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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE TERRITORY OF GUAM

10 UNITED STATES OF AMERICA)
11 *ex rel.* RAY SANCHEZ TOPASNA,)
12 Plaintiff,)
13 v.)
14 MARK S. SMITH (in both his official)
15 and personal capacities),)
16 Defendant.)

Case No. 15-CV-00040

MOTION FOR SUMMARY
JUDGMENT; MEMORANDUM
OF POINTS AND AUTHORITIES

17 COMES NOW, petitioner Mark S. Smith, by and through undersigned
18 counsel, and respectfully submits this motion for summary judgment or partial summary
19 judgment.

20 Respectfully submitted,
21 *s/Curtis Van de veld*

22 Dated: August 18, 2025

23 CURTIS VAN DE VELD
24 THE VANDEVELD LAW OFFICES, P.C.
25 *Counsel for Mark S. Smith*

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INTRODUCTION

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2 Defendant Mark S. Smith respectfully submits this motion for summary judgment
3 or partial summary judgment on the complaint in intervention, which alleges violations of
4 the False Claims Act (“FCA”), 31 U.S.C. § 3729 *et seq.*, for a purported fraud upon the
5 United States Department of Housing and Urban Development (“HUD” or “agency”) in
6 connection with its “Section 8” program. *See* Fed. R. Civ. P. 56. A few weeks ago, the
7 government filed its own motion for summary judgment. Doc. 121. The very admissions
8 in the government’s motion show that summary judgment should be entered in favor of
9 Mr. Smith.

10 In a strange twist, the government’s motion seeks summary judgment but never
11 even addresses materiality, a clear and critical element of the causes of action alleged under
12 the FCA. This glaring failure shows that the government’s motion is defective on its face,
13 and it has undoubtedly avoided that critical element because it cannot show any *material*
14 fraud that occurred. *See Universal Health Services, Inc. v. United States ex rel. Escobar*,
15 579 U.S. 176, 195 (2016); *United States ex rel. Zotos v. Town of Hingham*, 98 F.4th 339,
16 343-46 (1st Cir. 2024); *United States ex rel. Sorenson v. Wadsworth Brothers Construction*
17 *Company, Inc.*, 48 F.4th 1146, 1151-58 (10th Cir. 2022). Likewise, despite offering a
18 dizzying set of astronomical figures, the government’s motion glosses over the critical
19 damages element, which is also completely lacking in this case. *See Hendrix ex rel. United*
20 *States v. J-M Manufacturing Company, Inc.*, 76 F.4th 1164, 1173-74 (9th Cir. 2023).

21 While the government has attempted to portray this case as a brazen and
22 “cartoonish” fraud, Doc. 121 (at page 36), the reality is quite different. The government
23 likely knows this and therefore has resorted to oversized motions and the recitation of
24 exhaustive facts that never really strike at the heart of the matter. The bottom line is that
25 while there has been a dispute about whether Mr. Smith had a technical conflict under the
26 terms of the governing contracts and regulation, there has never been a dispute that he
27 provided the rental units and services that he was paid for, and he did not try to use his
28 position to get a better deal on his Section 8 contracts, which were originally executed long

1 3. As outside counsel for GHURA, Mr. Smith did not influence any important
2 decision, or any decision for that matter, with respect to the Section 8 program. Even if
3 being in a “position” to influence or being “capable” of influencing a decision were
4 somehow relevant, which it is not, David Sablan, the Chairman of the Board for GHURA
5 at the relevant time, has testified that Mr. Smith did not have the ability to influence
6 decisions on the Section 8 program. *See* Ex. A (attached to concise statement).

7 4. At around the same time that GHURA hired Mr. Smith, it also hired another law
8 firm to serve as “conflicts counsel” to handle matters where Mr. Smith may have a conflict.
9 *See* Ex. B (attached to concise statement).

