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## United States Ex Rel. DRC, Inc. v. Custer Battles, LLC

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*UNITED STATES EX REL. DRC, INC. V. CUSTER BATTLES, LLC*

This Summary discusses a recent decision from the United States Court of Appeals for the Fourth Circuit, *United States ex rel. DRC, Inc. v. Custer Battles, LLC*,<sup>1</sup> which addressed the applicability of the False Claims Act<sup>2</sup> (Act) to a contract made between a U.S. company and a non-U.S. government entity in postwar Iraq.<sup>3</sup> The Act serves as a tool to prevent contractors from committing fraud in the performance of government contracts by establishing liability for several types of conduct,<sup>4</sup> including when a person knowingly submits a false claim demanding payment of government funds.<sup>5</sup> Relevant to this case, the Act allows private parties, called relators, to enforce the Act by bringing qui tam actions against government contractors.<sup>6</sup>

In this qui tam action, the relators alleged that a government contractor, Custer Battles, violated the Act by submitting fraudulent claims for payment to the Coalition Provisional Authority, a U.S.-appointed government that temporarily governed postwar Iraq.<sup>7</sup> The parties disagreed over whether a false claim submitted to a non-U.S. government entity, such as the Coalition Provisional Authority, is cognizable under the Act.<sup>8</sup> The parties also disagreed over whether a false claim submitted to personnel working at the Coalition Provisional Authority satisfies the Act's presentment requirement, which mandates that, to recover damages in a qui tam action, a relator must

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1. 562 F.3d 295 (4th Cir. 2009).

2. After the Fourth Circuit issued this opinion, President Barack Obama signed into law a statute amending portions of the False Claims Act. Gerard E. Wimberly et al., *The Presentment Requirement Under the False Claims Act: The Impact of Allison Engine & the Fraud Enforcement & Recovery Act of 2009*, BRIEFING PAPERS, Aug. 2009, at 1, 6 (citing Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended in scattered sections of 18 U.S.C. and 31 U.S.C.)). All court citations in the *Custer Battles* opinions are to the former version of the Act. For a discussion of the impact of the Fourth Circuit's opinion in light of the statutory amendments, see *infra* text accompanying notes 64–70.

3. *Custer Battles IV*, 562 F.3d at 297.

4. See U.S. Dep't of Justice, *The False Claims Act: A Primer*, [http://www.justice.gov/civil/frauds/FCA\\_primer.html](http://www.justice.gov/civil/frauds/FCA_primer.html) (last visited Mar. 20, 2010). Congress initially passed the Act due to concerns that suppliers of goods were defrauding the government when they were performing contracts with the Union Army during the Civil War. *Id.*

5. 31 U.S.C.A. § 3729(a)(1) (West Supp. 1A 2009).

6. See U.S. Dep't of Justice, *supra* note 4. In qui tam actions, the relator, as a plaintiff, presents a claim for the benefit of the State as well as himself. *Custer Battles IV*, 562 F.3d at 297 n.\*. For example, claims may be brought for the benefit of the United States. *Id.*

7. *Custer Battles IV*, 562 F.3d at 297. Prior to turning over power to a new Iraqi government in June 2004, the Coalition Provisional Authority governed Iraq for nearly thirteen months. *Id.* at 298.

8. *Id.* at 301–02. Prior to the 2009 amendment, the Act defined a claim as a demand for payment made directly to the federal government or another recipient if the federal government provides any of the funds demanded. 31 U.S.C. § 3729(c) (2006), *amended by* 31 U.S.C.A. § 3729(b)(2)(A) (West Supp. 1A 2009). The current version of the Act adds to the definition but does not take away from its old meaning. See Wimberly et al., *supra* note 2, at 8–9 (citing 31 U.S.C.A. § 3729(b)(2)(A)). For a discussion on how the current version of the Act adds to the definition, see *infra* text accompanying notes 64–70.

demonstrate that the defendant presented a false claim to a U.S. government employee.<sup>9</sup>

