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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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UNITED STATES OF AMERICA EX REL.)
DRC, INC. AND ROBERT ISAKSON,)
)
Plaintiffs,)
)
v.)
)
CUSTER BATTLES, LLC, ET AL.)
)
Defendants.)
_____)

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

CV-04-199 A

BRIEF OF THE UNITED STATES IN RESPONSE
TO THE COURT'S INVITATION OF DECEMBER 21, 2004

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**BRIEF OF THE UNITED STATES IN RESPONSE
TO THE COURT'S INVITATION OF DECEMBER 21, 2004**

INTRODUCTION AND PROCEDURAL BACKGROUND

This civil action was filed by the relators under seal in February, 2004, pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* The relators allege that defendants violated the False Claims Act by presenting false claims to the Coalition Provisional Authority (CPA) in Iraq in connection with contracts between defendant Custer Battles, LLC, and the CPA.

After the government declined to intervene in the case, the defendants moved to dismiss the action under Rules 12(b)(1) and 12(b)(6), arguing first, that the CPA is not an agency of the United States, and thus, claims under the contracts were not presented to the government, and second, that the contracts at issue were funded with Iraqi funds, not U.S. funds, and thus, the alleged false claims were not "claims" covered by the FCA. The Court converted its consideration of the motion to dismiss to a motion for summary judgment pursuant to Rule 56

and requested supplemental briefing.

The Court invited, but did not require, the government "to file ... a brief setting forth the government's position with respect to whether the FCA [False Claims Act] applies to false claims made or presented to the CPA [Coalition Provisional Authority]." Order, Dec. 21, 2004. The government accepted the invitation and now files this brief.

FACTS¹

I. The Coalition Provisional Authority (CPA).

Throughout 2002 the United States demanded that the Iraqi regime under Saddam Hussein take action to comply with various United Nations Security Council resolutions arising from Iraq's 1990 invasion of Kuwait. International sanctions had been imposed for Iraq's non-compliance with multiple U.N. Security Council directives, but still Iraq did not comply. On March 19, 2003, acting in accordance with a series of U.N. Security Council resolutions, the United States and its Coalition partners launched major military operations against the former Iraqi regime of Saddam Hussein. Within a relatively short period of time, the Coalition Forces overcame the armed forces of Iraq and occupied much of the territory of Iraq. On April 16, 2003, the Commander of the Coalition Forces, General Tommy R. Franks, issued a Freedom Message

¹ Although the United States has diligently attempted to gather relevant documents both for purposes of responding to the parties' subpoenas issued in this case and for purposes of this brief, we are not able, at this time, to provide complete citations for some of the representations contained herein. This is primarily a result of the fact that the Coalition Provisional Authority no longer exists and that relevant documents and those U.S. Government personnel with knowledge of facts and events are in several Departments and agencies and are scattered throughout the world. Nevertheless, our current best assessment of the facts related to this matter is presented in this brief.

to the Iraqi People. USG 01217-1218.² The Freedom Message informed the Iraqi people,

Coalition Forces in Iraq have come as liberators, not as conquerors. []. Iraq and its property belong to the Iraqi people and the Coalition makes no claim of ownership by force of arms. []. We are working with the international community to ensure the delivery of humanitarian assistance and to promote law and order so that the Iraqis can live in security, free from fear. We are establishing the stability ... [to] help the Iraqis form a functioning government that respects the rule of law and reflects the will, interests, and rights of the people of Iraq. Meanwhile, it is essential that Iraq have an authority to protect lives and property, and expedite the delivery of humanitarian assistance to those who need it. Therefore, I am creating the Coalition Provisional Authority to exercise powers of government temporarily, and as necessary, especially to provide security, to allow the delivery of humanitarian aid and to eliminate weapons of mass destruction.

On May 8, 2003, the United States and the United Kingdom presented a joint letter to the United Nations stating that they "and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance [ORHA], to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction." USG 001220-1221.

On May 9, 2003, the President appointed L. Paul Bremer to serve as the Presidential Envoy to Iraq, reporting through the Secretary of Defense.

[Y]ou [Ambassador Bremer] are authorized to oversee, direct, and coordinate all United States Government (USG) programs and activities in Iraq except those under the command of the Commander, U.S. Central Command. This authority includes the responsibility to oversee the use of USG appropriations in Iraq, as well as Iraqi state- or regime-owned property that is properly under U.S. possession and made available for use in Iraq to assist the Iraqi people and support

² The United States's exhibits ("USG") are provided to the Court in numerical order and cited herein by Bates Number.

the recovery of Iraq.

USG 001253-1254. Four days later, on May 13, 2003, the Secretary of Defense designated the Presidential Envoy to be

the head of the CPA with the title of Administrator. You [Ambassador Bremer] shall be responsible for the temporary governance of Iraq, and shall oversee, direct and coordinate all executive, legislative and judicial functions necessary to carry out this responsibility, including humanitarian relief and reconstruction and assisting in the formation of an Iraqi interim authority.

USG 001255.

Ambassador Bremer quickly took several steps in anticipation of the adoption by the United Nations of Security Council of Resolution 1483.

First, on May 16, 2003, Ambassador Bremer issued by authority of, *inter alia*, "the laws and usages of war," Coalition Provisional Authority Regulation No. 1, which provided that

the CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq. [] The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.

USG 002573-2574.

Next, Ambassador Bremer, in his capacity as Administrator of the CPA, wrote to the Federal Reserve Bank of New York on May 17, 2003, requesting

on behalf of the Central Bank of Iraq, that the Federal Reserve Bank of New York (the "Bank") open and maintain an account on its books for the Central Bank of Iraq, entitled "Central Bank of Iraq/Development Fund for Iraq" (the "Account"). I acknowledge and agree that the Account shall be governed by the Bank's standard terms and conditions pertaining to accounts of foreign central banks and governments, to the extent consistent with the law and usages of war.

USG 02269. This account is commonly referred to as the DFI, and we discuss it in greater detail

below.

On May 22, 2003, the United Nations Security Council adopted Resolution 1483 which noted the joint letter from the United States and the United Kingdom dated May 8, 2003, and recognized the “obligations under applicable international law of these states as occupying powers under a unified command (the 'Authority')." USG 001222-1228. We also discuss UNSCR 1483 in greater detail below.

Thirteen months later, on June 28, 2004, the Interim Government of Iraq assumed full responsibility for governing Iraq until an elected Transitional Government of Iraq could assume office, as described in U.N. Security Council Resolution 1546, and the CPA was dissolved.

II. Sources of Funds for the CPA

The CPA conducted its operations, including contracting for projects intended to promote the reconstruction of Iraq and benefit the Iraqi people, with funds provided from four primary sources of money: (1) funds appropriated by Congress from the general revenues of the United States (hereinafter Appropriated Funds); (2) Iraqi funds confiscated by the President and vested in the Department of the Treasury, (hereinafter Vested Funds); (3) moveable Iraqi state assets, primarily currency and negotiable instruments, seized by the Coalition Forces occupying Iraqi territory (hereinafter Seized Funds); and (4) the DFI.

A. Appropriated Funds

Appropriated Funds are those public funds that Congress decides can be spent out of the general revenue of the United States government. *See* U.S. Const. Art. I, § 9, cl. 7. Appropriated Funds are quintessentially the money or property of the United States. Although Congress appropriated funds for use by the CPA, no appropriated funds were used to pay for the two

contracts at issue in this civil action.

B. Vested Funds

The second source of funds available to the CPA came from Vested Funds. Vested Funds is a term used in this brief to describe blocked funds that were confiscated by the United States pursuant to two Executive Orders transferring all title and ownership to those funds to the Department of the Treasury. Vested Funds were used to pay some invoices of Custer Battles under one of the contracts at issue in this civil action, *i.e.*, the Baghdad International Airport (BIAP) contract, discussed below.

