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False Claims Act Liability for Cyber Incidents

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False Claims Act Liability for Cyber Incidents

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Overview

- The Landscape
- False Claims Act Basics
- Understanding Applicable Requirements
- Auditing Compliance
- Preparing for Cyber Incidents
- Case Studies

The Landscape

- "**For too long companies have chosen silence under the mistaken belief that it is less risky to hide a breach than to bring it forward and to report it. . . . [T]hat changes today**" because, as part of the initiative, the Justice Department "will use [its] civil enforcement tools to pursue companies, those who are government contractors who receive federal funds, when they fail to follow required cybersecurity standards — because we know that puts all of us at risk."

  – Lisa Monaco, Deputy Attorney General, October 6, 2021

The Landscape

- Heightened focus on cybersecurity given situation in Russia/Ukraine
- Biden administration and Cybersecurity and Infrastructure Security Agency recently stressed request that organizations report breaches to law enforcement (CISA/FBI) while pledging not to share information with regulators who have oversight
- May 2021 EO provided “the Federal Government must bring to bear the full scope of its authorities and resources to protect and secure its computer systems.”

The Landscape

- “Companies want to be perceived as the victim of an intrusion whose information was taken, rather than a company that's attempting to conceal from consumers information that would help them protect themselves.”
  - Leonard Bailey, Special Counsel for National Security at DOJ, April 13, 2022

The Landscape

- “Importantly, [the Civil Cyber-Fraud Initiative] will focus on cases where federal agencies are victims. When companies that do business with the government knowingly make misrepresentations about their own cybersecurity practices, or when they fail to abide by cybersecurity requirements in their contracts, grants or licenses, the government does not get what it bargained for. Even more significantly, when false assurances are made to the government, sensitive government information and systems may be put at risk without the government even knowing it.”
  - Brian Boynton, Assistant Acting Attorney General for the Civil Division, October 13, 2021

The Landscape

- Boynton outlined three areas that are “prime candidates” under the Cyber-Fraud initiative
  - Noncompliance with cybersecurity standards required as a condition for payment under the contract
  - Misrepresentation of security controls or practices to secure a government contract
  - Failure to timely report suspected cybersecurity breaches or incidents

The Landscape

- In February 2022, DOJ reiterated its emphasis on cybersecurity-related False Claims Act cases:

  "The Department will pursue misrepresentations by companies in connection with the government's acquisition of information technology, software, cloud-based storage and related services designed to protect highly sensitive government information from cybersecurity threats and compromises."

  Dep't of Justice, "Justice Department's False Claims Act Settlements and Judgments Exceed $5.5 Billion in Fiscal Year 2021" (Feb. 1, 2022)

False Claims Act Basics

- Any person who knowingly submits false claims to the government is liable for treble damages
- Civil statute has no intent to defraud element, but "fraud" is often woven into DOJ press releases
- Whistleblower provision

False Claims Act Basics

- Government money requires greater scrutiny.

"Men must turn square corners when they deal with the Government."

- Justice Oliver Wendell Holmes, Jr.

Rock Island, Ark. & Louis. R.R. Co. v. United States, 254 U.S. 141, 143(1920), *quoted in United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008) (Easterbrook, J.).

False Claims Act Basics

- Investigated by the U.S. Department of Justice, including local U.S. Attorney's Offices, as well as federal law enforcement (OIGs)
- Government can issue subpoenas, including CIDs for documents and testimony
- Often commenced following a sealed whistleblower filing
- Investigations typically last years before resolution

False Claims Act Basics

Basic elements:

1. **Claims for Government funds**. This includes direct funds (prime contract, government program), or indirect funds (subcontract, vendor).
2. **False**. False statement, unallowable, etc.
3. **Knowing or reckless**. No intent to defraud needed.
4. **Material.** Must be material to payment.

False Claims Act Basics

- **Materiality**
  - False Claims Act liability may apply when an organization knowingly violates a requirement material to the government's payment decision
  - To prove materiality, the Justice Department often cites cases in which it has refused to pay contractors, or refused to reimburse grantees or program participants, that violated a particular requirement
  - DOJ likely taking steps already, speaking to federal agencies about denying payment even for inadvertent or negligent violations, to set up its materiality arguments -- including the statements we have cited

Understanding Applicable Requirements

- Take inventory of cybersecurity requirements in government contracts, grants, or program agreements
- Review incorporated provisions of law, such as the Federal Acquisition Regulations or the Defense Federal Acquisition Regulation Supplement

Understanding Applicable Requirements

- Assess what additional regulatory regimes may apply, as DOJ sometimes takes the position that compliance with other rules, such as state or local laws, or parallel regulatory regimes, are also material to payments under contracts, grants, and programs
  - *E.g.,* for any business that owns or licenses private information of New York residents, the New York Stop Hacks and Improve Electronic Data Security Act (SHIELD Act) may apply

Auditing Compliance

- Assess existing internal policies, procedures, and plans to ensure compliance with cybersecurity requirements
- Three key components
  - Risk assessment
  - Written Information Security Program (WISP)
  - Incident Response Plan

Auditing Compliance

- Risk assessment
  - Bring together appropriate group of knowledgeable individuals
  - Goal is to identify risks, quantify likelihood and severity, and outline mitigation factors
  - Consider appropriate form, such as NIST SP 800-30

Auditing Compliance

- WISP
  - Required in some states
  - Details an organization's overall information security program
  - Will typically include an overview of regulatory requirements and exceptions, list and organize existing policies under administrative (or organizational), physical, and technical safeguards, and expressly reference, and incorporate the risk assessment

Auditing Compliance

- Incident Response Plan
  - Details how an organization will respond in the event of a cyber incident
  - The best incident response plans balance flexibility and structural considerations

Auditing Compliance

- Incident Response Plan
  - Can use established framework, such as NIST SP 800-61, that covers key areas
    - Preparation
    - Detection and analysis
    - Containment
    - Eradication
    - Recovery and post-incident activity

Auditing Compliance

- Consider bringing in outside experts to assess processes and procedures
- Can be done under privilege

Preparing for Cyber Incidents

- Insurance considerations
- Establish complaint or reporting process
- Educate leaders

Preparing for Cyber Incidents

- Insurance considerations
  - Review policies both for cyber incident coverage as well as False Claims Act liabilities and defense costs
  - Discuss key details with broker
  - Consider what exclusions may apply

Preparing for Cyber Incidents

- Establish complaint or reporting process
  - Because of robust whistleblower component of False Claims Act, organizations should implement is an internal complaint or reporting process

Preparing for Cyber Incidents

- Educate leaders
  - False Claims Act provides for individual liability, not just corporate liability
  - Leaders who are aware of personal liability risks may be more likely to internalize the risks of noncompliance
  - Provide appropriate support to leaders

Case Study: Aerojet

- *U.S. v. ex rel. Markus v. Aerojet Rocketdyne Holdings Inc.*
  - Predates DOJ Cyber-Fraud Initiative
  - Case brought by Brian Markus, former senior director of cybersecurity, compliance and controls at Aerojet Rocketdyne
  - Accused Aerojet of misleading the government about compliance with regulations to safeguard controlled unclassified information from cybersecurity threats and protecting sensitive information

Case Study: Aerojet

- Aerojet had disclosed cybersecurity gaps to DoD and NASA, but there was a factual dispute if the company "revealed the full picture" of shortcomings
- Moreover, evidence showed Aerojet had identified – and government had acknowledged – cybersecurity noncompliance
- Factual dispute over the extent of disclosure, scienter, and materiality

Case Study: Aerojet

- 2019 ruling on MTD: fraud claims survived with judge ruling that compliance with the relevant rules for safeguarding information was material to the government's decision to reimburse Aerojet for the allegedly false claims
- First time a court held that failure to meet cybersecurity requirements could be the basis of FCA

Case Study: Aerojet

- Feb. 2022 denial of summary judgment: court found genuine issues of fact about whether Aerojet's disclosures about cybersecurity deficiencies were sufficient, scienter, and materiality
- As to materiality, Court cited: (1) contract terms, which incorporated cybersecurity rules; (2) open question of "actual knowledge" by government.

Case Study: Aerojet

- At trial, Relator argued that Aerojet received $2.6B on critical defense systems; that strict cybersecurity compliance was central; that Aerojet suffered intrusions, including from foreign nation states; that the company President hid the truth from the Board and government.
- Aerojet argued that the government did not expect "strict" compliance with cybersecurity terms; the government knew the industry was not fully compliant; Aerojet had "attempt[ed] to tell the government the truth" of its noncompliance; an, despite knowing of partial noncompliance, the government continued to pay.

Case Study: Aerojet

- Case settled April 29, 2022, reportedly for $9 million, after the second day of a jury trial

Case Study: Comprehensive Health

- *U.S. ex rel. Watkins v. Comprehensive Health Services Middle East, LLC* and *U.S. ex rel. Lawler v. Comprehensive Health Services, Inc. et al.*
  - CHS provides global medical services, including at government facilities in Iraq and Afghanistan
  - Contracts required CHS to store electronic medical record information of U.S. service members, diplomats, officials, and contractors securely

Case Study: Comprehensive Health

- Whistleblower lawsuit alleged that CHS violated the False Claims Act by, among other things, falsely representing that it had complied with contractual requirement that it store medical records on secure EMR system
- Settled on February 28, 2022 for $930,000

Case Study: Comprehensive Health

DOJ used this case to send a message:

The headline was:

"**First Settlement by the Department of Justice of a Civil Cyber-Fraud Case Under the Department's Civil Cyber-Fraud Initiative**"

Case Study: Comprehensive Health

The press release emphasized:

"**This is the Department of Justice's first resolution of a False Claims Act case involving cyber fraud since the launch of the department's Civil Cyber-Fraud Initiative**, which aims to combine the department's expertise in civil fraud enforcement, government procurement and cybersecurity to combat new and emerging cyber threats to the security of sensitive information and critical systems."