In April 2009, in *Custer Battles*, the Fourth Circuit held that false claims submitted to the Coalition Provisional Authority satisfied the statutory definition of a claim under the Act because a portion of the funds paid came from the U.S. government.<sup>10</sup> The court further held that the relators satisfied the presentment requirement even when the claims were presented to a U.S. government employee detailed to a non-U.S. government entity, such as the Coalition Provisional Authority.<sup>11</sup> The court concluded that the relators presented enough evidence to uphold the false claims stemming from one of two challenged contracts.<sup>12</sup>

This case is likely to have broad application despite recent statutory amendments to the Act. Nearly six weeks after the Fourth Circuit's opinion, President Obama signed the Fraud Enforcement and Recovery Act of 2009 that amended the False Claims Act.<sup>13</sup> As discussed further in this Summary, the amendments preserved the Fourth Circuit's holdings in this case.<sup>14</sup>

Following the fall of the Iraqi government led by Saddam Hussein, the U.S. government and coalition forces installed a temporary government body called the Coalition Provisional Authority.<sup>15</sup> The personnel administering services within the Coalition Provisional Authority were largely comprised of U.S. military service members, U.S. civilian contractors, and U.S. employees.<sup>16</sup>

Pertinent to this case, the Coalition Provisional Authority entered into two contracts with an international risk management firm called Custer Battles, LLC (Custer Battles).<sup>17</sup> The first contract (the Dinar Exchange Contract) called for replacing the old Iraqi currency, the dinar, with a newly designed Iraqi currency under the same name.<sup>18</sup> The second contract (the Airport Contract) called for

9. *Custer Battles IV*, 562 F.3d at 301. Under former 31 U.S.C. § 3729(a)(1), the Act created liability for any person who presented a false claim for payment “to an officer or employee of the United States Government or a member of the Armed Forces of the United States.” 31 U.S.C. § 3729(a)(1) (2006), amended by 31 U.S.C.A. § 3729(b)(2)(A) (West Supp. 1A 2009).

10. *Custer Battles IV*, 562 F.3d at 297–98.

11. *Id.* at 306.

12. *Id.* at 298.

13. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended in scattered sections of 18 U.S.C. and 31 U.S.C.). See generally Wimberly et al., *supra* note 2, at 6–7 (discussing the introduction, debate, and passage of the Act).

14. See Wimberly et al., *supra* note 2, at 8–9 (citing 31 U.S.C.A. § 3729(b)(2)).

15. See *Custer Battles IV*, 562 F.3d at 298. This body governed Iraq for nearly thirteen months before turning over power to an interim Iraqi government. *Id.*

16. *Id.* The non-U.S. personnel working for the Coalition Provisional Authority came from countries participating in the occupation of Iraq, “including Australia, the Czech Republic, Denmark, Italy, Japan, Poland, Romania, Spain, the United Kingdom, Ukraine, and others.” *Id.*

17. *Id.* at 298–99. Former U.S. Army Rangers, Scott Custer and Michael Battles, formed Custer Battles, LLC. *Id.* at 298.

18. *Id.* The old currency bore the image of Saddam Hussein, and the Coalition Provisional Authority sought to exchange all the old currency with new dinars that did not have the portrait of the old ruler on the bills. *Id.*

Custer Battles to supply personnel to provide security at the Baghdad International Airport.<sup>19</sup>

Under the Dinar Exchange Contract, the parties agreed to a cost-plus method of payment.<sup>20</sup> This meant that Custer Battles received full reimbursement for its actual expenses plus an additional 25% to provide profit and to cover overhead costs.<sup>21</sup> Custer Battles ultimately received \$15 million for work performed under the Dinar Exchange Contract.<sup>22</sup> Of the total amount received, Custer Battles received \$3 million as an advance payment from the Coalition Provisional Authority, which paid this advancement “with a U.S. Treasury check funded by [a] ‘seized assets’ account” held by the temporary government.<sup>23</sup> The remaining \$12 million in progress payments came from the Development Fund for Iraq, which was comprised of various non-U.S. and U.S. funds, including congressional appropriations and \$210 million of seized Iraqi funds.<sup>24</sup>