10 5. The complaint itself admits that GHURA and HUD were aware of the potential
11 conflict involving Mr. Smith and yet continued to make payments. Doc. 55 (pages 7-8).
12 The government has admitted that GHURA was aware of a potential conflict as early as
13 July 2011. Doc. 122 (page 5-6). The government has also admitted that, even after Mr.
14 Smith transferred his properties to Glenn Wong, GHURA was aware as early as March
15 2012 that there was still a potential conflict. Doc. 122 (page 7-8).

16 6. Likewise, the government has admitted that HUD was aware that there was still
17 a potential conflict involving Mr. Smith and Mr. Wong as early as September 2012. Doc.
18 122 (page 10). In December 2012, GHURA released payments on the contracts despite
19 knowing about the potential conflict, and HUD was aware that GHURA had done so. Doc.
20 122 (page 11). In April 2013, GHURA submitted a waiver request to HUD, demonstrating
21 that HUD was aware of the potential conflict related to Mr. Smith, and payments on the
22 contracts still continued. Doc. 122 (pages 11-12). In June 2013, GHURA resubmitted the
23 waiver request, again making it clear to HUD that there was a potential conflict, and the
24 payments on the contracts still continued for several more months. Doc. 122 (page 12).

25 7. In 2017 and 2018, the government commenced administrative proceedings
26 against Mr. Smith based on the same allegations contained in the complaints. In the
27 administrative proceedings, HUD imposed assessments and penalties totaling \$735,372
28 without affording Mr. Smith a jury trial.

1 **ARGUMENT**

2 **I. The Court should grant judgment in Mr. Smith’s favor on the government’s**
3 **complaint in intervention under 31 U.S.C. § 3730 because it elected to pursue**
4 **penalties and assessments in administrative proceedings as an alternative remedy.**

5 The government has already chosen to seek civil penalties and assessments against
6 Mr. Smith in administrative proceedings. *See Mark S. Smith v. United States Department*
7 *of Housing and Urban Development*, Case No. 25-CV-00016 (petition for review of
8 administrative proceedings).¹ The government cannot also proceed under the FCA. *See* 31
9 U.S.C. § 3730(c)(5) (“the Government may elect to pursue its claim through any alternate
10 remedy available to the Government, including any administrative proceeding to determine
11 a civil money penalty”); *see also* 31 U.S.C. § 3730(e)(3).

12 The government had the choice of proceeding administratively, *or* proceeding in
13 this civil suit. *See Securities and Exchange Commission v. Jarkesy*, 603 U.S. 109 (2024).
14 It elected the former. Having done so, it cannot now also seek to punish Mr. Smith yet
15 again. If the Court determines that the government can go forward with this civil suit, then
16 it should grant Mr. Smith’s petition for review in Case No. 25-CV-00016 because the
17 administrative proceedings violated his Seventh Amendment right to a jury trial under
18 *Jarkesy*. In other words, if the government is going to seek further penalties against Mr.
19 Smith, then it must recognize that the administrative proceedings were conducted in
20 contravention of the Seventh Amendment under *Jarkesy*, and it is only entitled to an award
21 of such penalties after a jury determination. In short, in a case that is supposedly about
22 “double-dipping,” the government cannot double-dip.

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24
25 ¹ As discussed in the petition for review, HUD actually filed two administrative
26 complaints against Mr. Smith. Administrative Law Judge J. Jeremiah Mahoney entered a
27 consolidated order dated November 15, 2024 as to both complaints, imposing assessments
28 totaling \$532,872, and civil penalties totaling \$202,500 for a total penalty of \$735,372. On
or about February 11, 2025, Secretarial Designee Andrew Hughes issued a final Order on
Secretarial Review affirming that finding.

