if the payment was actually made, the Government was unable to respond. The record demonstrates that USAID cannot be trusted to represent the truth.

Even when applying Trinity the Relators have met the burden for USAID's decisions "as genuine" to be doubted. Reasons to question USAID's decisions as genuine are further discussed under the USAID Arbitrary and Capricious Actions "***Cover-up"*** section of this supplemental brief, which follows.

USAID ARBITRARY AND CAPRICIOUS ACTIONS

Government's motion to dismiss was filed after the amended complaint was filed by the Relators. Below is a historical timeline of facts USAID wherein DRC, Inc. was deprived of valid payment. These series of events are only listed here to demonstrate USAID's animus towards the Relators. **Timeline to follow**:

April 14, 2000 USAID issued an Invitation to American Companies in Business Commerce Daily inviting U.S. companies to:

> "The **Government of Honduras** acting through The Honduran Social Investment Fund (FHIS) with financial assistance from the United States Agency for International Development Mission in Honduras, invites expressions of interest to participate in the first bidding process for the reconstruction and expansion of 22 water, sewerage and drainage sub-projects in 13 Honduran Municipalities… **the Honduran Government** is….Financing for this project originates from the United States Agency for International Development (USAID**) and the Government of Honduras (GOH).** All contracting processes under this Program will conform to the **GOH/USAID** Host Country Contracting Procedures…" (Exhibit 30)

Nowhere does it state that FHIS is a "quasi-independent public agency" as argued (U.S. Motion To dismiss docket 55-1 p14)

December 5, 2000, USAID issued its payment Guarantee directly to DRC, Inc stating

> "Guarantee: At the request of the ***Government of the Republic of Honduras, acting through the Honduran Social Investment Fund (FHIS),*** the Administrator of the United States Agency for International Development (Hereinafter "USAID), acting for the United States of America under the Foreign Assistance Act of 1961, hereby guarantees payment…" (Exhibit 20)

Nowhere does the payment guarantee state that FHIS is a "quasi-independent public agency" as argued (U.S. Motion To Dismiss docket 55-1 p14)

March 2, 2001 USAID Mission Director sent DRC a letter stating:

> "As Acting Mission Director, I am writing in response to your letter dated February 5, 2001, in which you highlight concerns that DRC, Inc has regarding the implementation of the contract signed on June 21, 2000 with the Honduran Social Investment Fund (FHIS) for the Government of Honduras (GOH) for the construction of water and sanitation systems in areas damaged by Hurricane Mitch (Contract No. PDM009-2001) While USAID will try to assist in resolving any difficulties, I want to emphasize that USAID is not a party to the contract between DRC and the GOH and all questions of contract

> interpretation or implementation must be directed by DRC to the GOH…" (Exhibit 21)

Nowhere does the above letter state that FHIS is a "quasi-independent public agency" as argued (U.S. Motion To Dismiss docket 55-1 p14)

December 2002 USAID Breach of its promise to Pay materials Donated to Honduras by DRC, Inc,

> "DRC entered into a second contract with FHIS on December 29, 2000 to construct six potable water and sewer projects for $8,373,930.77. The project funding was suspended by USAID on March 23, 2001. USAID signed an agreement with Honduras to proceed with DRC on a termination for convenience claim under the Federal Acquisitions Regulations. The six projects had many construction materials on site in storage paid for by DRC, after years of audits and investigations USAID finally instructed DRC, Inc. to donate the materials to the local municipalities and USAID would pay for the cost of the materials. November 4th 2002 DRC billed USAID for the materials that were donated on USAID's behalf, USAID paid DRC $92,986.86 shortly thereafter. The day after payment was made USAID contracting officer (James Athanas) called me and demanded a full release for the 1-A contract termination for convenience claim considering USAID paid the 92k, I told him I could not issue a release because the company was due well over one million, James Athanas then informed me that the contract was a Honduran Government Contract and not subject to the Federal Acquisitions Regulations (FAR) and USAID had no duty to mitigate damages upon the final decision of the contracting officer considering the (FAR) did not apply, James Athans said USAID would claw back the 92k payment, which USAID did the following day. DRC, Inc. ultimately filed a breach of contract claim for these monies before the Federal Court of Claims which was dismissed when the walk away agreement was signed in 2015." FARMER AFFIDAVIT 2 Exhibit 1)