To receive payment under the Dinar Exchange Contract, Custer Battles submitted invoices to U.S. personnel working with the Coalition Provisional Authority.<sup>25</sup> The Coalition Provisional Authority later discovered that these invoices reflected inflated costs that were much higher than the costs that Custer Battles actually incurred.<sup>26</sup> Following a meeting in October 2003 with representatives of the U.S. military and the Coalition Provisional Authority, Michael Battles left behind a spreadsheet detailing both the items invoiced to the Coalition Provisional Authority and the actual cost of those items.<sup>27</sup> The spreadsheet listed items invoiced to the Coalition Provisional Authority at costs approximately three-to-five times higher than the actual cost.<sup>28</sup>

Under the Airport Contract, the parties agreed to a different arrangement. The Coalition Provisional Authority had sent a request for proposals to various contractors, and Custer Battles had submitted the lowest bid, basing its estimated cost in part on the expected salaries of 138.5 personnel.<sup>29</sup> The Coalition

19. *Id.* at 299.

20. *Id.* at 298.

21. *Id.*

22. *Id.* at 299.

23. *Id.* at 298–99.

24. *Id.* at 299.

25. *Id.* After submission to the U.S. employee working at the Coalition Provisional Authority, the invoices were forwarded to “a U.S.-retained contractor and U.S. Military personnel for approval and ultimately to the finance office of the Coalition Authority for payment.” *Id.* Funds were usually dispersed “by wire transfers or with ‘bricks’ of cash.” *Id.* For further background on the practice of paying contractors and anecdotes regarding the creation of Custer Battles, see Matt Taibbi, *The Great Iraq Swindle: From Phony Bids to Invoicing Orgies, How Bush Allowed an Army of For-Profit Contractors to Invade the U.S. Treasury*, ROLLING STONE, Sept. 6, 2007, at 62.

26. *Custer Battles IV*, 562 F.3d at 299.

27. *Id.*

28. *Id.* For example, the spreadsheet indicated that Custer Battles invoiced trucks at \$80,000 when the actual cost was \$18,000. *Id.* Also, Custer Battles invoiced generators at \$400,000 when the actual cost for the generators was \$74,000. *Id.*

29. *Id.*

Provisional Authority accepted Custer Battles's bid, and the parties entered into a fixed price contract.<sup>30</sup> However, "[n]either the request for proposal nor the contract itself specified" the number of personnel required to perform the contract.<sup>31</sup>

Custer Battles's subcontractor for Iraq projects, DRC, Inc. (DRC), and its managing director, Robert Isakson, filed a qui tam action as relators on behalf of the United States against Custer Battles in the United States District Court for the Eastern District of Virginia.<sup>32</sup> DRC and Isakson raised four separate counts under the Act.<sup>33</sup> Three of the counts alleged that Custer Battles defrauded the U.S. government by knowingly submitting inflated invoices for the Airport and Dinar Exchange Contracts, created false documents to ensure payment for the Dinar Exchange Contract, and conspired "to defraud the United States under the Dinar Exchange Contract."<sup>34</sup>

Prior to sending the case to trial, the lower court limited Custer Battles's liability under the Dinar Exchange Contract to the \$3 million advance rather than the full \$15 million paid to the company.<sup>35</sup> The court also dismissed the conspiracy charge,<sup>36</sup> severed the Airport Contract charges from the Dinar Exchange Contract claims, and then proceeded to trial.<sup>37</sup>

The jury returned a verdict against Custer Battles, finding the company liable for the full \$3 million allowed by the lower court.<sup>38</sup> The court elected not to enter judgment on the verdict, however, and ruled in favor of Custer Battles on a previously deferred motion for judgment as a matter of law.<sup>39</sup>

In granting judgment as a matter of law to Custer Battles, the district court made three specific rulings.<sup>40</sup> First, the lower court held that the relators failed to satisfy the former § 3729(a)(1) presentment requirement because they only proved that Custer Battles presented invoices to the Coalition Provisional

30. *Id.* at 299–300.

31. *Id.* at 300.

32. *Id.*

33. *Id.*

34. *Id.* Pursuant to former § 3730(h) of the Act, the relators alleged in the fourth count a retaliation claim on behalf of a Custer Battles employee who had assisted in the investigation of the company. *Id.* This count went to trial with the Dinar Exchange Contract claims, and the jury returned a verdict for the relators. *Id.* at 301. The jury awarded the discharged employee \$165,000 "for Custer Battles' retaliation against his whistleblowing." *Id.* This outcome was not challenged on appeal. *See id.*

35. *Id.* (citing United States *ex rel.* DRC, Inc. v. Custer Battles, LLC (*Custer Battles I*), 376 F. Supp. 2d 617, 649 (E.D. Va. 2005)).