1 **II. The Court should enter judgment in Mr. Smith’s favor on all of the plaintiffs’**
2 **allegations because no false claim was made as he was not a “covered individual”**
3 **under the governing regulation and contract terms, and, in any event, the provision**
4 **was waived; alternatively, there was no false claim to support the plaintiffs’ demand**
5 **based on the payments for Mr. Smith’s legal services.**

6 Under traditional tools of interpretation, it is clear that Mr. Smith was not a
7 “covered individual” under the language in the contracts and corresponding regulation.
8 More than a decade’s worth of litigation has been based on the government’s desire to read
9 words into the contracts and regulation that simply do not appear. Because Mr. Smith has
10 never been a covered individual, there has never been a false and fraudulent claim in the
11 first place.

12 The regulation states:

13 **§ 982.161 Conflict of interest.**

14 (a) Neither the PHA nor any of its contractors or subcontractors may enter into any
15 contract or arrangement in connection with the HCV program in which any of the
16 following classes of persons has any interest, direct or indirect, during tenure or for
one year thereafter:

- 17 (1) Any present or former member or officer of the PHA (except a participant
commissioner);
- 18 (2) Any employee of the PHA, or any contractor, subcontractor or agent of the
19 PHA, **who formulates policy or who influences decisions with respect to the
programs;**
- 20 (3) Any public official, member of a governing body, or State or local legislator,
21 **who exercises functions or responsibilities with respect to the programs;** or
- 22 (4) Any member of the Congress of the United States.

23 (b) Any member of the classes described in paragraph (a) of this section must
disclose their interest or prospective interest to the PHA and HUD.

24 (c) The conflict of interest prohibition under this section may be waived by the
25 HUD field office for good cause.

26 24 C.F.R. § 982.161 (emphases added). The government has primarily contended that Mr.
27 Smith fell under the (a)(2) definition as an agent who was *in a position* to influence
28 decisions with respect to the program, Doc. 121 (at page 24), but numerous tools of

1 construction refute that contention.

2 As an initial matter, the government has never contended that Mr. Smith
3 formulated policy and has only relied on the “influences decisions” language in
4 subdivision (a)(2) of the regulation. The government’s apparent recognition that Mr.
5 Smith did not formulate policy is important because that language informs what it means to
6 influence decisions. A fundamental principle of construction is “the familiar interpretive
7 canon *noscitur a sociis*, ‘a word is known by the company it keeps.’” *Dubin v. United*
8 *States*, 599 U.S. 110, 124 (2023); *see Fischer v. United States*, 603 U.S. 480, 487 (2024).
9 This principle establishes that a “decision” under the regulation must be on a disputed
10 matter of major importance, similar to the importance of a policy determination. The
11 “decision” language does not include any ministerial or minor matter that may bear some
12 relation to the program. *See McDonnell v. United States*, 579 U.S. 550, 568-69 (2016)
13 (relying on *noscitur* principle to limit corruption statute to major decisions).

14 Other language in the regulation reinforces this interpretation. In particular,
15 subdivision (a)(3) states that a “public official” is covered if he or she “exercises functions
16 or responsibilities with respect to the programs.” Although subdivision (a)(2) applying to
17 subcontractors and agents certainly could have used the broader “functions and
18 responsibilities” language, it instead requires a much higher standard of influencing
19 important decisions about the program. In other words, exercising functions or
20 responsibilities related to the program does not trigger status as a covered individual for
21 purposes of subdivision (a)(2), and this distinction makes sense, as the standard should be
22 more stringent for public officials.

23 The Supreme Court has stated that the title of a provision is a contextual clue as to
24 its meaning. *See Dubin*, 599 U.S. at 120-21. This is especially true when the “key terms”
25 of the provision “are so ‘elastic’ that they must be construed ‘in light of the terms
26 surrounding them,’ and the title . . . chose[n] is among those terms.” *Id.* at 121 (citation
27 omitted). Here, the title of the regulation is “Conflict of interest.” Thus, the type of
28 “decision” meant by the regulation is an important disputed controversy that would affect

1 financial interests. The language in subdivision (a)(2) also states that the decision must be
2 “with respect to” the Section 8 program, and the Supreme Court has explained that such
3 phrases include a “limiting principle consistent with the structure of the [regulation] and its
4 other provisions.” *Maracich v. Spears*, 570 U.S. 48, 60 (2013). Indeed, the “with respect
5 to” language is less broad than the “in connection with” language in *Maracich* and
6 establishes that the decision must be directly related to the Section 8 program.