On November 19, 2003 USAID investigator **Keith Smith** contacted DRC's Honduran subcontractor. The subcontractor emailed Farmer a summary of his conversation with Agent Smith:

> "After talking with Keith C. Smith, we are really Worried that we will not be paid by DRC, the amount owe to us. He stated to us that your invoices had some problems, and that they were going to audited, and that you had some legal problems in the USA. He mentioned that USAID is worried that DRC is not going to pay all Contractors in Honduras, Even if USAID pays the invoices because almost all of the last payment DRC received was for payment of other obligations and nor for Honduran contractors **USAID has 3 million dollars to pay DRC, but if DRC is going to sue USAID the money is not going to be paid for a long time**, and as you have stated DRC is going to Pay US when The invoices are paid by USAID. SERPIC cannot afford to be paid any longer. So because of this we want a letter of DRC authoring USAID to directly pay SERPIC the amount owe" (Exhibit 22)

July 27th 2004 USAID Director Paul Tuebner sent a Letter to DRC, Inc. subcontractor CORDICA where he/USAID was processing direct payment to CORDICA awaiting approval from Washington, USAID refused to pay, speak with and/or meet with DRC yet they agreed to process payment to a subcontractor (Exhibit 23).

> "On our letter dated June 4'" 2004, "we informed you that USAID is carrying-out procurement actions to obtain the necessary authorizations that will allow payment to CORDICA. This matter is still under consideration and analysis in Washington." (Exhibit 19 Farmer Affidavit 2)

Sometime between 2003 and 2005 Mr. Bran, DRC, Inc. subcontractor SERPEC was interviewed by two retired FBI agents on behalf of DRC, Inc. where Mr. Bran stated:

> "Bran advised that he was interviewed by an Agent from USAID who visited him at the offices of SERPIC. He stated this Agent was a man by the name of Keith Smith who gave Bran a business card. The business card provided to Bran states the name as Keith C. Smith, Special Agent Overseas Division, 1300 Pennsylvania Ave., N.W. Washington, D.C., Tel 202-712-0381, Fax, 202-216-3801, and email: keismith@usaid.gov. The card has a gold badge on it and the name Agency for International Development Office of the Inspector General. Bran stated that during the interview with Keith Smith, Smith told him " DRC is a company which is about to disappear and that SERPIC better collect what DRC owes them because they will no longer be around when this investigation is over". Smith stated "DRC is going to go under". Bran further stated that Smith said" DRC has committed fraud in other countries and they are a bunch of crooks". Further, Bran stated, Smith said, "They are a bunch of con artists". Bran advised that when he heard Keith Smith say all those things, he felt somewhat intimidated and wondered if all Special Agent Smith was saying was in fact true. However, he also said he felt these comments were not appropriate coming from an Agent of the United States government." (Exhibit 24)

April 21st 2005 the United States Corp of Engineers ordered FHIS to pay DRC millions, (Answer to Motion to Dismiss Exhibit 8 Farmer Affidavit 1)

May 5, 2005 USAID investigator Keith Smith executed the search warrant (Reply to Motion to Dismiss Exhibit 10) and on **May 10th 2005** just five days after the search warrant USAID de-obligated the money guaranteeing DRC, Inc's contract and gave the approximately 2.8 million dollars to Honduras with $100,000.00 paid for FHIS legal defense and new projects (Answer to Motion to Dismiss Exhibit 17).

USAID doubled down and failed and refused to honor its payment obligations ordered by USACE, FHIS and Honduras. USAID conspired with Honduras with 2.8 million dollars for additional projects and FHIS legal defense which provides evidence of arbitrary and capricious actions and further denied payment to DRC. Reply to Motion to Dismiss (Answer to Motion to Dismiss to Exhibit 17). The Relators allege this 2.8 million dollar payment proves animus toward the Relators and also establishes the Government's decision to file the motion to dismiss is arbitrary, capricious and the decision to continue payments to FHIS as not genuine.