1. First Vesting Order. On March 20, 2003, the day after armed hostilities began, the President, pursuant to his emergency authority under the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. §§ 1701-1706, as amended by the USA PATRIOT Act, Pub. L. No. 107-56 § 106(1)(D), 115 Stat. 271, 278 (October 26, 2001), "confiscated and vested in the Department of the Treasury" all "blocked funds held in the United States in accounts in the name of the Government of Iraq, the Central Bank of Iraq, Rafidain Bank, Rasheed Bank, or the State Organization of Marketing Oil." Confiscating and Vesting Certain Iraqi Property, Exec. Order No. 13290, 68 Fed. Reg. 14307 (March 24, 2003) (the "First Vesting Order"), USG 001790-1791. Only funds subject to certain diplomatic immunities and certain then-existing writs were excluded from the order.³

³ The First Vesting Order specifically exempted from the vesting "any such amounts that as of the date of this order are subject to post-judgment writs of execution or attachments in aid of execution of judgments pursuant to section 201 of the Terrorism Risk Insurance Act of 2002 (Public Law 107-297), provided that, upon satisfaction of the judgments on which such writs are based, any remainder of such excepted amounts shall, by virtue of this order and without further action, be confiscated and vested." 68 Fed. Reg. at 14307.

The First Vesting Order was issued “to take additional steps with respect to the national emergency” that the President had declared on August 2, 1990, following the Iraqi invasion of Kuwait, triggering the first Gulf War. *Id.* In 1990, the President found that the Government of Iraq constituted an “unusual and extraordinary threat to the national security and foreign policy of the United States,” and consequently exercised the authority granted to him by, inter alia, IEEPA, to impose sanctions on Iraq, which included authorizing the President to order the blocking of certain Iraqi property and property interests within the jurisdiction of the United States. Exec. Order No. 12722, 55 Fed. Reg. 31803 (August 2, 1990). Other countries had taken similar action to block Iraqi assets present in their countries. Iraqi assets in the United States remained blocked until 2003 when the President ordered their confiscation and vesting with the First Vesting Order.

In the First Vesting Order, the President stated that the vested property “should be used to assist the Iraqi people and to assist in the reconstruction of Iraq.” 68 Fed. Reg. at 14307 (March 24, 2003). The President also authorized the Secretary of the Treasury to perform all functions of the President set forth in IEEPA § 1702(a)(1)(C), as amended, with respect to Iraqi assets and to take additional steps as may be necessary to carry out the purposes of the First Vesting Order. *Id.*

That same day, March 20, 2003, the Secretary of the Treasury took immediate steps to manage the cash and physical assets under the First Vesting Order. The Secretary authorized and directed the Federal Reserve Bank of New York (FRBNY), as fiscal agent of the United States, to take certain actions, including: (1) “[e]stablish a new account on its books in the name ‘U.S. Treasury Special Purpose Account’ (the “[Special Purpose] Account”) as a sub-account of the existing Treasury General Account on [the] books” of the FRBNY; (2) transfer to the newly

established Special Purpose Account the formerly blocked Iraqi assets which the President had confiscated and vested in the Treasury; and (3) "[h]old and manage the Vested Funds in the [Special Purpose] Account in the same manner as the [United States] Treasury General Account." Letter dated March 20, 2003, from John W. Snow, Secretary of the Treasury, to William J. McDonough, President of the FRBNY (the "March 20 Letter"), USG 001793-1794. Secretary Snow also authorized and directed the FRBNY to transfer Vested Funds held in fiscal agency or other accounts on the FRBNY's books into the Special Purpose Account where the Vested Funds were to be held and managed in the same manner as the [United States's] Treasury General Account.⁴ The Special Purpose Account for the Vested Funds was held by Treasury under account number 20X5816, Iraq Relief and Reconstruction Fund, Army. The account from which the U.S. Army paid Vested Funds was account number 21X2089, Iraq Relief and Reconstruction Fund, Army. USG 002245-2301.

As of April 9, 2003, over \$1.7 billion in confiscated cash was transferred to and held in the U.S. Treasury Special Purpose Account at the FRBNY, with an additional approximately \$197 million received by that account between April 10 and July 22, 2003. USG 002575-2581. In that same time frame, just under \$1.2 billion in cash was withdrawn or transferred from that account in eight separate transactions to specified U.S. agencies. *Id.* Much of that was converted

⁴ These transactions were accounted for in the U.S. budget through the creation of accounts on the books of the Treasury reflecting the budget authority made available through IEEPA. Technically, use of the funds consists of obligations (such as contracts) recorded against budget authority, with the cash to be used to liquidate those obligations upon disbursement. In this case, the vested cash was physically located in the Special Purpose Account in the FRBNY.

to cash and transported to Iraq. *See* USG 002476-2480.⁵ Approximately \$192 million, which was received in the Special Purpose Account on July 15, 2003, representing proceeds transferred from United Nations “778 Escrow Account,” was immediately transferred (by means of budgetary obligation and disbursement) to the DFI Account. USG 002481.

2. Second Vesting Order. On August 28, 2003, the President determined that it would be in the interest of the United States to confiscate “certain additional property of the former Iraqi regime, certain senior officials of the former regime, immediate family members of those officials, and controlled entities.” Executive Order Blocking Property of the Former Iraqi Regime, Its Senior Officials and their Family Members, and Taking Certain Other Actions, Exec. Order No. 13315 of August 28, 2003, 68 Fed. Reg. 52315 (September 3, 2003) (“Second Vesting Order”), USG 001839-1846. Unlike the First Vesting Order, confiscation and vesting would not be automatic but determined on a case by case basis by the Secretary of the Treasury. The President stated that any newly vested property, “shall promptly be transferred to the Development Fund for Iraq.” *Id.* at § 2. “Such property shall be used to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq’s infrastructure, for the continued disarmament of Iraq, for the costs of Iraqi civilian administration, and for other purposes benefitting the Iraqi people.” *Id.* at ¶ 2. Between August 28 and December 19, 2003, additional funds totaling approximately \$15,301,967.89 were confiscated, and vested in the Department of the Treasury pursuant to the Second Vesting Order. USG 002490. An additional \$937,000 was vested in March 2004, *id.*, and an additional \$1.8 million was transferred

⁵ *See generally*, “Using Vested Assets for the Reconstruction of Iraq,” Office of the Fiscal Assistant Secretary, U.S. Department of the Treasury, May 2003, USG 002459-2496.

thereafter. Pursuant to the standing order of the Department of the Treasury implementing the President's Executive Order, the Vested Funds from the Second Vesting Order were deposited into the Special Purpose Account and thereupon transferred (by means of budgetary obligation and disbursement) to the DFI Account. *Id.* Thus, more than \$18 million was transferred from the Special Purpose Account to the DFI Account pursuant to the Second Vesting Order, bringing the total amount of Vested Funds transferred to the DFI to approximately \$210 million.

C. Seized Funds

Seized Funds consist of Iraqi state- or regime-owned cash, funds, or realizable securities in Iraq that were found (*e.g.*, hidden near Saddam's Presidential palaces) and seized by Coalition Forces in Iraq in accordance with the laws and usages of war. Seized Funds were used to pay some invoices of Custer Battles under both of the contracts at issue in this civil action.

In an April 30, 2003 memorandum, President Bush confirmed the authority of the Secretary of Defense "to exercise all powers, consistent with the law and usages of war, related to the seizure, sale, administration, or use of state- or regime-seized cash, funds, or realizable securities in Iraq." USG 002274. This authority was in turn delegated from Deputy Secretary of Defense Wolfowitz to the Administrator of the CPA in a memorandum dated May 29, 2003. USG 02271. Deputy Secretary Wolfowitz wrote: "property taken under U.S. control under this delegation shall be held on behalf of and for the benefit of the Iraqi people, and shall be used only to assist the Iraqi people to support the reconstruction of Iraq." USG 002271. The CPA directed the use of the Seized Funds with the management support of the Department of Defense, and specifically, the U.S. Army, the 336th Finance Command (FINCOM), and the Defense Finance and Accounting Service (DFAS). *See generally* USG 002275-2317.

