UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

United States of America *ex rel.* Matthew Miller, Donald K. Bake, and Saad Khan,

Plaintiff/Relators,

v.

ManPow, LLC,

Defendant.

Case No. 2:21-cv-05418-VAP-ADSx

Order GRANTING Defendant's Motion for Summary Judgment (Doc. Nos. 157, 158)

Before the Court is a Motion for Summary Judgment ("Motion") filed by Defendant ManPow, LLC ("Defendant") on October 2, 2023. ("Mot.," Doc. No. 157-1.) Relators Matthew Miller, Donald K. Bake, and Saad Khan (collectively, "Relators") filed an Opposition on October 12, 2023. ("Opp'n," Doc. No. 175.) Defendant filed a Reply on October 19, 2023 ("Reply," Doc. No. 185), and the United States of America (the "Government") filed a Statement of Interest that same day (Doc. No. 182; *see* 28 U.S.C. § 517).

After considering all the papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced at the hearing, the Court GRANTS the Motion.

I. BACKGROUND

On July 2, 2021, Relators brought this action on behalf of the Government against Defendant under the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–3733. (*See* Compl., Doc. No. 1.)

After several extensions, the Government declined to exercise its right under 31 U.S.C. § 3730(b)(4) to intervene in the action on June 16, 2022. (Doc. No. 15.) On June 21, 2022, Relators served Defendant with the Summons and Complaint. (Doc. No. 18.)

Relators' claims arise from applications Defendant submitted under the federal government's Paycheck Protection Program ("PPP"). In response to the COVID-19 pandemic, Congress established the PPP via the Coronavirus Aid, Relief, And Economic Security Act ("CARES") Act in March 2020 to provide emergency loan assistance to businesses. *See* Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286-94 (2020). The program was administered by the U.S. Small Business Administration ("SBA") and made billions of dollars in government-guaranteed loans available to qualified business for payroll retention and other authorized expenses. *See id.*

Relators' operative complaint alleges that Defendant, a real estate company, applied for and received loans and loan forgiveness through the PPP despite making materially false statements and certifications in its applications. ("SAC," Doc. No. 112, ¶¶ 18, 43, 48-58.) Relators specifically allege that Defendant falsely certified that (1) it had payroll expenses in its two PPP loan applications (*id.* ¶¶ 45, 47-48, 51, 56); (2) economic

uncertainty made the two loans it requested necessary to support its ongoing operations (*id.* ¶¶ 52, 57); (3) the two loans' proceeds only would be used to retain workers and on other eligible expense categories (*id.*); (4) it would use all funds from its first PPP loan by the time it received its second PPP loan (*id.* ¶ 57); and (5) it had used all of its PPP loan proceeds prior to applying for loan forgiveness (*id.* ¶ 58). Relators also claim that (6) Defendant identified a false number of employees in its first PPP loan application (*id.* ¶ 49); and (7) Defendant falsely omitted in its loan forgiveness applications an affiliate who had received PPP loans (*id.* ¶ 58).

Relators accordingly state two claims against Defendant under the FCA: (1) knowingly presenting, or causing to be presented, false or fraudulent claims for the government's payment or approval under 31 U.S.C. § 3729(a)(1)(A); and (2) knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim under § 3729(a)(1)(B). (SAC 17-18.)

On October 2, 2023, Defendant filed a Motion for Summary Judgment (Doc. No. 157-1), a Statement of Undisputed Facts ("SUF," Doc. No. 157-2), and a Declaration of Michael S. Lowe ("Lowe Decl.," Doc. No. 164), including Exhibits 1 through 42 (Doc. Nos. 164-1–42).

On October 12, 2023, Relators filed an Opposition (Doc. No. 175), a Statement of Genuine Issues ("SGI," Doc. No. 175-1 at 1-56), their own Statement of Undisputed Facts ("RSUF," *id.* at 56-75), a Declaration of Ryan Davis ("Davis Decl.," Doc. No. 175-3), including Exhibits A through W, Y, and

Z (Doc. Nos. 175-4-22; Doc. Nos. 189-1–6),[1] and a Declaration of Donald Bake ("Bake Decl.," Doc. No. 175-2), attaching Exhibit X.