Case Study: Comprehensive Health

And it ended with this:

"The investigation and resolution of this matter illustrates the government's **emphasis on combatting cyber-fraud**. On October 6, 2021, the Deputy Attorney General announced the department's Civil Cyber-Fraud Initiative, which **aims to hold accountable** entities or individuals that put U.S. information or systems at risk by **knowingly providing deficient cybersecurity products or services**, **knowingly misrepresenting their cybersecurity practices or protocols**, or **knowingly violating obligations to monitor and report cybersecurity incidents and breaches**."

Conclusion

- Recap
  - Know your obligations and applicable requirements
  - Audit policies, procedures, and operations
  - Insurance considerations
- Questions?

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA ex rel. BRIAN MARKUS, Plaintiff, v. AEROJET ROCKETDYNE HOLDINGS, INC., a corporation and AEROJET ROCKETDYNE, INC., a corporation, Defendants.	No. 2:15-cv-2245 WBS AC MEMORANDUM & ORDER RE: DEFENDANTS' MOTION TO DISMISS RELATOR'S SECOND AMENDED COMPLAINT, STAY PROCEEDINGS, and COMPEL ARBITRATION

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Plaintiff-relator Brian Markus brings this action against defendants Aerojet Rocketdyne Holdings, Inc. ("ARH") and Aerojet Rocketdyne, Inc. ("AR"), arising from defendants' allegedly wrongful conduct in violation of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 et seq., and relating to defendants' termination of relator's employment. Defendants now move to (1) dismiss the Second Amended Complaint ("SAC") in part for the failure to state upon which can be granted under Federal Rule of

Civil Procedure 12(b)(6), (2) stay proceedings, and (3) compel arbitration.

I. Background

Relator Brian Markus is resident of the State of California. (SAC ¶ 6 (Docket No. 42).) He worked for defendants as the senior director of Cyber Security, Compliance, and Controls from June 2014 to September 2015. (Id.) Defendants ARH and AR develop and manufacture products for the aerospace and defense industry. (Id. ¶ 7.) Defendants' primary aerospace and defense customers include the Department of Defense ("DoD") and the National Aeronautics & Space Administration ("NASA"), who purchase defendants' products pursuant to government contracts. (See id.) Defendant AR is a wholly-owned subsidiary of ARH, and ARH uses AR to perform its contractual obligations. (Id. ¶ 8.)

Government contracts are subject to Federal Acquisition Regulations and are supplemented by agency specific regulations. On November 18, 2013, the DoD issued a final rule, which imposed requirements on defense contractors to safeguard unclassified controlled technical information from cybersecurity threats. 48 C.F.R. § 252.204-7012 (2013). The rule required defense contractors to implement specific controls covering many different areas of cybersecurity, though it did allow contractors to submit an explanation to federal officers explaining how the company had alternative methods for achieving adequate cybersecurity protection, or why standards were inapplicable. See id. In August 2015, the DoD issued an interim rule, modifying the government's cybersecurity requirements for contractor and subcontractor information systems. 48 C.F.R. §

252.204-7012 (Aug. 2015). The interim rule incorporated more cybersecurity controls and required that any alternative measures be "approved in writing prior by an authorized representative of the DoD [Chief Information Officer] prior to contract award." Id. at 252.204-7012(b)(1)(ii)(B). The DoD amended the interim rule in December 2015 to allow contractors until December 31, 2017 to have compliant or equally effective alternative controls in place. See 48 C.F.R. § 252.204-7012(b)(1)(ii)(A) (Dec. 2015). Each version of this regulation defines adequate security as "protective measures that are commensurate with the consequences and probability of loss, misuse, or unauthorized access to, or modification of information." 48 C.F.R. § 252.204-7012(a).

Contractors awarded contracts from NASA must comply with relevant NASA acquisition regulations. 48 C.F.R. § 1852.204-76 lists the relevant security requirements where a contractor stores sensitive but unclassified information belonging to the federal government. Unlike the relevant DoD regulation, this NASA regulation makes no allowance for the contractor to use alternative controls or protective measures. A NASA contractor is required to "protect the confidentiality, integrity, and availability of NASA Electronic Information and IT resources and protect NASA Electronic Information from unauthorized disclosure." 48 C.F.R. § 1852.204-76(a).

Relator alleges that defendants fraudulently entered into contracts with the federal government despite knowing that they did not meet the minimum standards required to be awarded a government contract. (SAC ¶ 30.) He alleges that when he started working for defendants in 2014, he found that defendants'

computer systems failed to meet the minimum cybersecurity requirements to be awarded contracts funded by the DoD or NASA. (Id. ¶ 36.) He claims that defendants knew AR was not compliant with the relevant standards as early as 2014, when defendants engaged Emagined Security, Inc. to audit the company's compliance. (See id. at ¶¶ 43, 51-53.) Relator avers that defendants repeatedly misrepresented its compliance with these technical standards in communications with government officials. (Id. ¶ 59-64.) Relator alleges that the government awarded AR a contract based on these allegedly false and misleading statements.[1] (Id. ¶ 65.) In July 2015, relator refused to sign documents that defendants were now compliant with the cybersecurity requirements, contacted the company's ethics hotline, and filed an internal report. (Id. ¶¶ 81-82.) Defendants terminated relator's employment on September 14, 2015. (Id. ¶ 83.)

Relator filed his initial complaint in this action on October 29, 2015. (Docket No. 1.) While the government was still deciding whether to intervene in this action, relator filed his First Amended Complaint ("FAC") on September 13, 2017. (Docket No. 22.) On June 5, 2018, the United States filed a notice of election to decline intervention. (Docket No. 25.) A few months later defendants filed a motion to dismiss, stay proceedings, and compel arbitration as to the FAC. (Docket No. 39.) In response to this motion, relator filed the SAC, alleging

[1] In total, relator alleges that AR entered into at least six contracts with the DoD between February 2014 and April 2015 (id. ¶¶ 84-93) and at least nine contracts with NASA between March 2014 and April 2016 (id. ¶¶ 105-114).

the following causes of action against defendants: (1) promissory fraud in violation of 31 U.S.C. § 3729(a)(1)(A); (2) false or fraudulent statement or record in violation of 31 U.S.C. § 3729(a)(1)(B); (3) conspiracy to submit false claims in violation of 31 U.S.C. § 3729(a)(1)(C); (4) retaliation in violation of 31 U.S.C. § 3730(h); (5) misrepresentation in violation of California Labor Code § 970; and (6) wrongful termination. Defendants now move to dismiss the SAC, stay proceedings, and compel arbitration. (Docket No. 50.)

II. Motion to Dismiss

A. Legal Standard

On a Rule 12(b)(6) motion, the inquiry before the court is whether, accepting the allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the plaintiff has stated a claim to relief that is plausible on its face. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A complaint that offers mere "labels and conclusions" will not survive a motion to dismiss. Id. (internal quotation marks and citations omitted).

B. Fraud Claims under the FCA

Relator brings two claims for fraud under the FCA. These two claims impose liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim

for payment or approval," 31 U.S.C. § 3729(a)(1)(A), or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," id. § 3729(a)(1)(B).

Outside of the context where "the claim for payment is itself literally false or fraudulent," the Ninth Circuit recognizes two different doctrines that attach FCA liability to allegedly false or fraudulent claims: (1) false certification and (2) promissory fraud, also known as fraud in the inducement. See United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1170-71 (9th Cir. 2006) (citation omitted). Under a false certification theory, the relator can allege either express false certification or implied false certification. The express false certification theory requires that the claimant plainly and directly certify its compliance with certain requirements that it has breached. See id. An implied false certification theory "can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 2001 (2016). The promissory fraud approach is broader and "holds that liability will attach to each claim submitted to the government under a contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct." Hendow, 461

F.3d at 1173.

Under either false certification or promissory fraud, "the essential elements of [FCA] liability remain the same: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." Id. Only the sufficiency of the complaint as to the materiality requirement is at issue on this motion.[2]

Under the FCA, a falsehood is material if it has "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). Most recently in Escobar, the Supreme Court clarified that "[t]he materiality standard is demanding." 136 S. Ct. at 2003. Materiality looks to the effect on the behavior of the recipient of the alleged misrepresentation. Id. at 2002. A misrepresentation is not material simply because the government requires compliance with certain requirements as a condition of payment. Id. at 2003. Nor can a court find materiality where "the Government would have the option to decline to pay if it knew of the defendant's noncompliance." Id. Relatedly, mere "minor or insubstantial" noncompliance is not material. Id. Evidence relevant to the materiality inquiry includes the

[2] Defendants correctly observe that relator's FCA claims must not only be plausible but pled with particularity under Federal Rule of Civil Procedure 9(b). See Cafasso ex rel. United States v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054-55 (9th Cir. 2011). However, defendants reference Rule 9(b) only to the extent they argue that relator has failed to plead particular facts in support of materiality. (See Mot. to Dismiss at 2-3, 15 & 18.) Therefore, the court assumes, without deciding, that relator has otherwise satisfied the requirements of Rule 9(b).

government's conduct in similar circumstances and whether the government has knowledge of the alleged noncompliance. See id. Defendants puts forth four different arguments in support of their contention that relator has insufficiently pled facts as to the materiality requirement.

First, defendants argue that AR disclosed to its government customers that it was not compliant with relevant DoD and NASA regulations and therefore it is impossible for relator to satisfy the materiality prong. The Supreme Court did observe in Escobar that "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." Id. Here, however, relator properly alleges with sufficient particularity that defendants did not fully disclose the extent of AR's noncompliance with relevant regulations. See id. at 2000 ("[H]alf-truths--representations that state the truth only so far as it goes, while omitting critical qualifying information--can be actionable misrepresentations."). For instance, relator alleges that AR misrepresented in its September 18, 2014 letter to the government the extent to which it had equipment required by the regulations (SAC ¶ 63), instituted required security controls (id. ¶¶ 60-61, 63), and possessed necessary firewalls (id. ¶ 62). Relator also alleges that these misrepresentations persisted over time, whereby AR knowingly and falsely certified compliance with security requirements when submitting invoices for its services.