The vast majority of Seized Funds consisted of cash, and much of that was United States currency. In order to ensure that Seized Funds were accounted for, audited, and used only for appropriate purposes, the Department of Defense, in consultation with the Departments of Treasury and State and the Office of Management and Budget, developed "Procedures for Administering, Using and Accounting for Vested and Seized Iraqi Property." USG 002275-2317. According to these Procedures, Seized Funds were regarded as property which the United States holds and administers on behalf of, and for the benefit of, the Iraqi people, to assist the Iraqi people, and to support the reconstruction of Iraq. After initial seizure, the Seized Funds were physically transported to and held at Camp Arifjan, Kuwait, under the control of the 336th Finance Command Disbursing Officer. USG 002295. Even though the Seized Funds never physically left the war zone in Iraq and Kuwait, the collection of Seized Funds were accounted for by establishing a Treasury deposit account number 21X2095, Collection of Seized Funds, Army, and the disbursement of seized funds were accounted for by establishing a separate Treasury accounting number 21X6098, Disbursement of Seized Assets, Army. USG 002295. These accounting numbers were used to document the collection and disbursement of Seized Funds. USG 002296.

D. The Central Bank of Iraq / Development Fund for Iraq (DFI)

The DFI is a bank account held at the FRBNY on the books of the Central Bank of Iraq (CBI) and established through a coordinated effort by the United Nations and the CPA acting through Ambassador Bremer. DFI Funds were used to pay some invoices of Custer Battles under one of the contracts at issue in this civil action, *i.e.*, the Iraq Currency Exchange (ICE) contract, discussed below.

In anticipation of the formal adoption of U.N. Security Council Resolution 1483, Ambassador Bremer wrote to the FRBNY on May 17, 2003, "on behalf of the Central Bank of Iraq" requesting that an account be opened "for the Central Bank of Iraq, entitled 'Central Bank of Iraq/Development Fund for Iraq.'" USG 002269. U.N. Security Council Resolution 1483, adopted five days later on May 22, 2003, addressed the DFI. First, it noted

the establishment of a Development Fund for Iraq to be held by the Central Bank of Iraq and to be audited by independent public accountants approved by the International Advisory and Monitoring Board of the Development Fund for Iraq and look[ed] forward to the early meeting of that International Advisory and Monitoring Board, whose members shall include duly qualified representatives of the Secretary-General, of the Managing Director of the International Monetary Fund, of the Director-General of the Arab Fund for Social and Economic Development, and of the President of the World Bank.

USG 001222-1228, at ¶ 12. The Security Council Resolution further noted

that the funds in the Development Fund for Iraq shall be disbursed at the direction of the Authority, in consultation with the Iraqi interim administration, for the purposes set out in paragraph 14 below.

Id. at ¶ 13. Resolution 1483 also underlined that the DFI was to

be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civil administration, and for other purposes benefiting [*sic*] the people of Iraq.

Id. at ¶ 14. Resolution 1483 then requested that "the Secretary-General transfer as soon as possible to the Development Fund for Iraq 1 billion United States dollars" from accounts established pursuant to earlier U.N. resolutions governing the "Oil for Food" program and decided that, after deducting certain U.N. expenses, "all surplus funds" in the accounts "be transferred at the earliest possible time to the Development Fund for Iraq." *Id.* at ¶ 17. The U.N. Security Council, through Resolution 1483, further decided that the proceeds of oil and gas sales

from Iraq would henceforth be deposited into the DFI (*Id.* at ¶ 20), that the DFI would be immune from attachment, garnishment, or execution (*Id.* at ¶ 22), and that countries holding financial assets of the previous Iraq government of Saddam Hussein should freeze them and transfer them to the DFI (*Id.* at ¶ 23).

The FRBNY established an account for the Central Bank of Iraq/Development Fund for Iraq (DFI). The FRBNY, with the approval of the Board of Governors of the Federal Reserve, acted pursuant to its authority under Section 14(e) of the Federal Reserve Act.⁶ Consistent with its Section 14(e) authority, the FRBNY established the DFI Account as a foreign central bank account, owned by and subject to the instructions of the Central Bank of Iraq (CBI). Ambassador Bremer, in his letter to the FRBNY requesting that the DFI Account be opened, acknowledged that it would be governed by the standard terms applicable to foreign central banks and governments. The CPA, as the entity temporarily governing Iraq, controlled the CBI, and the CBI, acting through Ambassador Bremer and those he authorized, controlled the DFI Account during the period the CPA existed (the CPA Control Period, *i.e.*, until June 28, 2004) consistent with UNSCR 1483. Consistent with UNSCR 1483, the account was also made subject to being audited by independent public accountants approved by the International Advisory and Monitoring Board.

The DFI Account was funded from three principal sources. The first deposit into the DFI occurred on May 28, 2003, and consisted of the \$1 billion specified in paragraph 17 of UNSCR

⁶ 12 USC § 358. Although the FRBNY has the authority, with the approval of the Board, to open and maintain an account for any foreign bank, including foreign commercial banks, as a matter of policy it only opens and maintains accounts for foreign central banks, monetary authorities, and international organizations in which the United States participates. The FRBNY has over 200 such account relationships and maintains over \$1.3 trillion in foreign assets.

1483. These were primarily unencumbered funds held by the United Nations at the JP Morgan Chase Bank as part of the U.N. "Oil for Food" program. (The "Oil for Food" funds were proceeds from Iraqi oil sales held by the United Nations under a previous program.) During the CPA Control Period, there were a total of 10 transfers of "Oil for Food" funds to the DFI Account, for a combined total of \$8.1 billion. (The U.N. also transferred \$120 million in non-Oil for Food funds, bringing the total transfers from the U.N. to the DFI Account during the CPA Control Period to \$8.22 billion.) Second, pursuant to U.N. Security Council Resolution 1483, all proceeds from export sales of Iraqi petroleum, petroleum products and natural gas were deposited into the DFI Account, less 5 percent that was deposited into a U.N. Compensation Fund for war reparations related to the First Gulf War.⁷ During the CPA Control Period, approximately \$11.42 billion in Iraqi Oil Proceeds were deposited into the DFI. The third source of funds was international donations and the deposit of Iraqi assets that were frozen by various countries in the early 1990's. During the CPA Control Period, a total of approximately \$1.12 billion in such blocked assets and donations from around the world had been deposited into the DFI Account, including the \$210 million in U.S. Vested Funds discussed above.

As the CPA was about to terminate and transfer governmental authority to the Interim Iraq Government, Ambassador Bremer, in a letter to the FRBNY dated June 15, 2004, advised

⁷ To implement this U.N. mandate, the Iraqi State Oil Marketing Organization required all purchasers of Iraqi oil to pay the purchase price into a "Central Bank of Iraq/Oil Proceeds Account" (the "Oil Proceeds Account") that the FRBNY opened pursuant to a request by Ambassador Bremer, acting on behalf of the CBI. Letter to Dino Kos, FRBNY Executive Vice President, from Ambassador Bremer, dated June 7, 2003. USG 002272-2273. As funds were paid into the Oil Proceeds Account, the FRBNY automatically transferred 5% of those funds to the U.N. Compensation Fund on the books of JP Morgan Chase Bank and transferred the remaining 95% to the DFI Account.

the FRBNY that, effective June 30, 2004, Ambassador Bremer's authority over all CBI accounts, including the DFI Account, would be transferred to the Governor of the CBI, Dr. Sinan Al-Shabibi, and such other persons as the Governor might designate. Letter to Dino Kos, FRBNY Executive Vice President, from Ambassador Bremer, dated June 15, 2004. Since June 30, 2004, the CBI has exercised exclusive authority over the DFI Account.

III. Management and Use of Funds.

Although the funds available for the CPA's use came from four principle sources (*e.g.*, U.S. Appropriated, Vested, and Seized Funds, and the DFI), it employed only two different, albeit similar, procedures for the use of these four funds: one for Appropriated, Vested, and Seized Funds, and the other for the DFI. The initial steps of both procedures, however, were the same.