36. *Id.* (citing *Custer Battles I*, 376 F. Supp. 2d at 651). Regarding Custer Battles's motion for summary judgment, the court found that any conspiracy would be a "legal impossibility" because all entities allegedly involved were subsidiaries of Custer Battles. *Id.* (quoting *Custer Battles I*, 376 F. Supp. 2d at 651).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

Authority, rather than to U.S. government employees.<sup>41</sup> Second, the district court used the same reasoning to hold that the relators failed in their false record claim under former § 3729(a)(2).<sup>42</sup> The court concluded that this section also has “an implied requirement that the false record or statement be *presented to* the U.S. government,” which the relators failed to meet.<sup>43</sup> Third, after making its rulings on the Dinar Exchange Contract, the court granted summary judgment to Custer Battles on the severed claim regarding the Airport Contract, holding that the relators failed to show that Custer Battles submitted a false claim under the contract.<sup>44</sup>

On appeal, the relators raised three challenges to the lower court’s rulings.<sup>45</sup> First, they alleged that the lower court erred in limiting the claim for damages to \$3 million under the Dinar Exchange Contract.<sup>46</sup> Second, the relators argued that it had satisfied the requirement of proving presentment of a false claim to a U.S. government employee under either the express requirement of former § 3729(a)(1) or the implied requirement of former § 3729(a)(2).<sup>47</sup> Third, they claimed that the lower court erred in granting Custer Battles summary judgment on the Airport Contract claim.<sup>48</sup>

The Fourth Circuit affirmed in part, reversed in part, and remanded for further proceedings.<sup>49</sup> Concerning the Airport Contract, the court affirmed the lower court’s ruling in favor of Custer Battles, holding that the relators had not presented sufficient evidence to support a violation of the Act.<sup>50</sup> The court ruled that there could be no false claim because the relators based their claim on the fact that Custer Battles provided less than 138 personnel to perform the contract, but neither the contract nor the proposal bid included such a term.<sup>51</sup>

Regarding the Dinar Exchange Contract claims, the court concluded that the district court erred in making three rulings of law.<sup>52</sup> First, the court reversed the

41. *Id.* (citing *United States ex rel. DRC, Inc. v. Custer Battles, LLC (Custer Battles II)*, 444 F. Supp. 2d 678, 683–85 (E.D. Va. 2006)). Under the former version of the Act, presentment of a false claim to a government employee was a required element to prove a violation of the Act. *See* 31 U.S.C. § 3729(a)(1) (2006), *amended by* 31 U.S.C.A § 3729(b)(2)(A) (West Supp. 1A 2009). Under the amended Act, the presentment requirement is no longer limited to government employees. *See* 31 U.S.C.A § 3729(b)(2)(A).

42. *Custer Battles IV*, 562 F.3d at 301 (citing *Custer Battles II*, 444 F. Supp. 2d at 685).

43. *Id.* (citing *Custer Battles II*, 444 F. Supp. 2d at 685).

44. *Id.* (citing *United States ex rel. DRC, Inc. v. Custer Battles, LLC (Custer Battles III)*, 472 F. Supp. 2d 787, 795–96, 800 (E.D. Va. 2007)).

45. *Id.*

46. *Id.*

47. *See id.*

48. *Id.*

49. *Id.* at 297. A three-judge panel issued the opinion. *Id.* The panel consisted of Judge Niemeyer, who authored the opinion, Judge Duncan, and Judge Shedd. *Id.*

50. *Id.* at 309.

51. *Id.* at 308–09.