7 As mentioned, the government’s primary argument has been that Mr. Smith was
8 “in a position” to influence decisions with respect to the Section 8 program. Doc. 121
9 (page 24). That is not what the regulation says, and those words do not appear in it. The
10 language makes clear that, for purposes of subdivision (a)(2), the individual must *actually*
11 influence important decisions. If the regulation meant that the person was merely in a
12 position or *capable* of influencing decisions, it would have said so. *Compare* 31 U.S.C. §
13 3729(b)(4) (“capable of influencing”). If the pertinent part of the regulation were focused
14 on the mere position of the individual, it would have been worded more like subdivisions
15 (1), (3), and (4). Instead, subdivision (2) is focused on whether the individual actually
16 influences decisions with respect to the Section 8 program.²

17 While the government’s interpretation of the regulation is flatly refuted by its plain
18 language and traditional tools of construction, it has alternatively offered two examples of
19 Mr. Smith supposedly influencing decisions with respect to the Section 8 program.
20 The first supposed example is that Mr. Smith made arguments on his own behalf to
21 GHURA that he was not a covered individual. Doc. 121 (at page 28). That cannot be what
22 the regulation contemplated, as it would be unworkable and non-sensical, applying to any
23 contractor who openly advocates for his own position, which almost all do. Assume that,
24 up until now, Mr. Smith’s interpretation of his status as a covered individual is correct

26 ² Even if the regulation were worded as “position” to influence or “capable” of
27 influencing, David Sablan, the Chairman of the Board for GHURA at the time, has testified
28 that Mr. Smith did not have the ability to influence decisions on the Section 8 program. *See*
Ex. A (attached to concise statement).

1 (which it is). According to the government, that does not matter; once he argued for his
2 correct position, he then became a covered individual. That is quite the Catch 22 and an
3 absurdly incorrect interpretation. *See Barroso v. Gonzales*, 429 F.3d 1195, 1200 (9th Cir.
4 2005) (“the ‘Catch 22’ created by the BIA’s interpretation” was an “absurd” construction).
5 Moreover, Mr. Smith argued that he was not a covered individual because GHURA had
6 conflicts counsel to advise on any matters where he had a potential conflict. *See Ex. B.*
7 Thus, it was clear that Mr. Smith was acting in his personal capacity, not as counsel, and
8 was specifically advocating that GHURA should consult with *other* counsel on the matter,
9 which is the whole point of having conflicts counsel.

10 The second supposed example offered by the government was that Mr. Smith
11 prepared a “legal memorandum” addressing consequences to GHURA for failures to
12 comply with HUD requirements. Doc. 121 (at page 28). In actuality, Mr. Smith prepared a
13 one-page letter (omitting the letterhead and address) that simply commented on a decision
14 that GHURA had *already* made to pursue adverse actions against employees who “violated
15 a number of GHURA personnel rules and regulations by discrediting the Authority through
16 poor behavior, by unauthorized possession of Authority property and basically failing to
17 perform their job responsibilities and duties when managing various GHURA projects.”
18 Ex. C (attached to concise statement). As the decision had already been made, there was
19 no decision to influence, and any purported decision was not with respect to the Section 8
20 program. Again, this was a ministerial task and not the type of “influence” or “decision”
21 contemplated under the regulation and contract.