First, an accounting and classification system was established. Second, each program or project and its corresponding requirements went through a process of approval. The CPA Program Review Board (PRB) reviewed proposed Iraq relief and reconstruction program and project requirements and recommended their approval or disapproval to the Administrator of the CPA. The CPA Administrator approved, via serial numbered allocation documents, the particular source of funds for the projects. Third, the funding for the project had to be allocated and approved. As we discuss below, this third step for the allocation and approval of funding differed depending on the source of the funds. Fourth, the specific contract requirements for the project had to be developed, and the contract awarded. With each contract, there was an accounting process that covered the commitment and obligation of the funds, which differed depending on the source of the funds. The contract would be performed, and the contractor

submitted its invoices to the CPA. Finally, payment was made in accordance with the funding allocation that had been approved before the contract had been awarded. The mechanics of payment depended on the source of the funds.

A. Use of Vested and Seized Funds

The United States Army and its Standard Finance System (STANFINS) provided support to the CPA to account for and to disburse Vested and Seized Funds. *See* USG 02295-2302. The use of STANFINS had its impact fairly early in the disbursement process. After the CPA Administrator approved an Iraqi Relief and Reconstruction Project with a certain amount of funding and determined to use either Vested or Seized Funds, the CPA Comptroller sent the plan to the Office of the Secretary of Defense (Comptroller) (OSD(C)) to obtain funding authority for these funds, since authority to make spending decisions had been conferred on the Secretary of Defense. Obtaining funding authority essentially assured the CPA that the funds were available and could be obligated. Distribution of funding authority to the CPA required action by several offices within the U.S. Government beginning with the Office of Management and Budget which apportioned the authority to OSD(C). Distribution of funding authority in turn followed a path through the Army Budget Office, the Army Forces Command, the 3rd Army Comptroller, and eventually to the CPA Comptroller. Once the CPA Comptroller received the authority to direct the use of the funds, and thus was assured of the funds' availability, he entered that commitment of funds on the CPA's ledger and, using Army Form DA3953 Purchase Request & Commitment, notified the CPA's Contracting Office. It is important to note that funding authority for Vested and Seized Funds originated and came through the United States government.

The CPA contracting officer awarded contracts, thereby obligating the funds, and the

CPA Comptroller recorded the obligation of funds for that contract on the CPA's ledger. The obligation of funds was also recorded on the Army's Database Commitment Accounting System through STANFINS. When the contractor presented its invoice to the CPA, the method of payment was determined: either by electronic fund transfer (EFT), check, or cash. Vested Funds, but not Seized Funds, were paid via all three methods, EFT, check, or cash; Seized Funds were paid by check or in cash. CPA payments via checks and EFT were coordinated with the Finance Battalion which prepared the Standard Form 1034 and made the payment. Checks were U.S. Treasury checks. CPA cash payments were coordinated with and recorded by the Army's 336th FINCOM which also physically held the cash. No matter what the form of the payment, the CPA Comptroller updated the CPA's ledgers using the SF 1034.

B. Use of DFI Funds

During the CPA Control Period, funds were disbursed from the DFI Account at the direction of Ambassador Bremer or his designees at the CPA. Ambassador Bremer designated the DFI Manager of the CPA to direct the disbursement of the DFI. During the time the CPA acted as the governing authority, there were a total of four DFI Managers, all of whom were employees of the U.S. Government. Specifically, the CPA Comptroller and others on his staff acting for Ambassador Bremer would send disbursement instructions to the staff of the FRBNY Markets Group (which operates the foreign central bank accounts maintained by the FRBNY) via an e-mail protocol that was jointly developed by the CPA Comptroller's Office and the Markets Group staff. All disbursements from the DFI Account in New York were made in one of two

ways: (1) shipments of physical currency to the CBI via U.S. military transport⁸ in such amounts and at such times as directed by the CPA Comptroller's Office; or (2) electronic wire transfers to such parties, in such amounts, and at such times as directed by the CPA Comptroller's Office. During the CPA Control Period, the FRBNY made twelve shipments of currency to the CBI totaling approximately \$10.3 billion. Also during the CPA Control Period, the FRBNY executed approximately 1,100 electronic funds transfers (EFT's) totaling approximately \$6 billion.

The mechanics of the payment process for contracts funded through the DFI were quite straightforward and operated similar to any commercial bank account. When the contractor submitted its invoice, the Contracting Officer's Representative prepared a receiving report and submitted it to the CPA's DFI Manager. Depending on the contractor's requirements and other factors, the payment would be made either by wire transfer, check, or cash. In the case of wire transfer, the DFI Manager, pursuant to those protocols established with the FRBNY, sent instructions to the Bank, which made the payment in accordance with the instructions. At least two payments to Custer Battles under one of its contracts at issue here were made by EFT from the DFI, *i.e.*, the Iraqi Currency Exchange (ICE) contract, discussed below. In the case of payment by cash or check, those funds were maintained in the CBI, where they had been transported from New York. The DFI Manager either wrote a check to the contractor or sent cash payment instructions to the CBI. The CBI then withdrew the cash and paid the contractor with the use of a CPA Form 1034. No matter which method of payment was employed, the DFI

⁸ More specifically, the currency was transported via an armored carrier under private contract to an Air Force base, where it was released to specific U.S. military officers designated to the FRBNY by the CPA Comptroller's Office. The currency was subsequently flown via U.S. military transport to Baghdad International Airport and then transferred to the vaults of the CBI.

Manager updated the DFI Account records maintained by the CPA.

IV. The CPA's Contract with Custer Battles, LLC.

The CPA entered into two prime contracts with Custer Battles, LLC – one, the Baghdad International Airport (BIAP) contract, and two, the Iraqi Currency Exchange (ICE) contract. Each of these contracts was governed by CPA's Memorandum No. 4, Contract and Grant Procedures Applicable to Vested and Seized Iraqi Property and the Development Fund for Iraq, which was adopted by Ambassador Bremer on August 20, 2003. Although CPA Memorandum No. 4, defines "Iraqi Funds" as a term of art,⁹ it does not reflect the legal status of those funds, and that definition has no legal consequences here. CPA Memorandum No. 4 also included Appendix B, Standard Terms and Conditions for Solicitations and Contracts in Excess of \$5,000, which were incorporated into each contract and specified, at paragraph 40,

Source of Funds. The obligation under this contract is made with Iraqi Funds, as defined in CPA Memorandum Number 04, dated August 19, 2003. No funds, appropriated or other, of any Coalition country are or will be obligated under this

⁹ Section 3, Paragraph 8 of CPA Memorandum No. 4 defines "Iraqi Funds," as Funds under the control of the Authority consisting of (a) proceeds from Iraqi state-owned property that has been vested or seized in accordance with applicable law and made available to the CPA to assist the Iraqi people and assist in the reconstruction of Iraq; and (b) funds in the Development Fund for Iraq, the establishment of which is noted in Resolution 1483 (2003)."

Memorandum No. 4 further provides that

As used in this memorandum, "Iraqi Funds" do not include funds provided through the appropriations process of Coalition member governments (for example, funds provided directly to the CPA by the governments of the United States or the United Kingdom).

USG 001302; *see also*, USG 001222-1228 (UNSCR 1483), section 3, ¶ 8. Similarly, Appendix D of CPA memo 4, dated August 2003, on page D-1 states: "Obligations under contracts with Iraqi Funds will be satisfied only with Iraqi Funds." USG 001329.

contract. [Bold in original]. USG 001316-001327.

A. The BIAP Contract. The BIAP contract was initiated as a one month letter contract for July, 2003, USG 002098-002103, which was extended for another month by an additional letter contract, until the contract was definitized on August 31, 2003. The final BIAP contract, CPA Contract Number DABV01-03-C-0016, was a firm fixed price contract in the amount of \$16,480,000 for a period of performance through June 30, 2004. USG 022096-002097. The Program Review Board approved \$14.8 million of Vested Funds and \$2 million of funds from the Iraqi Ministry of Transportation on August 6, 2003. USG 002053-002054. The initial payment to Custer Battles was paid with Seized Funds in the amount of \$2,000,000 which was subsequently collected from the Iraqi Ministry of Transportation as reimbursement. USG 002108-002114. Most of the remaining payments were made from Vested Funds, but there is some indication that certain additional payments may have been made from Seized Funds.¹⁰

B. The ICE Contract. The ICE contract was competitively awarded to Custer Battles based on price. Custer Battles was the low bidder. USG 001931. Originally, there was only Contract Line Item Number (CLIN) 0001 for \$6,801,550 (later increased to \$12,636,087.50) for time and materials to be paid with DFI. Subsequently, the contract was modified to include CLIN 0002 for \$3,000,000 also for time and materials and was to be paid with Seized Funds.¹¹

¹⁰ See USG 002115-002122 (Aug. 2003 payment); USG 002123-002129 (Sept. 2003 payment); USG 002130-2141 (Oct. 2003 payment); USG 002142-2150 (Nov. 2003 payment); USG 002151-002154, 2159-2161, 2165-2171, 2176 (Dec. 2003 payment); USG 002177-2191 (Jan. 2004 payment); USG 002193-002201 (Feb. 2004 payment); USG 002202-2209 (Mar. 2004 payment); USG 002210-2217 (April 2004 payment); USG 002218-2233 (May 2004 payment); USG 002234-002252 (June 2004 payment).