(Id. ¶¶ 135-36.)[3] While it may be true that AR disclosed some of its noncompliance (see id. ¶¶ 59-64), a partial disclosure would not relieve defendants of liability where defendants failed to "disclose noncompliance with material statutory, regulatory, or contractual requirements." See Escobar, 136 S. Ct. at 2001.

In fact, some of the evidence defendants put forth in favor of their motion to dismiss provides support for relator's allegations relevant to materiality.[4] The DoD informed the federal contracting officer that it could not waive compliance with DoD regulations, even for an urgent contract. (SAC ¶¶ 67-68; Req. for Judicial Notice Ex. Z at 1-4.) While the contracting officer was not prohibited from awarding the contract because of AR's noncompliance, AR could not process, store, or transmit controlled technical information until it was fully compliant. (Req. for Judicial Notice Ex. Z at 1.) Still, the DoD representative believed it to "be a relatively simple matter for the contractor to become compliant" based on the disclosure letter AR sent to the contracting negotiator. (Id. at 1-2.) Yet, relator's complaint alleges possible material nondisclosures

[3] The court recognizes that "allegations of fraud based on information and belief usually do not satisfy the particularity requirements under rule 9(b)." Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 540 (9th Cir. 1989) (citation omitted). However, as explained elsewhere in this motion, there are other parts of the complaint that allege fraud with sufficient particularity for the purposes of Rule 9(b).

[4] Because relator's complaint references the documents contained in defendants' Exhibits Y & Z (Docket Nos. 52-25 & 52-26) in his complaint, the court considers these materials, without converting the motion to dismiss into a motion for summary judgment, under the doctrine of incorporation by reference. See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

in this letter, such as AR's failure to report its status on all required controls, its alleged misstatements as to partial compliance with protection measures, and the fact that the company cherrypicked what data it chose to report. (See SAC ¶¶ 59-64.)[5] Accepting these allegations as true, the government may not have awarded these contracts if it knew the full extent of the company's noncompliance, because how close AR was to full compliance was a factor in the government's decision to enter into some contracts.[6]

Second, defendants contend that the government's response to the investigation into AR's representations

[5] Defendants argue for the first time in their reply that these alleged misstatements were not associated with a claim for payment and thus cannot support liability under the FCA. (See Reply in Supp. of Mot. to Dismiss ("Reply") at 4 (Docket No. 54).) Contrary to defendants' understanding, the FCA merely requires that the false statement(s) or fraudulent course of conduct cause the government to pay out money due. See Hendow, 461 F.3d at 1173. Under a promissory fraud theory, the relator only needs to allege that a claim was submitted "under a contract" that "was originally obtained through false statements or fraudulent conduct." See id.; see also United States ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890, 902 (9th Cir. 2017) (reaffirming Hendow's test for promissory fraud after Escobar). Here, relator alleges that AR secured its contracts with the government through misrepresentations made to government contracting agents and that the government ultimately paid out on these contracts. (See SAC ¶¶ 59-66, 129-131.)

[6] This promissory fraud theory, supported by these allegations of specific misrepresentations, distinguishes this case from United States ex rel. Mateski v. Raytheon Co., No. 2:06-CV-03614 ODW KSX, 2017 WL 3326452 (C.D. Cal. Aug. 3, 2017), aff'd, 745 F. App'x 49 (9th Cir. 2018). In Mateski, the relator merely alleged general violations of contract provisions that the government designated compliance with as mandatory to support a false certification theory. See id. at *7. Applying Escobar, the district court concluded that "such designations do not automatically make misrepresentations concerning those provisions material." Id. (citing 136 S. Ct. at 2003).

surrounding its cybersecurity compliance undermines relator's allegations as to materiality. Both the DoD and NASA have continued to contract with AR since the government's investigation into the allegations of this complaint. (See Req. for Judicial Notice Exs. S-V (Docket Nos. 52-19, 52-20, 52-21 & 52-22).)[7] Such evidence is not entirely dispositive on a motion to dismiss. Cf. Campie, 862 F.3d at 906 (cautioning courts not to read too much into "continued approval" by the government, albeit in a different context). Instead, the appropriate inquiry is whether AR's alleged misrepresentations were material at the time the government entered into or made payments on the relevant contracts. See Escobar, 136 S. Ct. at 2002. The contracts government agencies entered with AR after relator commenced this litigation are not at issue and possibly relate to a different set of factual circumstances. As discussed previously, relator has sufficiently alleged that AR's misrepresentations as to the extent of its noncompliance with government regulations could have affected the government's decision to enter into and pay on the contracts at issue in this case.

Defendants also argue that the government's decision

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[7] The court GRANTS defendants' request that it take judicial notice of these exhibits. Exhibits T through V are publications on government websites and thus properly subject to judicial notice. See, e.g., Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998-99 (9th Cir. 2010) (finding that it is "appropriate to take judicial notice of [information on government website], as it was made publicly available by government entities [], and neither party disputes the authenticity of web sites or the accuracy of the information displayed therein."). Exhibit S is an official Authorization to Operate signed by NASA officials, so its "accuracy cannot reasonably be questioned." See Fed. R. Evid. 201(b)(2).

not to intervene in this case indicates that the alleged misrepresentations were not material. (See Mot. to Dismiss at 3; Reply at 9.) As the Sixth Circuit has observed, in Escobar itself, the government chose not to intervene and the Supreme Court did not mention it as a factor relevant to materiality. See United States ex rel. Prather v. Brookdale Senior Living Communities, Inc., 892 F.3d 822, 836 (6th Cir. 2018) (citing 136 S. Ct. at 1998). Separately, "[i]f relators' ability to plead sufficiently the element of materiality were stymied by the government's choice not to intervene, this would undermine the purposes of the Act," as the FCA allows relators to proceed even without government intervention. Id. (citation omitted). And finally, there is no reason believe that the decision not to intervene is a comment on the merits of this case. See, e.g., United States ex rel. Atkins v. McInteer, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006) ("In any given case, the government may have a host of reasons for not pursuing a claim."); United States ex rel. Chandler v. Cook Cty., Ill., 277 F.3d 969, 974 n.5 (7th Cir. 2002) ("The Justice Department may have myriad reasons for permitting the private suit to go forward including limited prosecutorial resources and confidence in the relator's attorney.").

Third, defendants argue that AR's noncompliance does not go to the central purpose of any of the contracts, as the contracts pertain to missile defense and rocket engine technology, not cybersecurity. See Escobar, 136 S. Ct. at 2004 n.5 (noting that a misrepresentation is material where it goes to the "essence of the bargain"). This argument is unavailing at

this stage of the proceedings. Relator alleges that all of AR's relevant contracts with the DoD and NASA incorporated each entity's acquisition regulations. (See SAC ¶¶ 84, 105.) These acquisition regulations require that the defense contractor undertake cybersecurity specific measures before the contractor can handle certain technical information. Here, compliance with these cybersecurity requirements could have affected AR's ability to handle technical information pertaining to missile defense and rocket engine technology. (See Req. for Judicial Notice Ex. Z at 1.) Accordingly, misrepresentations as to compliance with these cybersecurity requirements could have influenced the extent to which AR could have performed the work specified by the contract.

Fourth and finally, defendants argue that the government's response to the defense industry's non-compliance with these regulations as a whole weighs against a finding of materiality. When evaluating materiality, courts should "consider how the [government] has treated similar violations." See United States ex rel. Rose v. Stephens Inst., 909 F.3d 1012, 1020 (9th Cir. 2018). Defendants contend that the DoD never expected full technical compliance because it constantly amended its acquisition regulations and promogulated guidances that attempted to ease the burdens on the industry. This observation is not dispositive. Even if the government never expected full technical compliance, relator properly pleads that the extent to which a company was technically complaint still mattered to the government's decision to enter into a contract. (See SAC ¶¶ 66-72.) Defendants have not put forth any judicially noticeable evidence that the government paid a company it knew was

noncompliant to the same extent as AR was. Therefore, this consideration does not weigh in favor of dismissal.

Accordingly, given the above considerations, relator has plausibly pled that defendants' alleged failure to fully disclose its noncompliance was material to the government's decision to enter into and pay on the relevant contracts.[8]

C. Conspiracy under the FCA

Relator's third count alleges that defendants participated in a conspiracy to submit false claims in violation of 31 U.S.C. § 3729(a)(1)(C). Relator maintains that defendants and their officers conspired together to defraud the United States by knowingly submitting false claims. (See SAC ¶ 144.) Section 3729(a)(1)(C) imposes liability on a person who conspires to commit a violation of Section 3729(a)(1)(A) or Section 3729(a)(1)(B).

Defendants argue that this count fails as a matter of law because relator has failed to identify two distinct entities that conspired. Derived from antitrust law, the intracorporate conspiracy doctrine "holds that a conspiracy requires an agreement among two or more persons or distinct business entities." United States v. Hughes Aircraft Co., 20 F.3d 974, 979 (9th Cir. 1994) (internal quotation marks omitted). The doctrine stems from the definition of a conspiracy and the requirement that there be a meeting of the minds. See Hoefer v. Fluor Daniel, Inc., 92 F. Supp. 2d 1055, 1057 (C.D. Cal. 2000) (citing Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983)). While

[8] The court expresses no opinion as to what relator will be able to establish at summary judgment or trial.

the Ninth Circuit has not addressed this issue, several district courts have applied the intracorporate conspiracy doctrine to FCA claims. See United States ex rel. Lupo v. Quality Assurance Servs., Inc., 242 F. Supp. 3d 1020, 1027 (S.D. Cal. 2017) (collecting cases). Courts have used this principle to bar conspiracy claims where the alleged conspirators are a parent corporation and its wholly-owned subsidiary. See, e.g., United States ex. rel. Campie v. Gilead Scis., Inc., No. C-11-0941 EMC, 2015 WL 106255, at *15 (N.D. Cal. Jan. 7, 2015).