22 In short, Mr. Smith was not a covered individual as that term is established under
23 traditional tools of construction. But even if he were, any bar on payments was waived
24 under § 982.161(c). Both GHURA and HUD were aware of the purported conflict and yet
25 issued the payments. HUD purportedly ordered GHURA to suspend payments on
26 September 20, 2012, which GHURA did. Ex. B. Nonetheless, GHURA elected to resume
27 payments in December of 2012. *Id.* The agency admitted that, on “December 28, 2012,
28 HUD’s Honolulu Field Office relayed the concerns of HUD’s Regional Administrator that

1 Wong’s ‘contracts continue to receive money without this matter coming to a head.’” *Id.*
2 Thus, HUD was obviously aware that payments were being made. GHURA also requested
3 waivers from HUD in April and June 2013, and the payments still continued until 2014.
4 Ex. B. HUD’s conduct reflected that it had waived any bar on payments under §
5 982.161(c) while it considered the purported conflict issue. *See Cox v. Ocean View Hotel*
6 *Corp.*, 533 F.3d 1114, 1125 (9th Cir. 2008) (“[i]mplied waiver may be inferred by conduct
7 or actions that mislead the breaching party into reasonably believing that the rights to a
8 claim arising from the breach was waived” and there is an “established rule that acceptance
9 of the benefit of a contract following breach by the other party constitutes a waiver of the
10 breach”).

11 Finally, the basis for the government’s allegation that there was a false claim
12 regarding Mr. Smith’s legal fees is unclear. The government alleges that, in obtaining the
13 position as outside counsel for GHURA, Mr. Smith asserted that he did not have a “conflict
14 of interest.” But whether he was a covered individual under § 982.161 does not determine
15 whether he has a “conflict of interest” under rules of professional conduct, particularly
16 when considering that GHURA also hired a conflicts counsel. In other words, even if Mr.
17 Smith was a covered individual under § 982.161, that does not mean his statement that he
18 did not have a conflict of interest was false or fraudulent. The government has never
19 attempted to show that Mr. Smith had a conflict of interest under the applicable rules of
20 professional conduct.

21 **III. The Court should enter judgment on all of the plaintiffs’ claims because the**
22 **alleged false representations were not material.**

23 To show a violation of the FCA, the alleged false representation must be material.
24 *See* 31 U.S.C. § 3729(a); *Universal Health Services, Inc. v. United States ex rel. Escobar*,
25 579 U.S. 176 (2016). Importantly, when considering materiality in the context of false and
26 fraudulent claims to government agencies, “if the Government pays a particular claim in
27 full despite its actual knowledge that certain requirements were violated, that is very strong
28 evidence that those requirements are not material.” *Id.* at 195. Recently, courts have

1 repeatedly entered defense judgments on allegations under the FCA for failing to satisfy
2 the rigorous materiality requirement set forth in *Universal Health Services*, particularly
3 when claims have been paid despite knowledge of a potential contractual violation. *See*
4 *United States ex rel. Zotos v. Town of Hingham*, 98 F.4th 339, 343-46 (1st Cir. 2024);
5 *United States ex rel. Sorenson v. Wadsworth Brothers Construction Company, Inc.*, 48
6 F.4th 1146, 1151-58 (10th Cir. 2022). This Court should do the same and enter judgment
7 in Mr. Smith’s favor.

8 The complaint itself admits that GHURA and HUD were aware of the potential
9 conflict involving Mr. Smith and yet continued to make payments. Doc. 55 (pages 7-8).
10 The government has admitted that GHURA was aware of a potential conflict as early as
11 July 2011. Doc. 122 (page 5-6). The government has also admitted that, even after Mr.
12 Smith transferred his properties to Mr. Wong, GHURA was aware as early as March 2012
13 that there was still a potential conflict. Doc. 122 (page 7-8). Likewise, the government has
14 admitted that HUD was aware that there was still a potential conflict as early as September
15 2012. Doc. 122 (page 10). In December 2012, GHURA released payments on the
16 contracts despite knowing about the potential conflict, and HUD was aware that GHURA
17 had done so. Doc. 122 (page 11). In April 2013, GHURA submitted a waiver request to
18 HUD, demonstrating that HUD was aware of the potential conflict, and payments on the
19 contract continued. Doc. 122 (pages 11-12). In June 2013, GHURA resubmitted the
20 waiver request, again making it clear to HUD that there was a potential conflict, and the
21 payments on the contracts still continued for several more months. Doc. 122 (page 12).