¹¹ The Program Review Board records indicate that the intent was to reimburse the payment of Seized Funds with funds from the DFI, but the reimbursement never occurred.

USG 001918, 001938-1939, 001941. The accounting classification routing number (ACRN) for CLIN 0002 accounting data indicates that CLIN 0002 should be paid with Seized Funds. USG 001938-1939.

CLIN 0002 of the contract was actually paid before any payments were made for CLIN 0001. CLIN 0002 was paid in full to the order of "CUSTER BATTLES LEVANT" the day the contract was signed (August 27, 2003) by means of U.S. Treasury check No. 8551 96365335 in the amount of \$3,000,000.00. Payment of CLIN 0002 came from Seized Funds and was accounted for under a Seized Funds account on the books of the Treasury. USG 001961-1964, 001969. All payments for CLIN 0001 on the ICE contract were paid using DFI Funds.¹² See USG 001970-1979 (Sept. 2003 payment); USG 001980-001996 (Nov. 2003 (1) payment); USG 001998-002003 (Nov. 2003 (2) payment). Thus, it appears that the ICE contract was paid with funds from two sources: DFI Funds for CLIN 0001, and Seized Funds for CLIN 0002.

THE GOVERNMENT'S POSITION

The Court has framed the issue as whether the False Claims Act applies to false claims presented to the Coalition Provisional Authority in Iraq. In this case, that determination hinges

¹² on October 22, 2003, the CPA's Chief Financial Officer, in a memorandum on the Availability of Funds which is part of the CPA's contract file, stated,

This certifies availability of funding from the Development Fund for Iraq (DFI) for PRB 440 / Allocation Request # 17, Ministry of Finance (Bank Note Exchange) for Contract # DAB01-03-C-0013. Original amount available from DFI was \$6,801,550.00, amount now available from DFI is \$12,636,087.50. Total contract is now in the amount of \$15,636,087.50 of which \$3,000,000.00 was funded from Vested Funds.

This last identification was apparently in error; the \$3 million payment in fact came from Seized Funds.

on two questions: (1) whether Custer Battles's alleged false claims for payment were presented to an officer or employee of the U.S. Government, and (2) whether Custer Battles's alleged false claims were to obtain money or property to be paid out, provided or approved by the United States. Addressing these questions requires a close examination of the money used to pay Custer Battles's claims, the identity of the persons to whom the claims were presented, and relevant FCA law. Our discussion of these issues below is solely for the purpose of determining the applicability of the FCA to claims presented by Custer Battles under its two contracts with the CPA that are at issue in this litigation, and not for any other purpose.

I. The False Claims Act

The FCA is the government's major tool for combating fraud against the government. It was first enacted in 1863 to combat fraud committed by those supplying the Union Army with goods and services during the Civil War. The FCA is quintessentially designed and equipped to root out war profiteering and fraud in times of war. As the Supreme Court described it,

The False Claims Act was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war.

United States v. McNinch, 356 U.S. 595, 599 (1958).

Given this origin, the major role United States officials played in the CPA, and the importance of rooting out any fraud that may have occurred during the occupation of Iraq, the United States sees the FCA as an important tool that should be available for any false claims presented to the CPA, in order that funds may be recovered to support reconstruction in Iraq.

Any dollar lost to fraud increases the burden on the U.S. taxpayer, who is continuing to be called on to provide major funding for Iraq.

Consideration of whether the FCA applies to false claims presented to the CPA must be governed by the language of the statute. The False Claims Act imposes liability on

[a]ny 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.

31 U.S.C. § 3729(a)(1).

Thus, in barest terms, if a person knowingly presents a false claim to a government official, or if the person causes another to present a false claim to a government official, the FCA is violated. The statute requires two elements: (1) presentment to a government officer or employee, and (2) a knowingly false claim.

A. Presentment to a Government Officer or Employee

The claim under question can be presented directly to a government official acting in his official capacity.¹³ A defendant can also cause a false claim to be presented to the government official by someone else. A common example of a defendant violating the FCA by causing another to present the false claim occurs when a defendant subcontractor presents false claims to the government's prime contractor which in turn taints the claim presented by the prime to an

¹³ "It now appears to be settled that when Congress uses the term 'employee' in a statute without defining it, the courts will presume that Congress intended to describe 'the conventional master-servant relationship as understood by common-law agency doctrine.' *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23, 112 S.Ct. 1344, 1347-48, 117 L.Ed.2d 581 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-740, 109 S.Ct. 2166, 2172, 104 L.Ed.2d 811 (1989))." *Cilecek, v. Inova Health System Services*, 115 F.3d 256, 259 (4th Cir. 1997).

officer or employee of the U.S. *See, e.g., United States v. Bornstein*, 423 U.S. 303 (1976).

B. A Knowingly False Claim.¹⁴

The other statutory requirement for liability under the FCA is that a "claim" be presented, in the words of section 3729(a)(1), "for payment or approval." Until amendments to the FCA in 1986, there was no statutory guidance on what a "claim" was. The Supreme Court has given the term "claim" the broadest interpretation:

This remedial statute reaches beyond "claims" which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money.

United States v. Neifert-White, 390 U.S. 228, 233 (1968). Moreover, the Court concluded that

the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.... [T]he Court has consistently refused to accept a rigid, restrictive reading.

Id. at 232.

The Court of Appeals for the Fourth Circuit, after reciting these statements from *Neifert-White*, has adopted a broad interpretation of the term "claim."

The test for False Claims Act liability distilled from the statute and the [cases] is (1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit monies due (i.e., that involved a "claim").

Harrison v. Westinghouse Savannah River Company, 176 F.3d 776,788 (4th Cir. 1999).

In 1986, Congress added a subsection to the FCA to include explicitly within the meaning of "claim" those demands for payment made on non-governmental entities if the United States

¹⁴ In the context of this brief, we are concerned with the nature of the thing presented to the government officer or employee, *i.e.*, whether it constitutes a "claim" within the meaning of the FCA; we are not concerned here with its falsity or the knowledge of its falsity.

"provides any portion of the money or property which is requested or demanded."¹⁵ Of course, the definition contained in section 3729(c) of the FCA is not an exclusive definition; indeed, it specifies that it merely "includes" such requests or demands where the United States provides any portion of the money or property. The FCA had functioned for 123 years without the need of a definition to include claims where the United States itself pays out all of the money claimed.¹⁶

The use by Congress of the term "provides" in section 3729(c) should also be read broadly and in concert with and to illuminate the language of the Supreme Court in *Neifert-White* that the FCA reaches "all fraudulent attempts to cause the Government to 'pay out' sums of money." The dictionary definition of "provide" fully comports with a broad meaning of claim. It includes the meaning "to make ready; prepare" and "to make available" (*American Heritage Dictionary of the English Language*, Houghton Mifflin Co., Boston, 1976) and "to make arrangements for supplying means of support, money, etc." (*Random House Dictionary of the*

¹⁵ The entire subsection, 31 U.S.C. § 3729(c), reads as follows:

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.