Here, relator identifies only a parent company, ARH, and its wholly-owned subsidiary, AR, as defendants. (SAC ¶¶ 7-8.) While relator alleges that defendants also conspired with its officers, a corporation, as a matter of law, "cannot conspire with its own employees or agents." Hoefer, 92 F. Supp. 2d at 1057. By failing to allege that defendants conspired with any independent individual or entity, relator's conspiracy claim fails as a matter of law.

Accordingly, the court will dismiss relator's third claim, that defendants participated in a conspiracy to submit false claims in violation of 31 U.S.C. § 3729(a)(1)(C).

III. Motion to Compel Arbitration and Stay Proceedings

"Relator does not oppose defendants' motion to refer his employment related claims to arbitration" based on his arbitration agreement with defendants. (Opp'n to Mot. to Dismiss at 16 (Docket No. 53); see also Decl. of Ashley Neglia Ex. 1 (arbitration agreement) (Docket No. 51-1).) Relator does oppose, however, defendants' request that the entire proceedings be stayed pending the resolution of these employment related claims

in arbitration. Relator contends that a stay is inappropriate as to his FCA claims because they are brought on behalf of the government, are not referable to arbitration, and are separate from the issues involved in his employment-related claims. (See Opp'n to Mot. to Dismiss at 16-17.)

Section 3 of the FAA provides that a court "shall on application of one of the parties stay the trial" of "any suit proceeding" brought "upon any issue referable to arbitration under [an arbitration] agreement . . . until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. A party is only "entitled to a stay pursuant to section 3" as to arbitrable claims. Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863 (9th Cir. 1979). As to nonarbitrable claims, which defendants concede the FCA claims are, this court has discretion whether to stay the litigation pending arbitration. Id. at 863-64. This court may decide whether "it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." Id. at 863. If there is a fair possibility that the stay may work damage to another party, a stay may be inappropriate. See Dependable Highway Exp., Inc. v. Navigators Ins. Co., 498 F.3d 1059, 1066 (9th Cir. 2007) (citation omitted).

The court will not expand the stay to encompass the nonarbitrable FCA claims. The issues involved in the FCA claims differ from those involved in relator's employment-based claims. Relator's FCA claims concern fraud that defendants allegedly perpetrated on the government, while relator's employment-based

claims concern the alleged violation of his own rights during his employment. Resolution of relator's employment-based claims will not narrow the factual and legal issues underlying the FCA claims. While relator brings one of his employment claims under the FCA, "[t]he elements differ for a FCA violation claim and a FCA retaliation claim." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1103 (9th Cir. 2008). Moreover, a stay would unnecessarily work to delay resolution of relator's FCA claims, which have been pending for more than three years.

Accordingly, the court will refer relator's employment-based claims, Counts Four, Five, and Six, to arbitration and stay proceedings as to these claims only.[9]

IT IS THEREFORE ORDERED that defendants' Motion to Dismiss Relator's Second Amended Complaint (Docket No. 50) be, and the same hereby is, GRANTED IN PART. Count Three of relator's Second Amended Complaint is DISMISSED WITH PREJUDICE. The motion is DENIED in all other respects.

IT IS FURTHER ORDERED that defendants' Motion to Compel Arbitration and Stay Proceedings (Docket No. 50) be, and the same hereby is, GRANTED with respect to Counts Four, Five, and Six of relator's Second Amended Complaint. Proceedings as to Counts One and Two are not stayed.

Dated: May 8, 2019

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

[9] All remaining Requests for Judicial Notice (Docket No. 52) are DENIED as MOOT.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA ex rel. BRIAN MARKUS, Relator, v. AEROJET ROCKETDYNE HOLDINGS, INC., a corporation and AEROJET ROCKETDYNE, INC., a corporation, Defendants.	No. 2:15-cv-02245 WBS AC MEMORANDUM AND ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

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Plaintiff-relator Brian Markus ("relator") brings this action against defendants Aerojet Rocketdyne Holdings, Inc. ("ARH") and Aerojet Rocketdyne, Inc. ("AR"), arising from defendants' allegedly wrongful conduct in violation of the False Claims Act, 31 U.S.C. §§ 3729 et seq. Relator brings the following claims against defendants: (1) promissory fraud in violation of 31 U.S.C. § 3729(a)(1)(A); and (2) false or fraudulent statement or record in violation of 31 U.S.C. §

3729(a)(1)(B). Before the court are the parties' cross-motions for summary judgment. Relator moves for summary judgment as to the first claim, promissory fraud, of his second amended complaint ("SAC"). (Docket No. 124.) Defendants move for summary judgment as to both claims. (Docket No. 116.) Both parties move for summary judgment on the issue of actual damages. Although the United States declined to intervene in this case, it filed a statement of interest addressing issues raised by defendants' motion and opposition to relator's motion. (Docket No. 135.)

I. Background

Relator Brian Markus was employed by defendants as the senior director for Cyber Security, Compliance & Controls from June 2014 to September 2015. (Second Am. Compl. ("SAC") ¶ 6 (Docket No. 42).) Defendants are in the business of developing and manufacturing products for the aerospace and defense industry and primarily contract with the federal government including the Department of Defense ("DoD") and the National Aeronautics and Space Administration ("NASA"). (SAC ¶ 7.) Defendant AR is a wholly-owned subsidiary of ARH, and ARH uses AR to perform its contractual obligations. (Id. at ¶ 8.)

Government contracts are subject to Federal Acquisition Regulations and are supplemented by agency specific regulations. On November 18, 2013, the DoD issued a final rule, which imposed requirements on defense contractors to safeguard unclassified controlled technical information from cybersecurity threats. 48

C.F.R. § 252.204-7012 (2013).[1] The rule required defense contractors to implement specific controls covering many different areas of cybersecurity, though it did allow contractors to submit an explanation to federal officers explaining how the company had alternative methods for achieving adequate cybersecurity protection, or why standards were inapplicable. See id.

In August 2015, the DoD issued an interim rule, modifying the government's cybersecurity requirements for contractor and subcontractor information systems. 48 C.F.R. § 252.204-7012 (Aug. 2015). The interim rule incorporated more cybersecurity controls and required that any alternative measures be "approved in writing prior by an authorized representative of the DoD [Chief Information Officer] prior to contract award." Id. at 252.204-7012(b)(1)(ii)(B). The DoD amended the interim rule in December 2015 to allow contractors until December 31, 2017 to have compliant or equally effective alternative controls in place. See 48 C.F.R. § 252.204-

[1] Defendants submitted a request for judicial notice of, among several other items, certain regulations. (Docket No. 119). The court need not take judicial notice of regulations. Accord Fed R. Evid. 201. Because relator does not object, the court takes judicial notice of Exhibit 37 and 121 of the Declaration of Tammy A. Tsoumas (Docket No. 117), which is data published on USASpending.gov, which is maintained by the United States Department of Treasury and other federal agencies. (See Daniels-Hall v. Nat'l Educ. Ass'n, 629 F. 3d 992 998-99 (9th Cir. 2010) ("It is appropriate to take judicial notice of [information on a government website], as it was made publicly available by government entities . . . and neither party disputes the authenticity of the web sites or the accuracy of the information displayed therein.") The court does not rely on the remaining items at issue in the request, and therefore the request is denied as moot as to those items.

7012(b)(1)(ii)(A) (Dec. 2015).

Each version of this regulation defines adequate security as "protective measures that are commensurate with the consequences and probability of loss, misuse, or unauthorized access to, or modification of information." 48 C.F.R. § 252.204-7012(a).

Contractors awarded contracts from NASA must comply with relevant NASA acquisition regulations. 48 C.F.R. § 1852.204-76 lists the relevant security requirements where a contractor stores sensitive but unclassified information belonging to the federal government. Unlike the relevant DoD regulation, this NASA regulation makes no allowance for the contractor to use alternative controls or protective measures. A NASA contractor is required to "protect the confidentiality, integrity, and availability of NASA Electronic Information and IT resources and protect NASA Electronic Information from unauthorized disclosure." 48 C.F.R. § 1852.204-76(a).

Relator claims defendants fraudulently induced the government to contract with AR knowing that AR was not complying with Defense Federal Acquisition Regulation 48 C.F.R. § 252.204-7012 ("DFARS") and NASA Federal Acquisition Regulation 48 C.F.R. § 1852.204-76 ("NASA FARS"), which is required to be awarded a government contract. (SAC ¶ 30.)

II. Summary Judgment Standard

A party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact as to the basis for the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A material fact is one that

could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable trier of fact to enter a verdict in the non-moving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. Celotex Corp, 477 U.S. at 322–23. Alternatively, the movant can demonstrate that the non-moving party cannot provide evidence to support an essential element upon which it will bear the burden of proof at trial. Id.

Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact. Acosta v. City Nat'l Corp., 922 F.3d 880, 885 (9th Cir. 2019) (citing Zetwick v. Cty. of Yolo, 850 F.3d 436, 440 (9th Cir. 2017)).

Where, as here, parties submit cross-motions for summary judgment, "each motion must be considered on its own merits." Fair Hous. Council of Riverside Cty., Inc. v. RiversideTwo, 249 F.3d 1132, 1136 (9th Cir. 2001) (internal citations and modifications omitted). "[T]he court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." Tulalip Tribes of Wash. v. Washington, 783 F.3d 1151, 1156 (9th Cir. 2015). Accordingly, in each instance, the court will view the evidence in the light most

favorable to the non-moving party and draw all inferences in its favor. ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1097 (9th Cir. 2003) (citations omitted).