22 These facts fall precisely within the Supreme Court’s admonition that “if the
23 Government pays a particular claim in full despite its actual knowledge that certain
24 requirements were violated, that is very strong evidence that those requirements are not
25 material.” *Universal Health Services*, 579 U.S. at 195. Courts have recently taken that
26 admonition to heart and rejected claims of materiality where payments continued despite
27 knowledge of a violation. *See Zotos*, 98 F.4th at 345; *Sorenson*, 48 F.4th at 1157-58.
28 These cases and Justice Thomas’s concurring opinion in *Kousisis v. United States*, 145 S.

1 Ct. 1382, 1400-01 (2025) reinforce a lack of materiality.

2 The materiality test is the “very ‘essence of the bargain’ standard” mentioned in
3 footnote 5 of *Universal Health Services*. *Id.* at 1400-01 (Thomas, J., concurring); *United*
4 *States v. Milheiser*, 98 F.4th 935, 944 (9th Cir. 2024). “[T]he essence-of-the-bargain
5 standard is rigorous and context specific.” *Kousisis*, 145 S. Ct. at 1404 (Thomas, J.,
6 concurring); *United States ex rel. Holt v. Medicare Medicaid Advisors, Inc.*, 115 F.4th 908,
7 917-22 (8th Cir. 2024); *Zotos*, 98 F.4th at 343-46; *Sorenson*, 48 F.4th at 1151-58.

8 In explaining that it was doubtful that a misrepresentation about a Disadvantaged
9 Business Enterprise (“DBE”) term in a contract was material, Justice Thomas stated that
10 the materiality standard “does not rest solely on a contract’s labels[,]” and “[e]ven in the
11 face of contrary contract language, materiality ‘cannot be found where noncompliance is
12 minor or insubstantial.’” *Kousisis*, 145 S. Ct. at 1401 (quoting *Universal Health Services*,
13 579 U.S. at 194). Here, the alleged misrepresentations were “minor or insubstantial[,]”
14 *Universal Health Services*, 579 U.S. at 194, thereby failing the rigorous essential benefit of
15 the bargain standard. *Kousisis*, 145 S. Ct. at 1401, 1404 (Thomas, J., concurring).

16 It is “clear that regulatory requirements in a contract are not automatically
17 material.” *Id.* at 1401. The contracts in this case were for rental properties, which
18 GHURA received. *Id.* at 1401-02 (“The contracts at issue in this case were for bridge
19 repairs, not minority hiring.”). “If the [conflict of interest] conditions ‘went to the very
20 essence of the parties’ bargain,’ the failure to meet those conditions presumably would
21 have had some impact on the final work product.” *Id.* at 1402 (citation omitted).
22 Obviously, the conflict provision had no impact on the quality of the rental units, *id.*, and
23 GHURA itself concluded that there was no conflict. Furthermore, like the condition
24 allegedly misrepresented in *Kousisis*, the conflict provision here was waivable and thus did
25 not require termination or go to the essential benefit of the bargain. *Id.*

26 The lack of materiality here is even more clear than it was in *Kousisis*. In *Kousisis*,
27 the petitioner had clearly made misrepresentations about the DBE term in the contract,
28 defeating the very essence of its purpose. As discussed above, it is far from clear that the

1 conflict of interest provision at issue here was violated, and the agency failed to show that
2 Mr. Smith used his position to enrich himself unfairly. Indeed, Mr. Smith was receiving
3 payments for the rental units long before he even assumed his role with GHURA, and,
4 even after he assumed his counsel position, GHURA took the position that there was no
5 conflict. At bottom, HUD's view of materiality can only be based on a theoretical conflict
6 under a hypertechnical and flawed interpretation of a contract term that had nothing to do
7 with the quality of the units that Mr. Smith rented, units that were rented long before the
8 theoretical conflict even arose. In sum, under both *Universal Health Services* and Justice
9 Thomas's opinion in *Kousisis*, there is a lack of materiality, requiring summary judgment
10 to be entered. *See Zotos*, 98 F.4th at 343-46; *Sorenson*, 48 F.4th at 1151-58.