The search warrant investigation initiated by Agent Keith Smith of USAID on May 5, 2005 ended two years later on **March 23, 2007** when the US Department of Justice issued a letter of declination to DRC, Inc. (Docket 66 Motion to Dismiss Answer Exhibit 11). The 2.8 million dollar payment issued by USAID defendants to FHIS is clear violation of 18 U.S.C §666

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.
18 U.S.C. § 666

October 7th 2009 FHIS, using letterhead of the Honduran Presidency certified for payment fifty-one million four hundred eighty two thousand five hundred fifty-six dollars and nine cents $51,482,556.09 (Exhibit 25). This certification for

payment was delivered to USAID on October 8, 2009 at 2:48 PM. USAID did not pay as requested by FHIS. Only discovery will show what USAIID employees did in response to this order for payment by FHIS. USAID promised payment to Honduras under the contract and left Honduras holding the bag while also leaving DRC, Inc. in limbo.

In 2016 USAID continued its cover up, after Judge Friedman's ruling USAID paid International Business Consultants (IBI) $174,000 to issue an assessment of IDECOAS/FHIS where IBI concluded that IDECOAS/FHIS was eligible for Government to Government assistance. (Exhibit 27) Why would USAID pay an independent contractor $174,000 of US taxpayer money to issue an opinion in reference to FHIS eligibility under (G2G) assistance and now represent to this court that USAID determined FHIS was "quasi-independent public agency" (U.S. MTD docket 55-1 p14) In addition, USAID has many professionals capable of doing such assessment so why would USAID hire an independent contractor? Discovery will answer this question. USAID has refused to honor FOIA requested submitted by Relators counsel for said IBI report, discovery against USAID will reveal this report and the cover-up, ***which in history at times the cover-up has been determined to be worse than the crime itself (Fraud, Lies, Conspiracy & Bribes)***. The IBI report is evidence that USAID sought third party approval of (G2G) FHIS funding in light of Judge Friedman's ruling.

April 15, 2017 Murray Farmer issued a summary by email to thousands of USAID employees over Easter Break of that year which sparked an inquiry with the USAID Inspector General Agent Kristopher Nordeen who contacted Farmer by email (Farmer Affidavit 2) (Exhibit 28). Nordeen requested documentation substantiating Farmer's claims. Farmer sent USAID IG's the information requested and never heard from the IG office again. USAID's lack of action toward Farmer forced him to look towards the false claims act in order to root out USAID corruption and to protect other Americans from similar Frauds. It was clear to Farmer that USAID could not be trusted to police itself

> "I built a website (www.usaid.co) and wrote USAID a letter which I gave USAID, all of its employees that I could obtain emails to (thousands received my email) and the USAID Inspector General's office a chance to come clean and make assurances to me and my family that USAID would not allow this injustice to ever happen again to another American Family. USAID'S thousands of silent voices told me that they would do it again and it is likely happening somewhere in the world now, I could not sleep at night worrying that someone else may be suffering due to USAID's impunity and corruption. I was so hurt by USAID betrayal that I contemplated suicide when Judge Friedman determined FHIS to be separate, I did not want to sue the defendants under the False Claims Act, but I believe God moved me in order to prevent innocent others from suffering the same. My conscience would not rest if someone else may bear the same burden as I and my family have borne, then I would be guilty of not having warned. I could not live with that guilt if it were to occur. I have suffered and I would be equally responsible for the crimes of USAID if I did nothing" (Farmer Exhibit 19 Affidavit 2)

October 26, 2017 "I filed the False Claims Act Case to protect the U.S. Citizens right to have Good Honest Government of the U.S. and of Foreign Allies

and so other Americans would not fall victim to Foreign Governments fraud and USAID's impunity, interference and collusion." (Farmer Exhibit 19 Affidavit 2)

The Relators believe that discovery will reveal that USAID funded over ten years of FHIS legal defense against DRC, Inc.'s meritorious claims for payment where USAID spent millions of dollars. Taxpayer money appropriated by U.S. Congress for Honduras to purchase rice, beans and toilets to fight against an American Contractor, especially one that delivered potable water and sewer projects to everyone's satisfaction. Farmer affidavit Exhibit 19. The Relators allege these legal payments are a false claim, and allege the failure to pay a valid claim establishes animus toward the relators and also proves the Government's decision to file the motion to dismiss is arbitrary and capricious.