III. Scope of the Claims

As an initial matter, the parties dispute the scope of relator's claims. In his SAC, relator specified eighteen contracts that AR had with the DoD and NASA between February 23, 2014 and April 1, 2016. (SAC ¶¶ 84-93, 105-14.) Relator also alleges in his SAC that defendants obtained subcontracts, separate from those listed in the SAC, subject to the DFARS and NASA FARS regulations, by falsely representing that they were compliant with those regulations. However, relator does not produce any evidence as to those subcontracts, and the court will not consider them in deciding the cross motions for summary judgment. (SAC ¶ 126.)

A. Contracts Awarded After Litigation Commenced

Defendants indicate that six of the contracts were awarded after relator commenced this action. (Defs.' MSJ at 24.) This court has already held that "[t]he contracts government agencies entered with AR after relator commenced this litigation are not at issue." United States v. Aerojet Rocketdyne Holdings, Inc., 381 F. Supp. 3d 1240, 1248 (E.D. Cal. 2019). The court sees no reason to depart from this holding, and once again will not consider contracts entered into after the commencement of litigation as bases for the SAC's claims, specifically the six contracts awarded after the original complaint was filed.[2]

[2] Relator filed his first complaint on October 29, 2015. Therefore, the court will not consider the following six

B. Contracts Explicitly Containing FARS Clauses

Defendants argue that the scope of relator's claim must be limited to only those contracts that contain the DFARS or NASA FARS clauses. (Defs.' Mot. for Summ. J. ("Defs.' MSJ") at 22 (Docket No. 116); Defs.' Reply to Relator's Resp. to Defs.' Statement of Undisputed Facts ("Defs.' SUF") ¶ 32, 35, 38, 40-43, 46, 49, 51, 53 (Docket No. 138).) However, the parties agree that six of the remaining 12 contracts do include the cybersecurity clauses.

Defendants argue that one of these six contracts with the FARS clause, #NNC15CA07C (awarded Mar. 31, 2015), should not be considered because, prior to contracting, it was determined that AR did not have access to any information requiring protection under the NASA FARS clause. However, defendants' evidence indicates that NASA was still contemplating whether the clause was relevant to the contract in 2016. (See Decl. of Tammy A. Tsoumas Decl. in Support of Defs.' Mot. for Summ. J. ("Tsoumas Decl."), Ex. 166, ("clause probably applies," "clause is relevant," and "we should be enforcing the clause.") Therefore, #NNC15CA07C remains at issue for relator's claims.

C. Contracts Not Containing FARS Clauses

Relator claims the six contracts without the clauses would have incorporated the clauses through other methods. Relator explains that contracts without the DFARS clause would be accompanied by DD Form 254, "which required that AR comply with

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contracts entered into: #NNM16AB22P (awarded Nov. 17, 2015), #NNM16AA02C (awarded Nov. 19, 2015), #NNM16AB21P (awarded Dec. 14, 2015), #W31P4Q-16-C-0026 (awarded Dec. 23, 2015), #NNH16CP17C (awarded Jan. 15, 2016), and #NNM16AA12C (awarded Apr. 1, 2016).

all laws and regulations governing access to 'Unclassified Controlled Technical Information,'" or another NASA FARS clause imposing the cybersecurity regulations on AR despite them not being in the contract. (Relator's Opp'n at 11-12; Relator's Reply at 8 (Docket No. 139).) Defendants note that only three of the specified contracts in the SAC contain the DD Form 254 or the other NASA FARS clause, but two of those were awarded after litigation and are not being considered by the court as explained above. (Defs.' Reply at 4 (Docket No. 138); Defs.' SUF ¶ 32, 49, 51.) Contract no. #W31P4Q-14-C-0075 does incorporate DD Form 254 and will be considered by the court.

Relator claims defendants' evidence of which contracts contained the pertinent clause is flawed because (1) the defendants' supporting evidence consists of only order forms, rather than complete contracts; (2) the parent award (which is not produced) does contain the clause; or (3) the orders produced state that they do not list all applicable clauses. (Defs.' SUF ¶ 32, 35, 38, 40-43, 46, 49, 51, 53.) However, relator merely argues that these other documents incorporated the clauses but does not produce any evidence to that effect. Therefore, the court cannot assume that the other documents relator describes actually contain the clauses.

In sum, relator's SAC specifies 18 contracts that he alleges were obtained in violation of the False Claims Act. Six of those 18 were obtained after litigation commenced. Six of the remaining 12 explicitly contain the clauses, and one incorporates DD Form 254 which has the DFARS clause. Therefore, the court will only consider the seven contracts which have the clauses

either explicitly listed or are incorporated, as shown through the parties' evidence.[3]

IV. Relator's Claims under the False Claims Act

Relator brings two claims for fraud under the False Claims Act, which impose liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A), or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," id. § 3729(a)(1)(B).

Outside of the context where "the claim for payment is itself literally false or fraudulent," the Ninth Circuit recognizes two different doctrines that attach False Claims Act liability to allegedly false or fraudulent claims: (1) false certification and (2) promissory fraud, also known as fraud in the inducement. See United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1170-71 (9th Cir. 2006) (citation omitted).

Under either promissory fraud or false certification, "the essential elements of [False Claims Act] liability remain the same: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." Id.

A. Promissory Fraud

Both sides move for summary judgment on the promissory

[3] Specifically, the court will consider contract nos. #W31P4Q-14-C-0075, #NNC10BA13B (parent award for #NNC13TA66T), #N00014-14-C-0035, #FA8650-14-C-7424, #N68936-14-C-0035, #NNC15CA07C, and #HR001115C0132.

fraud claim. The promissory fraud approach to the False Claims Act is broader than the false certification approach and "holds that liability will attach to each claim submitted to the government under a contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct." Hendow, 461 F.3d at 1173. For the following reasons, the court cannot grant summary judgment for either side on relator's promissory fraud claim.

1. False Statement or Fraudulent Course of Conduct

Under the False Claims Act, "the promise must be false when made." Hendow, 461 F.3d at 1174 (citations omitted). Further, "innocent mistakes, mere negligent misrepresentations, and differences in interpretations are not sufficient for" False Claims Act liability. Id. (citations omitted).

Relator contends defendants made false statements regarding AR's cybersecurity status by not disclosing the full extent of AR's noncompliance with the DFARS and NASA FARS clauses. (Relator's Mot. for Summ. J. ("Relator's MSJ") at 16; United States' Statement of Interest at 6 (Docket No. 135).) Relator argues any disclosures to DoD agencies "softened," or downplayed, the state of AR's noncompliance which resulted in omissions of information the government would want to know to make assessment about the safety of its information." (See Relator's MSJ at 8, 16.)

The evidence indicates that AR disclosed on multiple occasions to the DoD and NASA that it was not compliant with the DFARS clause. AR disclosed whether it was compliant with each control identified in the DFARS clause by providing a compliance

assessment matrix via email or letter, though its accuracy is in question as discussed below. (Tsoumas Decl., Ex. 60-61, 65, 78, 83, 89, 110, 111 (Docket No. 117).) AR also disclosed its noncompliance to agencies via documented meetings and teleconferences. (Tsoumas Decl., Ex. 55, 56, 58, 61, 65, 66; Defs.' SUF ¶ 74, 75, 113, 114.) However, there is no record of what was stated during those meetings or conferences.

Defendants correctly point out numerous instances where the government acknowledged AR's noncompliance and was even working with AR to implement a waiver. (See Tsoumas Decl., Ex. 253, Dep. of Laurie Hewitt 60:6-61:5, 63:15-16 ("With this letter it was my understanding that Aerojet was not in compliance with the DFARS clause")); (Tsoumas Decl., Ex. 85, 86, 91, 92, 115.) Defendants' evidence produced on summary judgment shows that AR disclosed information to NASA about noncompliance and NASA acknowledged it. (Tsoumas Decl., Ex. 162,168, 169, 180.) Though defendant has produced evidence demonstrating disclosures of noncompliance, these disclosures hold less weight when they are incomplete.

Relator bases his claim partially on the alleged nondisclosure of data breaches AR experienced. (Relator's MSJ at 2.) A memo by an outside firm dated September 4, 2013, outlines four incidents that occurred which resulted in "huge quantities of data leaving the Rocketdyne network." (Decl. of Gregory Thyberg ISO of Relator's Mot. for Summ. J ("Thyberg Decl."), Ex. A at 60 (Docket No. 125).) Defendants respond that the attack took place on Pratt & Whitney Rocketdyne's network before it was merged with the Aerojet General Corp. and defendants did not

"control critical IT and security resources" (Defs.' Opp'n at 20 (Docket No. 130)); (Thyberg Decl., Ex. A at 71.) Steps were taken to remedy the problem, however, the report only details steps that were taken for two of the four incidents it outlines. (Thyberg Decl., Ex. A at 62-63.) Further, the report made a set of recommendations as the "current infrastructure will still allow malware to enter and cause further problems such as data leakage" and "large quantities of data are still being detected leaving the network." (Id. at 59, 61, 77, 79.)

Even though the network at issue was not fully in defendants' control at the time of the breaches, defendants note the information technology systems integrated later. (Defs.' Response to Relator's Statement of Facts ("Relator's SUF") ¶ 11 (Docket No. 130-2).) This evidence creates a genuine dispute of material fact concerning whether the problems outlined in the reports stemming from the 2013 breaches were still occurring when the companies were integrated. There is no evidence that the recommendations in the 2013 report were acted upon. Further, there is no showing that these 2013 breaches were disclosed to the contracting agencies, or were not relevant to compliance with the necessary regulations.

Relator also bases his claim on annual cybersecurity audits done by outside agencies. (Relator's MSJ at 3.) These audits concluded AR was not fully compliant with the necessary DFARS and NASA FARS controls. (Relator's MSJ at 3.) Defendants do not dispute these findings by outside agencies and note that AR disclosed this information to the DoD and NASA. (Relator's SUF at ¶ 29-31.) However, the nature of the disclosures creates

a genuine dispute as to material fact because the evidence does not suggest that AR revealed the full picture.