¹⁶ Indeed, even before the addition of section 3729(c), the FCA had been held to apply to claims that were not entirely funded by the U.S. Government. The Supreme Court in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), ruled that the FCA had been violated where:

[a] large portion of the money paid to the respondents under these contracts was federal in origin, granted by the Federal Public Works Administrator, an official of the United States. [] Payment was then made from a joint construction bank account containing both federal and local funds. *Id* at 542-43.

English Language, Unabridged Edition, New York, 1966). Synonyms are: "deliver, dispense, feed, furnish, hand, hand over, supply, transfer, turn over, bestow, devote, donate, give away, hand out, present." (*Merriam-Webster Online Thesaurus*, found at: <http://www.merriam-webster.com/cgi-bin/thesaurus?book=Thesaurus&va=provide&x=17&y=17>). These uses further indicate that the term "claim" should be read broadly to include those factual instances where the United States "pays out" or "provides" money or property.

There is no explicit requirement in the statute that requires that the "claim" be for money or property that is owned by or titled in the United States. Interpreting the use of the term "claim" broadly fully encompasses all situations where the United States "pay[s] out sums of money" or "provides ... money or property" from resources (including financial and tangible property) within its legal possession, control and administration or in which it has an interest. The term "claim" is not limited or restricted to the United States's own money in the public fisc which requires Congressional appropriation to be withdrawn from the Treasury.

Courts have applied this principle in factual situations where the United States has the legal right to control and administer the money or property of entities other than the United States. For instance, courts have found FCA liability (under section 3729(a)(7) of the FCA) where oil and gas producers have underpaid royalties for oil and gas produced on Indian land and the royalties belong to the Indians, but the Department of Interior collects the royalty payments on behalf of the Indians. *See, United States ex rel. Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039, 1047 (10th Cir. 2004); *United States ex rel. Koch v. Koch Industries, Inc.*, 1995 WL 812134 (N.D. Okla. 1995). Courts have also found that the FCA is violated when false claims are presented to the Department of Defense by contractors selling military goods under the

Foreign Military Sales Program even though the foreign country transfers its own money to the U.S. Treasury to pay for the purchases. *See, e.g., United States ex rel. Campbell v. Lockheed Martin Corp.*, 282 F. Supp. 2d 1324 (M.D. Fla. 2003); *United States ex rel. Hayes v. CMC Electronics, Inc.*, 297 F. Supp. 2d 734 (D. N.J. 2003).

Thus, the specific issue to be determined is whether the money which defendants requested from the CPA via their invoices under these two contracts was to be paid out, provided or approved by the United States Government. The answer lies in the nature of the funds used to fund these two contracts. The second issue is whether the claims were presented to U.S. Government officials. If defendants presented or caused to be presented to U.S. Government officials claims for money that were to be paid out, provided or approved by the United States, including money in which the U.S. had an interest or exercised some control, the False Claims Act applies. On the other hand, if false claims were not presented to U.S. Government officials or were to be paid with funds that the United States did not pay out, provide or approve, then the FCA would not apply to such claims.

The resolution of both the issue of whether the defendants' claims were presented to an officer or employee of the United States and the issue of whether the defendants' claims were to be paid out, provided or approved by the United States is intricately tied together in the legal nature and factual operation of the Vested, Seized, and DFI Funds.¹⁷ Thus, we discuss each type

¹⁷ No detailed discussion of Appropriated Funds is necessary here since no Appropriated Funds were involved with the funding of the two contracts at issue here. Of course, funds appropriated by Congress are clearly money or property that the United States pays out or provides. Any false claims presented to an officer or employee of the United States requesting or demanding such Appropriated Funds provided by the United States would violate the FCA. Thus, under the presentment analysis described in detail below, if false claims were presented to the CPA in connection with its operating expenses and which the CPA paid with the funds

of fund separately to analyze the two issues present here.

II. Vested Funds

Vested Funds are funds of the United States. “Vesting” involves the transfer of ownership or title.¹⁸ By issuing the First and Second Vesting Orders, the President asserted claims of ownership over certain blocked Iraqi funds. The IEEPA recognizes this by its own terms, providing that “all right, title and interest in any property so confiscated shall vest ... in such agency or person as the President may designate,” and directing that such “interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States.” 50 U.S.C. § 1702(a)(1)(C). While the Vested Funds were held in the Special Purpose Account, they belonged to the United States; they no longer belonged to Iraq. *See, e.g. Smith v. Federal Reserve Bank of New York*, 346 F.3d 264 (2d Cir. 2003) (rejecting effort by judgment creditors of Iraq to attach Special Purpose Account because, upon vesting, title to the funds in that account passed to the United States); *accord, Acree v. Snow*, 78 Fed. Appx. 133 (D.C. Cir. 2003) (adopting the reasoning of the Second Circuit in a case raising the same issue). As a matter of domestic law and as two Courts of Appeals have held, the United States had full and complete legal control and authority to administer Vested Funds. The Army, Department of Defense, OMB, and the Treasury may have been acting at the request of the CPA in making payments from the Vested Funds, but these payments were most

appropriated by Congress for the CPA's Operating Expenses in the Emergency Supplemental Appropriation, the FCA would apply to such false claims.

¹⁸ *See, e.g. BLACK'S LAW DICTIONARY* 1557 (7th ed. 1999) (defining “vest” as “1. to confer ownership of (property) upon a person. 2. To invest (a person) with the full title to property.”); *see also, Propper v. Clark*, 337 U.S. 472, 483-84 (1949) (vesting is a permanent transfer of title).

certainly paid out, provided or approved by the U.S. Government.

Defendants argue that the holding of *United States ex rel. Bustamante v. United Way/Crusade of Mercy, Inc.*, 2000 WL 690250 (N. D. Ill. 2000), supports their view that in some circumstances funds held in the Treasury are not U.S. funds.¹⁹ As we have seen, however, whether the funds claimed are or are not funds to which the U.S. claims title is not the decisive test for a "claim." The test is whether the funds are paid out, provided or approved by the government – whether the funds are ones in which the U.S. has an interest or are under the authority, control and management of the government. Certainly, funds owned by the United States are under the government's control and management; they are paid out, provided or approved by the government. The short answer to defendants' *Bustamante* argument here with regard to Vested Funds is that Vested Funds are quintessentially funds owned by and titled in the United States. Thus, Vested Funds, which were owned and titled in the U.S. and were controlled and managed by the U.S., were certainly paid out, provided or approved by the United States.

In *Bustamante*, the relator argued that the United Way had violated the FCA by making false claims to federal employees to obtain payroll deductions for charitable contributions. Although the *Bustamante* Court concludes that no federal funds were used for the contributions, only federal employees' personal funds, that was not what the Court relied on. Instead, the court dismissed the case because it concluded that federal employees there were not "recipients" as that term is used in the definition of claim within section 3729(c) of the FCA. Thus, the federal employees in *Bustamante* were not acting in their official capacity when the United Way

¹⁹ Defendants' Rebuttal Memorandum in Support of Motion to Dismiss, December 14, 2004, p. 8, and Defendants' Motion for Summary Judgment, January 21, 2005, pp. 30, 34.

allegedly presented them with false claims for charitable contributions. Rather, the employees were acting in their personal, individual capacities with regard to their personal salaries in which the federal government no longer had an interest.

The facts here differ from *Bustamante* in two ways. First, the facts do not implicate the issue of whether the CPA or the government officers or employees were "recipients" within the meaning of the FCA because, here, Custer Battles caused its claims to the CPA to be presented to an officer or employee of the United States or to a member of the Armed Forces of the United States. In *Bustamante*, the claims were presented to the federal employees in their private, personal capacities. Second, defendants' invoices on the BIAP contract were paid out, provided or approved by the United States, in this instance using U.S. money, Vested Funds. In *Bustamante*, the individual government employees controlled their individual salary funds, and it was the individual employees who directed the payment or provision of their contributions; the United States did not control, approve or provide the contributions.