On October 19, 2023, Defendant filed a Reply. (Doc. No. 185.) The Government filed a Statement of Interest that same day. (Doc. No. 182; *see* 28 U.S.C. § 517.)

II. LEGAL STANDARD

A motion for summary judgment or partial summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). "The moving party may produce evidence negating an essential element of the nonmoving party's case, or . . . show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000) (reconciling *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). The nonmoving party must then "do more than simply show that there is some metaphysical doubt as to the

[1] Exhibits E, O, P, Q , R, and W were filed on October 24, 2023, after the Court denied leave to file them under seal. (*See* Doc. Nos. 189-1–6; *see also* Doc. No. 188.)

material facts" but must show specific facts which raise a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, a court construes the evidence in the light most favorable to the nonmoving party. *Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991). "[T]he judge's function is not [] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

III. FACTS

Both Defendant and Relators filed Statements of Undisputed Facts. ("SUF," Doc. No. 157-2; "RSUF," Doc. No. 175-1 at 56-75.) Relators also filed a Statement of Genuine Issues. ("SGI," Doc. No. 175-1 at 1-56.)

To the extent certain facts or contentions are not mentioned in this Order, the Court has not found it necessary to consider them in adjudicated the pending Motion.

A. Uncontroverted Facts

The following material facts are supported adequately by admissible evidence and are uncontroverted. They are "admitted to exist without controversy" for the purposes of this Motion. *See* Local Rule 56-3.

1. Defendant's Operations and Business Structure

Defendant is part of a network of real estate companies that does business under the name New Western Acquisitions ("New Western").[2] (SGI ¶ 1.) New Western is a brokerage firm that, together with its subsidiaries and business affiliates, assists customers with locating residential properties for investment purposes and acquires and sells residential real property, often through a wholesaling process. (*Id.* (citing SAC ¶ 19); RSUF ¶ 2.)[3] New Western does so by operating regional brokerages in multiple states through entities bearing some variation of the name "United InvestexUSA." (RSUF ¶¶ 3-4.)

Defendant provides certain support services to New Western's regional offices.[4] (SGI ¶ 2.) Defendant pays the salaries of all its employees, including some who work at New Western's regional offices. (*Id.* ¶ 5.) Defendant pays its employee salaries out of its own bank account using a payroll provider and issues annual W-2s to the employees reflecting its payment of those wages. (*Id.* ¶¶ 6, 7.) Defendant then invoices the regional offices for services it provides, including for the salaries of employees who either worked at the regional offices or at Defendant's base

[2] Relators assert that Defendant's stated version of this fact is not supported properly by the evidence it cites. The Court agrees and adopts Relators' version of the fact. The Court deems the fact undisputed for purposes of this Motion. *See* Fed. R. Civ. P. 56(e)(2); Local Rule 56-1.

[3] Defendant did not submit any statement of genuine issues in response to Relators' RSUF. *See* Local Rule 56-2. The Court accordingly considers the facts asserted in Relators' RSUF undisputed to the extent they are supported properly by sufficient evidence. *See* Fed. R. Civ. P. 56(e)(2).

[4] The Court deems this fact undisputed for purposes of this Motion. *See supra* note 2.

of operations. (*Id.* ¶ 8.) The regional offices repay Defendant for all salary expenses incurred by these employees. (*Id.*; RSUF ¶¶ 5, 12; Lowe Decl. Ex. 6, at 94:6-17.)

2. Defendant's Loan and Loan Forgiveness Applications

a. Defendant's First Draw PPP Loan

On April 9, 2020, Defendant applied for a "First Draw" PPP Loan of $1,400,611 through Dallas Capital Bank ("Dallas Capital"). (SGI ¶¶ 22, 64-65.) To apply, Defendant was required to submit SBA Form 2483 or the lender's equivalent and supporting payroll documentation to Dallas Capital. (*Id.* ¶ 50.) On April 13, 2020, Dallas Capital certified that Defendant had provided it with the documents necessary to demonstrate Defendant's qualifying payroll costs. (SGI ¶ 66; Lowe Decl. Ex. 23.) Defendant represented in its application that it had average monthly employment costs of $560,244. (RSUF ¶ 29; SAC ¶ 7; Lowe Decl. Ex. 21, at 2.) It calculated this amount using the gross wages it paid its employees in 2019 per its payroll provider records. (SGI ¶ 65.)