Defendants do not dispute that a 2014 outside audit determined that AR was only compliant with 5 of the 59 required controls under DFARS 252.2014-7012. (Relator's SUF ¶ 29); (2d. Decl. of Tammy A. Tsoumas ("Tsoumas 2d. Decl.") (Docket No. 130-1), Ex. 215, 216, (internal emails focused on creating matrix of controls and acknowledging that "AR is compliant with 5" of the controls).) In September 2014, AR disclosed its "position on DFARS" 252.204-7012 to the Army, but identified, in a compliance matrix created by AR, that 10 controls were "in place and compliant." (Tsoumas Decl., Ex. 78.) This compliance matrix which listed 10 compliant controls was sent to multiple government agencies as part of AR's purported disclosures. (Id., Ex. 60, 65, 78, 83, 110, 111.) Defendants provide no explanation or evidence for the differing number of compliant controls between the audit and the information sent to agencies.

Further, the outside audits found that AR had several high, moderate, and low risk deficiencies and a low security monitoring score from 2013 to 2015. (Relator's SUF ¶ 31-33, 35.) An auditing firm was able to penetrate AR's network within four hours, requiring the firm to recommend immediate action. (Relator's SUF ¶ 34.) Defendants point out that these audits do not necessarily translate to AR being non-compliant with DFARS or NASA FARS as the audit reports do not specify as such.

However, part of the DFARS clause requires contracts to provide "adequate security" which requires the contract to implement certain controls "at a minimum." 48 C.F.R. § 252.204-

7012(b). Adequate security is defined as "protective measures that are commensurate with the consequences of probability of loss, misuse, or unauthorized access to, or modification of information." 48 C.F.R. § 252.204-7012(a). A reasonable trier of fact could find that the government agencies with whom AR was contracting would not see AR as providing adequate security if they were aware of the audit findings. There is no evidence showing that the government agencies were aware of the findings from these audits, or that the findings were not relevant to compliance.

In sum, though defendants disclosed noncompliance with the at issue regulations, the extent of the disclosure is unclear from the evidence presented at this stage. A genuine dispute of material fact exists as to the sufficiency of the disclosures about the 2013 breaches and information gathered in audits done by outside firms.

Because the court cannot conclude as a matter of law that the first element of promissory fraud is met, plaintiff's motion for summary judgment on the promissory fraud claim must be denied. Defendants' motion for summary judgement on the promissory fraud claim may be granted if defendant can show the absence of a genuine issue of material fact and negate one or more of the remaining three elements of promissory fraud. The court accordingly analyzes the remaining elements below for this purpose.

2. Scienter

If defendants made false statements or engaged in a fraudulent course of conduct, they must have done so "knowingly."

31 U.S.C. § 3729(a)(1)(A). The term knowingly is defined as having "actual knowledge," acting with "deliberate ignorance of the truth or falsity of the information," or acting in "reckless disregard of the truth or falsity or the information." Id. at § 3729(b)(1)(A)(i-iii).

Relator's supporting evidence shows that defendants knew AR needed to comply with the DFARS and NASA FARS clauses, and were aware of AR's noncompliance and the information obtained through outside audits. (Relator's SUF ¶ 40-48, 59, 60-66.) Given the evidence cited by relator, and the contradictions in information that AR had versus what was presented to the government agencies, defendants have not demonstrated the absence of a genuine dispute of fact on the scienter element. Accordingly, the court cannot grant defendants' motion for summary judgment on the promissory fraud claim based on the that element.

3. Materiality

Under the False Claims Act, materiality means a defendant's fraud has "a natural tendency to influence" or was "capable of influencing" the government's payment decision. 31 U.S.C. § 3729(b)(4). "[M]ateriality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." Universal Health Servs., Inc. v. United States ex rel. Escobar, --- U.S. ----, 136 S. Ct. 1989, 2002 (2016) (alternations omitted) ("Escobar").

Defendants note that materiality is not established merely because the "[g]overnment designates compliance with a particular statutory, regulatory, or contractual requirement as a

condition of payment." Escobar, 136 S. Ct. at 2003. The mere fact that a regulation is a requirement does not dispositively mean it is a condition of payment or that it is material. See id. However, it does not follow that the incorporation of a regulation as a condition of the contract may not be taken into account in determining whether compliance with the regulation is material.

Here, compliance with the relevant clauses was an express term of the contracts. (See Tsoumas Decl., Ex. 129 ("The Contract shall comply with the following Federal Acquisition Regulation (FAR) clauses").) It may be reasonably inferred that compliance was significant to the government because without complete knowledge about compliance, or noncompliance, with the clauses, the government cannot adequately protect its information. (See Tsoumas Decl., Ex. 34, DoD Presentation Apr. 26, 2018, at 45:5-7.) Therefore, a genuine dispute of fact exists as to the materiality element.

Defendants argue that compliance with DFARS and NASA FARS was nonmaterial because the government awarded contracts to other contractors and AR despite knowledge that they were noncompliant. (Defs.' SUF at ¶ 160, 179, 178, 193, 199, 162, 171, 174, 180, 183, 186, 189, 195, 201, 204, 207, 210, 213, 216, 219, 222.) However, without some evidence of the circumstances of those other contracts, the court cannot speculate as to other contractors' level of non-compliance when analyzing whether similar "particular type[s]" of claims were paid. Escobar, 136 S. Ct. at 2003-04. Specifically for AR, as discussed above, a genuine dispute of material fact exists as to whether the

government had "actual knowledge that certain requirements were violated" due to the sufficiency of AR's disclosures. Escobar, 136 S. Ct. 2003-04 (emphasis added).

Defendants have not shown an absence of a genuine dispute of material fact on the element of materiality. Therefore, the court cannot grant summary judgment for defendants on the promissory fraud claim based on the materiality element.

4. Causation

The False Claims Act requires "a causal rather than temporal connection between fraud and payment." Hendow, 461 F.3d 1174 (citations omitted). The relator must show actual, but-for causation, meaning defendant's fraud caused the government to contract. See United States ex rel. Cimino v. Int'l Bus. Machs. Corp., 3 F.4th 412, 420 (D.C. Cir. 2021) (concluding that in a False Claims Act fraudulent inducement claim the relator "was required to plead actual causation under a but for standard.")

Because of the dispute as to whether AR fully disclosed its noncompliance, a reasonable trier of fact could find that the government might not have contracted with AR, or might have contracted at a different value, had it known what relator argues AR should have told the government. Accordingly, the court cannot grant summary judgment for defendants on the promissory fraud claim based on the causation element.

In sum, a genuine dispute of material fact exists regarding each element of the promissory fraud claim for the seven contracts. Therefore, both sides' motions for summary judgment on the promissory fraud claim must be denied.

B. False Certification

Defendants also move for summary judgment on the second claim of the SAC, false certification. Under a false certification theory, the relator can allege either express false certification or implied false certification for knowingly presenting "a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A).

As noted above, contracts awarded after this litigation commenced will not be considered. Relator's claim for false certification is based solely on an invoice payment under a NASA contract that was entered into after relator brought this action and is therefore not a proper basis for his false certification claim. (See Relator's Opp'n at 14; Tsoumas Decl., Ex. 121, Row 126 (the contract at issue was awarded on April 28, 2016).) Because relator provides no other examples of alleged false certifications, defendants' motion for summary judgment on relator's second claim of false certification will be granted.

V. Damages

Relator moves for summary judgment on the issue of damages, contending that he has established as a matter of law that the damages amount to $19,044,039,117.00, which amounts to three times the sum of each invoice paid under each contract that was obtained through the allegedly false statements or fraudulent conduct. Conversely, defendants move for summary judgment on the issue of damages, contending that there is no evidence that the government suffered actual damages. In essence, relator would have the court find as a matter of law that what the government received under the contracts had no economic value whatsoever, whereas defendants would have the court find that the government

received the full economic value of goods and services AR was contracted to provide.

Neither of these propositions is supported by the record before the court at this time. The amount of statutory or actual damages, if any, to which relator would be entitled is for the trier of fact to determine and cannot be adjudicated on summary judgment. Therefore, both sides' motions for summary judgment on the issue of damages will be denied.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment (Docket No. 116) be, and the same hereby is, DENIED on the promissory fraud claim and GRANTED on the false certification claim of relator's Second Amended Complaint.

IT IS FURTHER ORDERED that relator's motion for summary judgment (Docket No. 124) be, and the same hereby is, DENIED.

Dated: February 1, 2022

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA *ex rel.*
JAMES WATKINS, M.D.,
ABINO ORTEGA, R.N.,
ROBERT SMITH, D.PM., M.Sc., R.Ph.,

Plaintiffs,

- against -

CHS MIDDLE EAST, LLC,

Defendant.

----------X

Civil Action No.
17-cv-4319

(Ross, J.)

UNITED STATES *ex rel.*
M. SHAWN LAWLER, DDS,

Plaintiffs,

- against -

COMPREHENSIVE HEALTH SERVICES, INC.,
COMPREHENSIVE HEALTH SERVICES, LLC,
COMPREHENSIVE HEALTH SERVICES
INTERNATIONAL, LLC,
CHS MIDDLE EAST, LLC,
CALIBURN INTERNATIONAL CORPORATION, and
SALLYPORT GLOBAL SERVICES LTD.,

Defendants.

----------X

Civil Action No.
20-CV-698

(Brodie, Ch. J.)