11 **IV. The Court should enter judgment in Mr. Smith's favor because it is undisputed**
12 **that there are no legally cognizable damages; additionally, any penalties must be**
13 **limited and offset as a matter of law.**

14 As the plain language of the FCA states, plaintiffs must prove damages. *See* 31
15 U.S.C. §§ 3729(a) and 3731(d); *see Hendrix ex rel. United States v. J-M Manufacturing*
16 *Company, Inc.*, 76 F.4th 1164, 1173-74 (9th Cir. 2023). Of course, if there are no damages,
17 there are no treble damages because three times zero equals zero. *Hendrix* makes clear that
18 the government did not suffer any legally cognizable damages under the FCA.

19 “The proper measure of damages when a ‘defendant agreed to provide goods or
20 services to the government, is the difference between the value of the goods or services
21 actually provided by the contractor and the value of the goods or services would have had
22 to the government had they been delivered as promised.’” *Id.* at 1174. In *Hendrix*, the
23 Ninth Circuit rejected the argument that damages were proven simply because the plaintiff
24 would not have paid if it had known the truth, explaining that a plaintiff must show that the
25 goods or services provided were “plainly unusable, not used, or returned.” *Id.* Here, as in
26 *Hendrix*, it is clear that GHURA received the rental units and legal services that were paid
27 for and payment was made even with knowledge of a potential conflict. In short, there
28 were no damages under *Hendrix*. The government may contend that payment was legally

1 prohibited because Mr. Smith was a covered individual, but that argument was rejected in
2 *Hendrix*. There is no federal statute that barred payment. Even if the government could
3 somehow rely on the regulation, its plain language makes clear that it is waivable, *see* 24
4 C.F.R. § 982.161(c), again facially undermining such an argument.

5 Finally, as *Hendrix* recognizes, the fact that there are no legally cognizable
6 damages in this case is also established by the FCA's inclusion of civil penalties. In other
7 words, Congress intended that any intangible harm caused by the defendant's conduct is to
8 be addressed in the form of a civil penalty, not a treble-damages award. *Hendrix*, however,
9 also clarifies that any potential civil penalties must be limited in this case. *Hendrix* made
10 clear that civil penalties should be assessed on a project basis. *See Hendrix*, 76 F.4th at
11 1172-73. Thus, at most, the government would only be able to collect a maximum penalty
12 of \$60,000, that is, a maximum \$10,000 penalty for each of the five properties alleged in
13 the complaint, and a maximum \$10,000 penalty for the legal-services project.

14 Furthermore, to the extent that any part of the administrative judgment is sustained, *see*
15 *Mark S. Smith v. United States Department of Housing and Urban Development*, Case No.
16 25-CV-00016, it would offset any penalties imposed in this case. *See* 31 U.S.C. §
17 3730(c)(5); *see also* 31 U.S.C. § 3730(e)(3). Likewise, even if there were somehow any
18 damages in this case, they would have to be offset by any part of the administrative order
19 that is sustained. *Id.*

20 **V. The Court should grant summary judgment on Counts V and VI because they are**
21 **barred by the statute of limitations.**

22 The conspiracy allegations in Counts V and VI of the Complaint in Intervention
23 are not particularly clear, but the government's motion for summary judgment maintains
24 that they are based on agreements made between Mr. Smith and Mr. Wong to transfer
25 properties in 2011 and 2012. *See* Doc. 121 (pages 34-35). The government did not file
26 those claims until September 2019, beyond the six-year statute of limitations. *See* 31
27 U.S.C. § 3731(b). Accordingly, the Court should enter judgment in Mr. Smith's favor.