It practically goes hand in glove that if the United States pays out, provides or approves the money defendants claimed, defendants' claims were ultimately presented to an officer or employee of the United States Government or a member of the Armed Forces of the United States. Here, defendants' claims were ultimately presented to such officials: members of the U.S. Army or other officers or employees of the Department of Defense. When the Army paid out those Vested Fund moneys, payment was based on claims presented to the Army by the CPA. The CPA took its actions based on invoices submitted by Custer Battles under its BIAP contract with the CPA. Thus, in the words of the FCA, Custer Battles caused claims to be presented to the Army. The payments to Custer Battles for its claims under the BIAP contract were made

from Vested Funds by the U.S. to the defendants. Defendants' claims under the BIAP contract with the CPA were claims on the U.S. Treasury no less than if the BIAP contract had been directly with the U.S. Army for Appropriated Funds.

Defendants' reliance on *United States ex rel. Totten v Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) is also misplaced. That case involved allegations that the defendant violated the FCA by presenting false claims to Amtrak in connection with a contract for which Amtrak had received a federal grant. The issue there as framed by the court was "whether [a False Claims Act] plaintiff may prevail against a defendant who submits a false 'claim' to a federal grantee (such as Amtrak), without presenting evidence that the claim was ever actually submitted to the U.S. Government." *Id.* at 492. In this case, however, the facts show that claims presented by Custer Battles to the CPA were, in fact, presented to the U.S. Army for payment from Vested Funds, and payment was made by the U.S. Army. Moreover, the CPA was re-supplied with Seized Funds as required to meet the monetary needs of the CPA in paying its contractors. Although the United States continues to believe that *Totten* was wrongly decided, its holding is inapposite here.²⁰

²⁰ The United States submits that the majority's decision in *Totten* is erroneous for the reasons cogently set forth by Judge Garland in his dissenting opinion. In particular, the majority's ruling that Sections 3729(a)(1) and (a)(2) apply only where the United States reimburses a grantee for the prior payment of a false claim is inconsistent with the plain language of 31 U.S.C. § 3729(c), which defines a claim to include not only a request for money where "the Government will reimburse such . . . grantee . . . for any portion of the money . . . requested," but also where the Government "provides any portion of the money . . . which is requested." The latter phrase retains independent meaning only if it is properly construed to cover the situation where the Government provides money to a grantee upfront, and that money then becomes the target of a false claim. The majority's alternative interpretation of this latter phrase - that it was added in 1986 simply to impose liability where the Government reimburses a false claim by paying money directly to a subgrantee, 380 F.3d at 493 - is grammatically defective, *see id.* at 511 (Garland, J., dissenting), purports to redress a problem that Congress never identified, and

Thus, defendants' claims for Vested Funds under the BIAP contract may violate the FCA if the claims are shown to have been knowingly false because those claims were for money or property to be paid out, provided or approved by the United States and they were ultimately presented to an officer or employee of the United States government.

III. Seized Funds

The nature of Seized Funds differs somewhat from Vested Funds in that there was no Executive Order, issued pursuant to federal statute, specifically "vesting" ownership of the Seized Funds in the United States. Rather, under the laws and usages of war, the occupying force may take possession and control over cash that is the property of the occupied State, which in this case would include taking possession over the Seized Funds and which implicitly would include the authority to administer and manage those Funds. Art 53 of the Hague Regulations, Hague Convention Annex, 36 Stat. at 2308.

The laws and usages of war impose some restrictions on the purposes for which such Seized Funds may be used, but the funds remain subject to the control of the occupying force. Seized Funds were money or property over which the United States has control and authority to administer and manage.²¹

fails to account for the "causes" to be presented or made language in Sections 3729(a)(1) and (a)(2), which already fully covered this situation.

²¹ Despite the lack of a specific vesting order with regard to the Seized Funds and General Franks's Freedom Message to the Iraqi People that, "Iraq and its property belong to the Iraqi people and the Coalition makes no claim of ownership by force of arms," there, nevertheless, is some basis to conclude that the United States acquired title to funds seized by U.S. Armed Forces by operation of international law. With respect to the type of property making up the Seized Funds, *i.e.*, public movable property, "[w]riters have generally held that title . . . passes from the former owner to the captor upon effective seizure, or, in other words, when the property is placed under guard and is in the 'firm possession' of the captor, or at the latest within 24 hours after lawful seizure by the invader." Von Glahn, *The Occupation of Enemy*

In spite of the absence of a vesting order, Seized Funds were legally subject to the control and management of the occupying forces. Under international law, the United States was an occupying power in Iraq during the time relevant to this litigation. In this instance, the applicable international law consists of customary international law, international conventions, and U.N. Security Council Resolutions. Each source of law articulates both rights and responsibilities on the United States (and perhaps also on other members of the Coalition). Article 53 of the Hague Regulations of 1907 provides that

[a]n army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

Article 53 technically does not apply as a matter of treaty law, since Iraq is not a party to the Hague Convention (IV) Respecting the Laws and Customs of War on Land. ("The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention." Art. 2, Hague Regulations.) Nevertheless, the Hague Regulations are generally thought to reflect customary international practice.

Moreover, the United States and the United Kingdom in their joint letter dated May 8, 2003, to the U.N., acknowledged their obligations under international law. "*The States*

Territory, p 181; *see also id.* at p. 183 ("In all instances in which a belligerent occupant lawfully seizes enemy movable public property, he has a complete and legal right to use such property, remove it from the occupied territory, or consume it, if such is possible."). While it is true that CPA Orders and Regulations stated that seized Iraqi property would be held "on behalf, and for the benefit of the people of Iraq" or "in trust and for the use and benefit of the people and benefit of Iraq," *E.g.*, CPA Order No. 4, s. 3, such statements are not inconsistent with U.S. legal title to property seized by U.S. forces.

participating in the Coalition will strictly abide by *their* obligations under international law."

[emphasis added]. USG 001220-1221. Throughout the letter, the two countries consistently use the phrase, "The United States, United Kingdom, and Coalition partners" to describe on whom the obligations lie and the actions they will take in Iraq. The United Nations responded by noting in UNSCR 1483 the joint letter of May 8, 2003, from the United States and the United Kingdom,

and recognizing the specific authorities, responsibilities, and obligations under applicable international law *of these states as occupying powers* under a unified command ("the Authority"). [Emphasis added.]

UNSCR 1483 then included the following specific provision regarding international law:

5. *Calls upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.

USG 001222-1228. The salient point is that the obligations of international law run to States. The existence of the CPA did not divest the United States of its rights and obligations as an occupying power in Iraq; to the extent that the CPA and its personnel exercised authority in Iraq it was authority that derived from the authorities of the occupying States as supplemented by U.N. Security Council resolutions.

Since the U.S. Forces operating as part of the Coalition were instrumental in seizing and documenting the seizure of the funds, and the United States Army held possession of them at Camp Arifjan, Kuwait, the Seized Funds were under the control, administration, and management of the United States for purposes of the FCA. The U.S. Army maintained both physical control of the Seized Funds and budgetary and accounting control. Thus, defendants' claims for Seized Funds under the BIAP and ICE contracts were paid out, provided or approved by the United States.

As with Vested Funds, it is clear that Custer Battles's claims were ultimately presented to "an officer or employee of the United States Government or to a member of the Armed Forces of the United States." The Seized Funds themselves were physically under control of the Army's 336th Finance Command at Camp Arifjan, Kuwait. Claims to be paid with Seized Funds were ultimately presented to members of the U.S. Army, who employed the Army's STANFINS system to account for the funds and their disbursement in accordance with the requirements of OMB and the U.S. Treasury.

Thus, defendants' claims for Seized Funds under its two contracts may violate the FCA if the claims are shown to have been knowingly false because those claims were for money or property subject to a U.S. interest or control to be paid out, provided or approved by the United States and they were ultimately presented to an officer or employee of the United States government.

IV. Development Fund for Iraq

The DFI differs substantially from Vested and Seized Funds in that the funds making up the DFI involved no accounting on the books of the U.S. Treasury and, as such, presents a closer question as to whether they were covered by the FCA. There was no involvement by the U.S. Army or its STANFINS system. Moreover, Congress was not involved in any way in the establishment of the DFI or in the sources of funding for the DFI as it was with the Vested Funds. Another distinction with Vested Funds is that the United States has never claimed title or ownership of the DFI. (To the extent that title to Seized Funds was transferred to the United States upon seizure by operation of international law, DFI differs from Seized Funds in this aspect as well.) The funds in the DFI have always been Iraqi funds.