UNITED STATES IS ON BOTH SIDES OF THE DISPUTE

The United States Supreme court has never dismissed any lawsuit of United States vs. United States for any action as non-justiciable. Lawsuits by definition must have at least two parties and the theory "a person cannot sue itself" falls apart when it's the United States. The United States has previously sued itself , although it is uncommon, see *United States v. Interstate Commerce Commission, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451 (1949), U.S. v. F.C.C., 707 F.2d 610, 227 U.S.App.D.C. 413 (D.C. Cir. 1983). In US v ICC*, the Court stated that "There is much argument with citation of many cases to establish the long-recognized general

principle that no person may sue himself. Properly understood the general principle is sound, for courts only adjudicate justiciable controversies. They do not engage in the academic pastime of rendering judgments in favor of persons against themselves. Thus a suit filed by John Smith against John Smith might present no case or controversy which courts could determine. But one person named John Smith might have a justiciable controversy with another John Smith. This illustrates that courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented. While this case is United States v. United States, et al., it involves controversies of a type which are traditionally justiciable".

Once again, the Department of Justice conflates the facts and the law. The United States is not on both sides of this dispute, because the United States is no longer a party to the action. The U.S. only needs to hire independent counsel for the USAID defendants to eliminate any potential conflict.

The FCA provides a cause of action against anyone who submits or causes to be submitted a false claim to the Government, United States included. The United States or private citizens suing the USA under the false claims act is lawful.

In the alternative, the relators are prepared to amend the complaint and dismiss the allegation of proceeding against the USAID defendants in their "Official Capacity" and proceed against the USAID Defendants in their individual capacity.

TIMELINE ADDRESSED IN COURT NEEDED CLARIFICATION

Below is a brief timeline of the work and lawsuits between DRC and Government as requested in the January 16, 2020, hearing.

June 21, 2000: DRC, Inc. entered into a contract with FHIS signed in the Honduran Oval Office by the President of Honduras in a live televised ceremony. (McAvoy Affidavit)

November 16th 2001: USAID and the U.S. Embassy issued DRC, Inc. a Certificate of Appreciation "for significant contribution to the Hurricane Mitch Reconstruction and Transformation Effort" (Exhibit 29)

July 16, 2001: all projects were substantially complete which means 95% compete for use for the intended purpose awaiting final punch list items. (Exhibit 19 Farmer Affidavit 2)

February 15, 2002: All projects were completed delivered and functioning to everyone's satisfaction. (Exhibit 19 Farmer Affidavit 2)

April 29th 2004: DRC, Inc. sued USAID in Federal Court of Claims for payment against USAID for breach of contract (Exhibit 19 Farmer Affidavit 2)

September 16, 2004: USAID sued DRC, Inc. under the false claims act and requested stay of the Federal Court of Claims Actions, stay was granted. (Exhibit 19 Farmer Affidavit 2)

October 24th 2014: Friedman issued ruling FHIS is separate from the Republic leaving DRC, Inc. with no ability to seek relief for payment. (Answer Motion to Dismiss Exhibit 15)

January 6th, 2015: DRC, Inc. and USAID signed a walk away agreement. Defunct DRC after litigating for over 13 years for just payment was unable to pursue its just payment claims, therefore, it signed a walk away agreement and walked into the sunset**.** (Exhibit 19 Farmer Affidavit 2)

Wherefore, the Motion to Dismiss submitted by the Government is arbitrary and capricious and is based upon a history and pattern of animus toward the relators. The Relators have presented a meritorious case. The Relators have clearly established all the elements to proceed with a violation of the False Claim Act. Therefore the Motion to Dismiss filed by the Government is due to denied.

Respectfully submitted,

*s/ Willie J. Huntley, Jr.*_____
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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following on the 23rd day of January, 2020.

Jay D. Majors, Esquire

/s/Willie J. Huntley, Jr.
Of Counsel