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the United States Department of State and the United States Air Force (collectively the "United States"); Comprehensive Health Services, Inc.; Comprehensive Health Services, LLC; Comprehensive Health Services International, LLC; CHS Middle East, LLC; and Caliburn International, LLC (collectively the "Defendants"); James Watkins, Abino Ortega, Robert Smith, and M. Shawn Lawler (collectively the "Relators") (hereafter the United States, Defendants, and Relators are collectively referred to as "the Parties"), through their authorized representatives.

RECITALS

A. Comprehensive Health Services, LLC ("CHS"), is a provider of medical solutions, including global medical services, and is headquartered in Cape Canaveral, Florida. The company was originally incorporated in Maryland as Comprehensive Health Services, Inc., and in 2018 was re-organized in Delaware. Comprehensive Health Services International, LLC, also headquartered in Cape Canaveral, FL, is a wholly-owned direct subsidiary of Comprehensive Health Services, LLC, organized in Delaware, and the direct parent of CHS Middle East, LLC. CHS Middle East, LLC, a provider of global medical services, is a wholly-owned direct subsidiary of Comprehensive Health Services International, LLC, and the contracting party for the MSSI contract and the ALiSS and Balad subcontracts, as defined in subparagraphs C(1)–(3). Caliburn International, LLC, ("Caliburn") CHS's parent company, organized in Delaware, is a provider of professional services and specialized technology solutions for government and commercial clients and is headquartered in Reston, VA. Caliburn is owned by Caliburn Holdings, LLC, a Delaware

company headquartered in Reston, VA. On September 30, 2021, Caliburn International changed its name to Acuity International.

B. The below civil actions were filed pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the "Civil Actions"):

- On July 21, 2017, James Watkins, Abino Ortega, and Robert Smith filed a *qui tam* action in the United States District Court for the Eastern District of New York captioned *United States ex rel. James Watkins, M.D.; Abino Ortega, R.N.; and Robert Smith, D.P.M. M.Sc. R.P.H., v. CHS Middle East, LLC*, CV-17-4319.
- On May 10, 2019, M. Shawn Lawler filed a *qui tam* action in the United States District Court for the Middle District of Florida, which was transferred to the United States District Court for the Eastern District of New York on February 5, 2020, captioned *United States ex rel. Lawler v. Comprehensive Health Services, Inc. et al.*, CV 20-0698.

Relators in the Civil Actions allege, among other things, that Defendants had obligations under contracts and subcontracts with the United States Department of State and the United States Air Force to operate medical facilities in Iraq at the United States Embassy in Baghdad, the United States Consulate in Basrah, and the air base at Balad, consistent with United States standards and that Defendants received payment for doing so even though they failed to meet these standards by, among other things, failing to maintain appropriate staffing levels; allowing unqualified employees to perform surgery, pharmacy, and radiology services; failing to adequately secure medical records in HIPAA-compliant electronic medical records systems; failing to disclose known HIPAA breaches; knowingly importing non-approved controlled substances into Iraq from South Africa; and bidding on

the contracts knowing that they could not meet the obligations. The United States intends to partially intervene in the Civil Actions.

C. The United States contends that it has certain civil claims against Defendants for the following conduct (the "Covered Conduct"):

1. Between 2011 and 2021, CHS submitted proposals for, and was awarded, an initial contract (Contract No. SAQMMA11D0073) and series of contract extensions with the Department of State ("DoS") to provide medical support services at the DoS facilities in Iraq ("MSSI Contract"). The total value of the initial contract and extensions was over $577 million. The period of performance under the MSSI Contract ran until September 2021.
2. Between 2015 and 2021, CHS was a subcontractor on two Department of State prime contracts to provide medical support services at DoS facilities in Afghanistan (the "ALiSS Subcontracts"). The first subcontract was issued under a prime contract valued at $40 million between GDSS and the Department of State (Contract No. SAQMMA14D0152). In 2017, the vendor DynCorp was substituted for GDSS and CHS remained as a subcontractor. The second ALiSS subcontract was issued under prime Contract No. SAQMMA-14-D-0151, and ran, with extensions, from April 2017 through September 15, 2021, with a total value of over $34 million. The total value of the ALiSS Subcontracts was over $78 million.
3. Between 2014 and the present, the United States Air Force ("Air Force") awarded Sallyport Global Holdings, Inc. contracts for Balad Base

Operations, Base Life Support and Security Services in Iraq (the "BBS Contracts," also known as Contract Nos. FA8615-14-C-6020, FA8630-18-C-5003 and FA8630-19-C-5004) for a total value of approximately $1.9 billion. As part of the BBS Contracts, Sallyport Global Holdings, Inc. subcontracted medical services to CHS Middle East, LLC and Comprehensive Health Services, Inc. (the "Balad Subcontracts") with a total value of over $111 million.

4. The MSSI Contract and the ALiSS Subcontracts required CHS to provide medical supplies, including controlled substances, that were U.S. Food and Drug Administration ("FDA") or European Medicines Agency ("EMA") approved and were manufactured according to federal quality standards. Up until May 1, 2021, the Balad Subcontracts required the supply and storage of medication to be in line with EU/USA standards.

5. The MSSI Contract required CHS to provide a secure electronic medical record system ("EMR") to store all patients' medical records, including the confidential identifying information of U.S. servicemembers, diplomats, officials, and contractors working and receiving medical care in Iraq.

6. The United States contends that CHS knowingly, recklessly, or with deliberate ignorance, submitted or caused others to submit false claims under the MSSI Contract, the ALiSS Subcontracts, and the Balad Subcontracts, and that it has certain civil claims against CHS for that conduct, as described further below:

a. Between 2012 and 2019, CHS knowingly, recklessly, or with deliberate ignorance, submitted or caused to be submitted claims to DoS for reimbursement under the MSSI Contract that failed to disclose that CHS had not complied with the terms of the contract requiring CHS to store all patients' medical records on a secure EMR. DoS paid CHS for that EMR under the MSSI Contract.

b. More specifically, CHS submitted or caused to be submitted, and DoS paid CHS for, claims that included costs of storing medical records on an EMR. In truth, CHS did not consistently comply with the MSSI Contract's requirements regarding the storage of medical records, but nonetheless billed DoS $485,866 for the EMR.

c. When CHS staff scanned medical records for the EMR, CHS staff saved and left scanned copies of some of the records on an internal network drive, which non-clinical staff could have accessed.

d. Even after staff raised concerns about the privacy of protected medical information, CHS did not take adequate steps to store the information exclusively on the EMR.

e. DoS paid CHS $485,866 for its claims related to construction of an EMR and for storage of medical records on an EMR. CHS's claims failed to disclose that CHS had also stored some medical records on an internal network drive, which non-clinical staff could have accessed, in violation of the MSSI Contract.

7. The United States contends that, between 2012 and 2019, CHS knowingly, recklessly, or with deliberate ignorance, submitted or caused others to submit, false claims to DoS under the MSSI Contract and the ALiSS Subcontracts, and to the Air Force under the Balad Subcontracts with respect to controlled substances by representing that the substances were FDA- or EMA-approved. More specifically:

   a. CHS lacked a DEA license necessary for exporting controlled substances from the United States to Iraq.

   b. CHS obtained controlled substances by using an arrangement in which CHS physicians based in Florida sent letters requesting that a South African physician prescribe the controlled substances. A South African shipping company then received the controlled substances and sent them to CHS in Iraq with a prescription to the requesting Florida-based CHS physician. The controlled substances obtained by the South African supplier were not FDA- or EMA-approved. CHS used these controlled substances for patients under the MSSI Contract, the ALiSS Subcontracts and the Balad Subcontracts, and obtained reimbursement for them from the United States.

   c. CHS's process for procuring controlled substances did not include personnel with the requisite expertise in ensuring that the controlled substances would meet the FDA and EMA contract and regulatory requirements. Rather, CHS vested responsibility with a

procurement manager who had no medical, legal, or pharmacological training.

d. When asked by DoS if the drugs procured under the MSSI contract were FDA- or EMA-approved as required by the contract, CHS stated that they were.

e. The United States paid CHS $141,829 for claims CHS submitted or caused to be submitted that failed to disclose that the controlled substances were not FDA- or EMA-approved, in violation of the MSSI Contract, the ALiSS Subcontracts and the Balad Subcontracts.

D. This Settlement Agreement is neither an admission of liability by Defendants nor a concession by the United States that its claims are not well founded.

E. Relators claim entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Settlement Agreement and to Relators' reasonable expenses, attorneys' fees and costs.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. Defendants shall pay to the United States $930,000.00 (the "Settlement Amount"), and interest on the Settlement Amount at a rate of 1% simple interest per annum from July 7, 2021, of which $474,018.25 is restitution, by electronic funds transfer pursuant to written instructions to be provided by the Office of the United States Attorney for the

Eastern District of New York no later than fifteen days after the Effective Date of this Agreement.

2. Conditioned upon the United States receiving the Settlement Amount and as soon as feasible after receipt, the United States shall pay to Relators by electronic funds transfer the following sums (the "Relators' Shares"), pursuant to written instructions to be provided by each Relator or his counsel:

a. To Dr. James Watkins, $15,000;

b. To Dr. Robert Smith, $15,000;

c. To Abino Ortega, $15,000;

d. To Dr. M. Shawn Lawler, $127,050.

3. Defendants shall pay to counsel for Relators Watkins, Ortega and Smith $325,000.00 for expenses, and attorneys' fees and costs by electronic funds transfer pursuant to written instructions to be provided by Andrew St. Laurent, Esq. and Gary L. Azorsky, Esq., no later than fifteen days after the Effective Date of this Agreement; and Defendants shall pay to counsel for Relator Lawler $206,691.00 for expenses, and attorneys' fees and costs by electronic funds transfer pursuant to written instructions to be provided by Joshua Russ at Reese Marketos LLP no later than fifteen days after the Effective Date of this Agreement.

4. Subject to the exceptions in Paragraph 6 (concerning reserved claims) below, and upon the United States' receipt of the Settlement Amount, plus interest due under Paragraph 1, the United States releases Defendants together with their current and former parent companies; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; and the company successors and assigns of

any of them from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.*, or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud.