In other respects, however, the DFI is, by its nature, very similar to Seized Funds in that by virtue of international law, the United States through its role in the creation and operation of the CPA had certain discretion with respect to the expenditure of DFI funds and held legal authority to administer and pay out the funds. Thus, the United States believes that claims made to obtain money from the DFI qualify as claims within the meaning of the FCA.

International law, as well as UNSCR 1483, imposed particular rights and responsibilities that the Geneva and Hague Conventions do not address. One of these was responsibility for the management of this unique creation, the DFI. Although paragraph 14 of UNSCR 1483 states that "funds in the Development Fund for Iraq shall be disbursed at the direction of the Authority," it is clear from the text of 1483, read as a whole, that responsibility for the DFI was placed on "these states as occupying powers under unified command," not on a non-state third party that would not be bound by the terms of the resolution. As we discussed above, international law, under the law and usages of war and under the U.N., generally places rights and responsibilities of occupying powers on nations, not their joint administrative creations.

Of course, at the time of the adoption of UNSCR 1483, it was clearly established that Ambassador Bremer was the head of "the Authority," and that Ambassador Bremer was a U.S. Government official and that he acted at the direction of and reported to the President through the Secretary of Defense. On May 9, 2003, when the President appointed Ambassador Bremer as his envoy, he gave him the "authority to oversee the use of USG appropriations in Iraq, *as well as Iraqi state- or regime-owned property that is properly under U.S. possession and made available for use in Iraq to assist the Iraqi people and support the recovery of Iraq.*" [Emphasis added.] USG 001253-1254. When the U.N. Security Council established directions and responsibilities

on "the Authority," those directions and responsibilities were placed on the United States as an occupying power. The fact that the United States shared responsibility for the DFI with the U.K. and other Coalition partners does not negate the fact that the U.S., through Ambassador Bremer and his designees at the CPA, executed this responsibility and controlled and administered the DFI.

In this respect, the nature of the DFI is similar to the nature of the Seized Funds: both were controlled, administered, managed and disbursed by the United States. The DFI includes in part public money or property of Iraq, most of which was heavily regulated by U.N. Security Council resolutions imposing economic sanctions on Iraq. When the U.S. Armed Forces and other Coalition Forces occupied Iraq territory, the Security Council expressly directed in UNSCR 1483 that the Iraqi "Oil for Food" money in the existing U.N. escrow account, plus any revenues from the future sales of Iraqi petroleum products be deposited into the DFI and be disbursed by the Authority for the benefit of the Iraqi people, in consultation with interim Iraqi authorities. The U.N. Security Council also mandated that other frozen Iraqi monies be deposited in the DFI for the same purpose. The Security Council's mandate that "the Authority" was to direct disbursement of DFI funds was in effect a directive to the United States (and to the United Kingdom and other Coalition states) as occupying powers; the U.S. Commander of Coalition Forces in Iraq had created the Authority as an administrative mechanism for the United States and coalition partners to fulfill their responsibilities as occupying powers in control of Iraq and its resources, to include providing for the welfare of the Iraqi people. Thus, by operation of international law and particularly UNSCR 1483, the United States had certain rights, interests and responsibilities over the fund in the DFI.

It should make no difference that these DFI funds were maintained outside the Treasury at the FRBNY. Defendants point to the holding in *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176 (3rd Cir. 2001), where the Court upheld the dismissal of a FCA civil action involving funds of a bankruptcy estate over which the U.S. Trustee and the U.S. Bankruptcy Court had control.²² In *Hutchins v. Wilentz*, the defendant law firm was alleged to have presented false claims to the Bankruptcy Court and Trustee for inflated legal fees and costs. The fees were to be paid out of the bankrupt debtor's estate. The Court of Appeals first noted that "it is undisputed that the United States Trustee and the United States Bankruptcy Courts are government agents for purposes of the False Claims Act." *Id* at 182. Thus, the presentment requirement of the FCA was clearly met. However, the Court also noted that the relator failed expressly to allege that the United States could suffer any potential economic loss because the relator failed to demonstrate the U.S. had any interest in the debtor's bankruptcy estate controlled by the U.S. Trustee. Here, in contrast to the facts in *Hutchins v. Wilentz*, the United States had an interest in the DFI to use those funds to provide for the reconstruction of Iraq and for the welfare of the Iraqi people. That interest was imposed by operation of international law on the United States as an occupying power and particularly by the provisions of UNSCR 1483.

The United States through the CPA had legal control of the DFI under UNSCR 1483 and legal rights and responsibilities as an occupying power to provide for the welfare of the Iraqi people. To the extent contractors fraudulently frustrated the United States in the fulfillment of its rights or responsibilities as an occupying power, the United States should be able to use its laws,

²² Defendants' Rebuttal Memorandum in Support of Motion to Dismiss, December 14, 2004, p. 11, and Defendants' Motion for Summary Judgment, January 21, 2005, pp. 30, 34-35.

including the False Claims Act, to redress and deter that kind of conduct.²³

The United States also paid out, provided or approved the funds out of the DFI in the sense that Ambassador Bremer and other U.S. officers or employees assigned to the CPA controlled all disbursements from the DFI. In order to pay claims which had been presented claiming DFI funds, the United States, through Ambassador Bremer and its other employees, had to take some action to pay, provide or approve payment of the funds.

Ambassador Bremer had the authority to pay out the DFI funds (or to refuse to provide them). The United States, under UNSCR 1483, had control over the DFI "working through the Coalition Provisional Authority," USG 001220-1221, and through Ambassador Bremer and the other U.S. Government employees. As such, it was the United States that paid out or provided the DFI funds in response to Custer Battles's claims for such funds. It also follows from the mechanics of actual disbursement, that claims for DFI funds were in fact presented to "an officer or employee of the United States Government or to a member of the Armed Forces of the United States" within the meaning of the FCA.

Thus, in our view, while perhaps a closer issue than with respect to Vested or Seized Funds, defendants' claims for DFI Funds under their ICE contract violate the FCA if the claims are shown to have been knowingly false because those claims were for money or property to be paid out or provided by the United States and they were ultimately presented to an officer or employee of the United States government.

²³ The legal control over the disbursement of DFI funds by the United States concluded with the assumption of authority by the Iraqi Interim Government on June 28, 2004. Any continued management of DFI funds by U.S. Government employees is pursuant to specific authority granted by the Iraqi Government. USG 002582-2584.

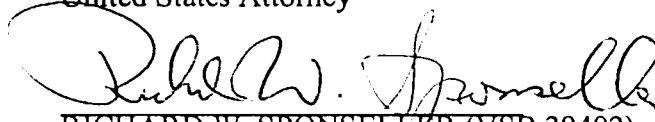
CONCLUSION

For the reasons stated above, the United States believes that Custer Battles's claims presented to the CPA under the BIAP and ICE contracts would violate the FCA if the claims are shown to have been knowingly false because those claims were for funds in which the U.S. had an interest or exercised certain dominion and were to be paid out, provided or approved by the United States and they were ultimately presented to an officer or employee of the United States government.²⁴

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²⁴ Given the extent of the issue as framed by the Court in its invitation to the United States, the United States takes no position in this brief on whether or not Custer Battles's claims were knowingly false within the meaning of the FCA. 31 U.S.C. § 3729(a).

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April 2005, I caused a true and correct copy of the foregoing

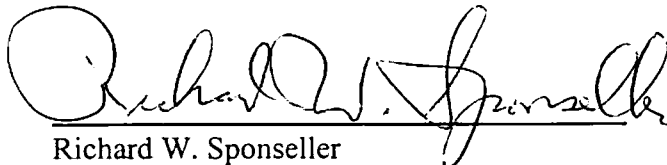
**BRIEF OF NON-PARTY THE UNITED STATES IN RESPONSE
TO THE COURT'S INVITATION OF DECEMBER 21, 2004**

to be served by facsimile to the fax numbers set forth below and by United States Mail, postage prepaid, and the 26 exhibits thereto to be delivered by overnight delivery separately on a CD ROM on:

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