52. *See id.* at 309.

lower court's ruling that limited Custer Battles's liability to only \$3 million.<sup>53</sup> The Fourth Circuit held that any of the false "claims presented on the \$15-million Dinar Exchange Contract" qualified under the statutory definition of a claim under the Act.<sup>54</sup> The court noted that "[s]o long as 'any portion' of the claim is or will be funded by U.S. money given to the grantee, the full claim satisfies the definition of claim" under the Act.<sup>55</sup> Thus, the court reversed the district court's decision to limit liability to \$3 million and remanded the issue to allow the relators to prove additional damages.<sup>56</sup>

Second, the court reversed the lower court's ruling that the relators failed to present sufficient evidence to satisfy the presentment requirement.<sup>57</sup> Under this requirement, the relators had to show that, under the Dinar Exchange Contract, Custer Battles knowingly presented false claims to employees of the United States.<sup>58</sup> The court concluded that the lower court wrongly assumed that U.S.

53. *Id.* The lower court found that the \$3 million advance (paid by the U.S. Treasury) was a request for U.S. funds while the remaining \$12 million (paid from the Development Fund for Iraq) was a request for Iraqi funds and thus did not qualify as a claim under the Act. *Id.* at 301 (citing *Custer Battles I*, 376 F. Supp. 2d 617, 641–49 (E.D. Va. 2005)). The lower court conducted a source-of-funds analysis to determine whether the \$12 million in progress payments constituted funds paid by the U.S. *Id.* at 302 (citing *Custer Battles I*, 376 F. Supp. 2d at 623). It considered the Development Fund for Iraq to belong to the Iraqi people even though \$210 million in the fund came from the U.S. *Id.* at 303. Thus, the lower court considered the United States government to no longer have title over those funds. *Id.*

54. *Id.* at 305.

55. *Id.* at 303. Former § 3729(c) defined a claim as the following:

any request or demand . . . for money or property which is made to a . . . 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 . . . grantee[] or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c) (2006), amended by 31 U.S.C.A. § 3729(b)(2)(A) (West Supp. 1A 2009).

56. *Custer Battles IV*, 562 F.3d at 305. The court noted that the lower court ruling might be harmless in the sense that the damages sustained by the relators may have totaled only \$3 million; however, this issue could not be resolved unless the relators elected for a new trial on their claims under the Dinar Exchange Contract. *Id.* The court held that, on remand, the relators should first have "the option to have a new trial on the Dinar Exchange Contract claims" before the district court ruled on the remanded issues stemming from Custer Battles's motion for judgment as a matter of law. *Id.* at 309.

57. *Id.* at 308. The lower court reached its ruling by determining 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." *Custer Battles II*, 444 F. Supp. 2d 678, 684 (E.D. Va. 2006).

58. *Custer Battles IV*, 562 F.3d at 305–06 (citing 31 U.S.C. § 3729(a)(1) (2006), amended by 31 U.S.C.A. § 3729(a)(1) (West Supp. 1A 2009)). The lower court offered an analogy to illustrate its holding that there was no presentment to a U.S. government employee:

[I]f 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 [Coalition Provisional Authority] was not a U.S. entity, then those U.S. employees detailed to the [Coalition Provisional Authority] were acting in their capacity as officers of the [Coalition Provisional Authority], not as employees of the United States government.

*Custer Battles I*, 376 F. Supp. 2d at 648 n.86.

government employees “could not be working in their official capacities” while detailed to work for the Coalition Provisional Authority.<sup>59</sup> Thus, the court held that U.S. employees detailed to the Coalition Provisional Authority can still be acting in their official capacity as U.S. officials or employees and that presentment of a false claim to these individuals satisfies the requirements of former § 3729(a)(1) of the Act.<sup>60</sup> After reversing the district court on this issue, the court remanded for further consideration of Custer Battles’s remaining arguments.<sup>61</sup>

Third, the court reversed the lower court’s ruling that former § 3729(a)(2) of the Act had an implied requirement of presentment to a U.S. government employee.<sup>62</sup> Relying on Supreme Court precedent, the court held that, because the text of former § 3729(a)(1) requires presentment and former § 3729(a)(2) does not have the same express language, courts should not read an implied presentment requirement into § 3729(a)(2).<sup>63</sup>

The recent amendments to the Act are generally consistent with the holdings of *Custer Battles*, although the consistency is achieved in differing ways. One holding—that a claim made against a non-U.S. government entity such as the Coalition Provisional Authority is within the definition of a claim under the Act—is consistent with the recent amendments.<sup>64</sup> The recent amendment adds to the definition of a claim without removing any of the language the court used in *Custer Battles*; thus, the holding remains good law, even in light of the amendments.<sup>65</sup>

Another of the court’s holdings—the requirement of presentment to a U.S. government employee is met even when presenting to a U.S. employee detailed

59. *Custer Battles IV*, 562 F.3d at 306. The court supported its logic by extending the analogy provided by the lower court: “If that employee were a soldier detailed to remodel the kitchen in her government-owned housing, the court would surely have to hesitate in concluding that the soldier was not acting in her official capacity when the soldier’s orders required her to remodel the kitchen.” *Id.*

60. *Id.* at 307.