28

1 **VI. The Court should grant summary judgment on Count VII.**

2 Counts VII of the Complaint in Intervention asserts a claim for “Restitution
3 (Unjust Enrichment).” The Court should enter summary judgment in Mr. Smith’s favor on
4 Count VII for multiple reasons.

5 *First*, Count VII does not specify whether it is based on federal common law,
6 Guam law, statutory provisions, or cite to any authority to support it. “The FCA includes
7 comprehensive procedures for enforcement ‘Where a statute expressly provides a
8 particular remedy or remedies, a court must be chary of reading others into it. . . . The
9 FCA allows no room for the creation of additional federal common law.” *Mortgages, Inc.*
10 *v. U.S. Dist. Court for Dist. Of Nev. (Las Vegas)*, 934 F.2d 209, 213 (9th Cir. 1991). The
11 FCA provides comprehensive procedures for the enforcement of remedies in this context,
12 and restitution/unjust enrichment is not one of them. In short, there is no legal basis for
13 Count VII, and judgment should be entered in Mr. Smith’s favor on that count.

14 *Second*, even if there were somehow a viable claim for “restitution (unjust
15 enrichment),” it is barred by the statute of limitations. Count VII was filed by the
16 government on September 11, 2019. The last payment alleged in the complaint was on
17 May 2, 2014. Doc. 55.³ While Mr. Smith does not concede that the government receives
18 the benefit of the limitations period in 28 U.S.C. § 2462 in this context, that statute only
19 provides a five-year limitations period. *See Kokesh v. Securities and Exchange*
20 *Commission*, 581 U.S. 455 (2017). Thus, best case scenario for the government, Count VII
21 had to be filed before May 2, 2019. The government’s claim was filed several months too
22 late.

23 *Third*, in any event, there was no “unjust” “enrichment” here. As explained above,
24 Mr. Smith provided the rental properties for which he was paid. It would be a windfall for
25

26 ³ Count 7 only requests recovery for the Section 8 payments, not Mr. Smith’s legal
27 fees, and it therefore cannot serve as a basis for such an award. In any event, the complaint
28 alleges Mr. Smith received fees for his legal services up until May 21, 2013, earlier than the
last payment for the rental units.

1 the government to have received the rental properties and now the return of the funds that
2 Mr. Smith earned for the rental properties, particularly where the government was well
3 aware of the purported conflict. *See United States v. Luna*, 968 F.3d 922, 930 (8th Cir.
4 2020) (“restitution is ‘compensatory’ and courts ‘cannot award the victim a windfall’”);
5 *United States v. Maynard*, 743 F.3d 374, 380 (2d Cir. 2014). Numerous cases have held
6 that restitution is inappropriate in this context. *See United States v. Avenatti*, No. 22-
7 50301, 2024 WL 4553810, at *2 (9th Cir. Oct. 23, 2024); *United States v. Matsumaru*, 244
8 F.3d 1092, 1109 (9th Cir. 2001); *United States v. Huff*, 609 F.3d 1240, 1247-49 (11th Cir.
9 2010); *United States v. Allen*, 529 F.3d 390, 396 (7th Cir. 2008).

10 *Fourth*, to the extent that any part of the administrative judgment is sustained, *see*
11 *Mark S. Smith v. United States Department of Housing and Urban Development*, Case No.
12 25-CV-00016, it would offset any claim of unjust enrichment. In other words, while the
13 government is not entitled to any windfall whatsoever under restitution principles, it is
14 certainly not entitled to double, triple, or quadruple windfalls. *See* 31 U.S.C. § 3730(c)(5);
15 *see also* 31 U.S.C. § 3730(e)(3).

16 CONCLUSION

17 For the foregoing reasons, the Court should grant summary judgment in Mr.
18 Smith’s favor on all of the plaintiffs’ claims. Alternatively, it should grant partial summary
19 judgment in his favor.

20
21 RESPECTFULLY SUBMITTED this 18th day of August, 2025.

22
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24 *Counsel for Mark S. Smith*
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