5. Subject to the exceptions in Paragraph 6 below, and upon the United States' receipt of the Settlement Amount plus interest due under Paragraph 1, Relators, for themselves and for their, successors, attorneys, agents, and assigns, release Defendants together with their current and former parent companies; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; and the company successors and assigns of any of them and their officers, agents, and employees, from any civil monetary claims the Relators have on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733.

6. Notwithstanding the releases given in Paragraphs 4 and 5 of this Agreement, or any other term of this Agreement, the following claims and rights of the United States are specifically reserved and are not released:

a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);

b. Any criminal liability;

c. Except as explicitly stated in the Agreement, any administrative liability or enforcement right, including the suspension and debarment rights of any federal agency;

d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;

e. Any liability based upon obligations created by this Agreement;

f. Any liability of individuals;

g. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

7. Relators and their heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B). Conditioned upon Relators' receipt of the Relators' Shares, Relators and their heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States, its agencies, officers, agents, employees, and servants, from any claims arising from the filing of the Civil Actions or under 31 U.S.C. § 3730, and from any claims to a share of the proceeds of this Agreement and/or the Civil Actions.

8. Relators, for themselves, and for their heirs, successors, attorneys, agents, and assigns, release Defendants, together with their current and former parent companies; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; and the company successors and assigns of any of them, and their officers, agents, and employees, from any liability to Relators arising from the filing of the Civil Actions under 31 U.S.C. § 3730(d) for expenses or attorneys' fees and costs, or, with respect to Relators Watkins, Ortega and Smith, 31 U.S.C. § 3730(h).

9. Defendants waive and shall not assert any defenses Defendants may have to any criminal prosecution or administrative action relating to the Covered Conduct that

may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

10. Defendants fully and finally release the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that Defendants have asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct or the United States' investigation or prosecution thereof.

11. Defendants fully and finally release the Relators from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that Defendants have asserted, could have asserted, or may assert in the future against the Relators, related to the Civil Actions and the Relators' investigation and prosecution thereof.

12. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of Defendants, and their present or former officers, directors, employees, shareholders, and agents in connection with:

(1) the matters covered by this Agreement;

(2) the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement;

(3) Defendants' investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil investigation(s) in connection with the matters covered by this Agreement (including attorneys' fees);

(4) the negotiation and performance of this Agreement;

(5) the payment Defendants make to the United States pursuant to this Agreement and any payments that Defendants may make to Relators, including costs and attorneys' fees,

are unallowable costs for government contracting purposes (hereinafter referred to as "Unallowable Costs").

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by Defendants, and Defendants shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Agreement, Defendants shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by Defendants or any of their subsidiaries or affiliates from the United States. Defendants agree that the United States, at a minimum, shall be entitled to recoup from Defendants any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine Defendants' books and records and to disagree with any calculations submitted by Defendants or any of their

subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by Defendants, or the effect of any such Unallowable Costs on the amount of such payments.

13. Defendants agree to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, Defendants shall encourage, and agree not to impair, the cooperation of their directors, officers, and employees, and shall use their best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. Defendants further agree to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in their possession, custody, or control concerning any investigation of the Covered Conduct that Defendants undertake, or that has been performed by another on their behalf.

14. This Agreement is intended to be for the benefit of the Parties only.

15. Upon receipt of the payment described in Paragraph 1 above, the United States and the Relators shall promptly sign and file in the Civil Actions a Joint Stipulation of Dismissal of each respective Civil Action pursuant to Federal Rule of Civil Procedure 41(a)(1). The Joint Stipulations of Dismissal filed in the Civil Actions shall provide for the dismissal with prejudice as to the Relators.

16. Each Party and signatory to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion.

17. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States

District Court for the Eastern District of New York. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

18. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

19. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

20. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

21. This Agreement is binding on Defendants' successors, transferees, heirs, and assigns.

22. This Agreement is binding on Relators' successors, transferees, heirs, and assigns.

23. All parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

24. Defendants agree not to take any action nor to make or permit to be made any public statement indicating that the Settlement Agreement is without factual basis. Nothing in this Paragraph affects Defendants' testimonial obligations or rights to take positions in litigation to which the United States is not a party.

25. This Agreement is effective on the date of signature of the last signatory to the Agreement ("Effective Date of this Agreement"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

DATED: 2/25/22

BREON PEACE
United States Attorney
Eastern District of New York
Counsel for United States of America
271-A Cadman Plaza East, 7th Fl.
Brooklyn, New York 11201

By: _____
Christopher D. Volpe
Assistant United States Attorney
(718) 254-6188
christopher.volpe@usdoj.gov

ROGER B. HANDBERG
United States Attorney
Middle District of Florida
Counsel for United States of America
400 North Tampa St.
Tampa, Florida 33602

By: _____
Jeremy Bloor
Assistant United States Attorney
(407) 648-7500
jeremy.bloor@usdoj.gov

THE UNITED STATES OF AMERICA

DATED: 2/25/22

BREON PEACE
United States Attorney
Eastern District of New York
Counsel for United States of America
271-A Cadman Plaza East, 7th Fl.
Brooklyn, New York 11201

By: _____
Christopher D. Volpe
Assistant United States Attorney
(718) 254-6188
christopher.volpe@usdoj.gov

ROGER B. HANDBERG
United States Attorney
Middle District of Florida
Counsel for United States of America
400 North Tampa St.
Tampa, Florida 33602

By: _____
Jeremy Bloor
Assistant United States Attorney
(407) 648-7500
jeremy.bloor@usdoj.gov

COMPREHENSIVE HEALTH SERVICES, INC.; COMPREHENSIVE HEALTH SERVICES, LLC; COMPREHENSIVE HEALTH SERVICES INTERNATIONAL, LLC; CHS MIDDLE EAST, LLC; AND CALIBURN INTERNATIONAL CORPORATION - DEFENDANTS

DATED: 2/22/22 BY: _____

COMPREHENSIVE HEALTH SERVICES, INC.
COMPREHENSIVE HEALTH SERVICES, LLC
COMPREHENSIVE HEALTH SERVICES INTERNATIONAL, LLC
CHS MIDDLE EAST, LLC
CALIBURN INTERNATIONAL CORPORATION

Robert F. Stalick
Printed Name

Chief Executive Officer
Title

DATED: 2-22-2022 BY: _____

William F. Gould
Leila George-Wheeler
HOLLAND & KNIGHT LLP
Counsel for Defendants

THE RELATORS

DATED: Feb 18 2022 BY: James F. Watkins
James Watkins

DATED: _____ BY: _____
Abino Ortega

DATED: _____ BY: _____
Robert Smith

DATED: _____ BY: _____
Andrew St. Laurent
HARRIS ST. LAURENT & WECHSLER LLP

Gary Azorsky
COHEN MILSTEIN SELLERS & TOLL PLLC
Counsel for Relators Watkins, Ortega, and Smith

DATED: _____ BY: _____
M. Shawn Lawler

DATED: _____ BY: _____
Rachel V. Rose
RACHEL V. ROSE - ATTORNEY AT LAW, PLLC

Joshua M. Russ
REESE MARKETOS LLP

Kevin Darken
Counsel for Relator Lawler

THE RELATORS

DATED: _____ BY: _____
James Watkins

DATED: 02/19/22 BY: _____
Abino Ortega

DATED: _____ BY: _____
Robert Smith

DATED: _____ BY: _____
Andrew St. Laurent
HARRIS ST. LAURENT & WECHSLER LLP

Gary Azorsky
COHEN MILSTEIN SELLERS & TOLL PLLC
Counsel for Relators Watkins, Ortega, and Smith

DATED: _____ BY: _____
M. Shawn Lawler

DATED: _____ BY: _____
Rachel V. Rose
RACHEL V. ROSE - ATTORNEY AT LAW, PLLC

Joshua M. Russ
REESE MARKETOS LLP

Kevin Darken
Counsel for Relator Lawler

THE RELATORS

DATED: _____ BY: _____
James Watkins

DATED: _____ BY: _____
Abino Ortega

DATED: 2/18/22 BY: _____
Robert Smith

DATED: _____ BY: _____
Andrew St. Laurent
HARRIS ST. LAURENT & WECHSLER LLP

Gary Azorsky
COHEN MILSTEIN SELLERS & TOLL PLLC
Counsel for Relators Watkins, Ortega, and Smith

DATED: _____ BY: _____
M. Shawn Lawler

DATED: _____ BY: _____
Rachel V. Rose
RACHEL V. ROSE - ATTORNEY AT LAW, PLLC

Joshua M. Russ
REESE MARKETOS LLP

Kevin Darken
Counsel for Relator Lawler

THE RELATORS

DATED: _____ BY: _____
James Watkins

DATED: _____ BY: _____
Abino Ortega

DATED: _____ BY: _____
Robert Smith

DATED: _____ BY: _____
Andrew St. Laurent
HARRIS ST. LAURENT & WECHSLER LLP

Gary Azorsky
COHEN MILSTEIN SELLERS & TOLL PLLC
Counsel for Relators Watkins, Ortega, and Smith

DATED: 02FEB2022 BY: _____
M. Shawn Lawler

DATED: 2/22/22 BY: _____
Rachel V. Rose
RACHEL V. ROSE - ATTORNEY AT LAW, PLLC

Joshua M. Russ
REESE MARKETOS LLP

Kevin Darken
Counsel for Relator Lawler

For Civil Action No. 17-CV-4319:

SO ORDERED this

____ day of _____, 2022

_____
HONORABLE ALLYNE R. ROSS
United States District Judge, Eastern District of New York

For Civil Action No. 20-CV-698:

SO ORDERED this

____ day of _____, 2022

_____
HONORABLE MARGO K. BRODIE
Chief United States District Judge, Eastern District of New York