61. *Id.* at 309. Custer Battles raised the following three additional issues upon which the district court did not rule: “whether the claims were materially false; whether the United States suffered damage; and whether the individual defendants had sufficient knowledge of the fraudulent conduct to be liable.” *Id.* at 305.

62. *Id.* at 308.

63. *Id.* (discussing *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2129–30 (2008)). The court acknowledged that, at the time of its ruling, the lower court did not have the benefit of *Allison*, which resolved the implied requirement of presentment issue. *Id.* In *Allison*, the Court held that “[t]he inclusion of an express presentment requirement in subsection (a)(1), combined with the absence of anything similar in subsection (a)(2), suggests that Congress did not intend to include a presentment requirement in subsection (a)(2).” *Allison*, 128 S. Ct. at 2129.

64. See *Wimberly et al.*, *supra* note 2, at 8–9 (citing 31 U.S.C.A. § 3729(b)(2) (West Supp. 1A 2009)).

65. The amended version of the “claim” definition includes payment requests made to “an officer, employee, or agent of the United States.” 31 U.S.C.A. § 3729(b)(2)(A)(i) (West Supp. 1A 2009).



to a non-U.S. government entity—appears at first glance to be moot in light of the amended version of the Act. However, further analysis reveals that the holding is still relevant and good law, and it may be applied by later courts. Former § 3729(a)(1) required presentment of a false claim 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.”<sup>66</sup> The amended version does not include this phrase.<sup>67</sup> Thus, liability under the Act is broader with the amendment because it removes the government employee language that served to narrow the Act’s applicability.<sup>68</sup>

On its face, the amended statute broadens liability beyond that found by the Fourth Circuit in *Custer Battles* because the requirement of presentment to a U.S. employee has been removed.<sup>69</sup> The amended version of the Act would impute liability against persons who present false claims to the U.S. government as well as non-U.S. government entities regardless of whether U.S. employees were detailed to work with the non-U.S. government entity.<sup>70</sup> This would appear to make the *Custer Battles* ruling moot; however, this viewpoint is rather shortsighted. Given that *Custer Battles* is a recent case that has interpreted the former version of the Act and has not been overruled, the case is still useful for future interpretations of the Act. The holding that extended liability to false claims submitted to the Coalition Provisional Authority will serve as a helpful analogy for relators seeking to attach liability to those who submit false claims to non-U.S. government entities.

In *Custer Battles*, the Fourth Circuit interpreted the Act to permit a qui tam action against contractors who (1) make claims for payment from funds originating in part from the United States, even though the funds are controlled by a non-U.S. government entity<sup>71</sup> and (2) present false claims for payment to U.S. employees, even when those employees are detailed to a non-U.S. government entity such as the Coalition Provisional Authority.<sup>72</sup> Despite recent amendments to the Act, these holdings are consistent with the current version of the Act and stand as an apt example of applying the Act against non-U.S. government entities.

*Steven C. Woodliff\**

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66. 31 U.S.C. § 3729(a)(1) (2006), amended by 31 U.S.C.A. § 3729(a)(1)(A) (West Supp. 1A 2009).

67. See 31 U.S.C.A. § 3729(a)(1)(A).

68. See Wimberly et al., *supra* note 2, at 9.

69. See 31 U.S.C.A. § 3729(a)(1)(A).

70. See Wimberly et al., *supra* note 2, at 9.

71. *Custer Battles IV*, 562 F.3d 295, 303, 305 (4th Cir. 2009).

72. *Id.* at 306.

\* This Summary is dedicated in memory of Sgt. Michael R. Woodliff.