Defendant made other certifications in its application. Defendant "certif[ied] in good faith" that "[c]urrent economic uncertainty ma[de] th[e] loan request necessary to support [its] ongoing operations . . . ." (Lowe Decl. Ex. 21, at 3; *see* RSUF ¶ 44.) It also averred that "[a]ll loan proceeds [would] be used only for business-related purposes as specified in the loan application and consist with the Paycheck Protection Program Rule." (Lowe Decl. Ex. 21, at 3; *see* RSUF ¶ 32; SAC ¶ 8.)

Paul Hess, Defendant's then-chief financial officer, also incorrectly listed on Defendant's First Draw PPP Loan application that Defendant had 41 employees. (SGI ¶¶ 67, 69.) Hess believed that Defendant had 141 employees, and Defendant, in fact, had 142 employees when it applied for the loan. (*Id.* ¶¶ 69-70; RSUF ¶ 13.)

On April 15, 2020, in an email to a New Western regional manager, Hess wrote that Defendant would be passing through the PPP loan funds to New Western regional offices as "a credit at the bottom of the [profit and loss statement] for the portion the PPP covers/saves us." (RSUF ¶ 78; Davis Decl. Ex. W, at 2.) On April 17, 2020, Hess sent another email to New Western personnel stating that PPP loans were "free money." (RSUF ¶ 79; Bake Decl. Ex. X.) At his deposition in this case, Hess could not recall whether he "explored any alternative means for obtaining funds to support [Defendant]'s ongoing operations" when he completed Defendant's First Draw PPP Loan application. (RSUF ¶ 53.) He also could not recall whether Defendant had asked its affiliate UI Holdings to provide any funds to support its ongoing operations. (*Id.* ¶ 54.)

Dallas Capital approved Defendant's First Draw PPP Loan on April 16, 2020. (SGI ¶ 71.) The "covered period" for Defendant's First Draw PPP Loan was April 16, 2020, through October 1, 2020. (SGI ¶ 72.) Though Defendant paid more than $4.7 million in wages to its employees during this period (*id.* ¶ 73), Defendant kept the loan proceeds in a segregated bank account with Dallas Capital and did not remove them until May 2021 (RSUF ¶ 73).

Sherman Bridge Alt Fund ("Sherman Bridge") also applied for and obtained a First Draw PPP Loan for $184,990. (SGI ¶ 75.) Sherman Bridge had 10 employees when Defendant applied for a First Draw loan. (*Id.* ¶ 74.) In 2019, Sherman Bridge transferred $12,407,772.60 to Defendant, and Defendant transferred $7,495,577 back to Sherman Bridge. (RSUF ¶¶ 68-69.)

On May 23, 2020, the SBA issued guidance in the form of a series of Frequently Asked Questions stating that "[a]ny borrower that, together with its affiliates received PPP loans with an original principal amount of less than $2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith." (SGI ¶ 30.)

In December 2020, the SBA issued SBA Form 3511 titled "Paycheck Protection Program Affiliation Worksheet." (Lowe Decl. Ex 11.) The worksheet's stated purpose was to collect information from PPP borrowers who may have affiliates, and it asked borrowers "to provide information regarding the size standard that you (Borrower) used when making your eligibility certification and regarding the size of your affiliates." (*Id.* at 2.) The worksheet also requested affiliate information "depending on the size standard" the borrower had indicated in a previous section of the form. (*Id.* at 5.)

b. Defendant's First Draw Loan Forgiveness Application

Defendant applied for forgiveness of its First Draw PPP Loan on November 18, 2020. (SGI ¶ 88.) Loan forgiveness applicants were instructed to verify their eligible cash compensation and non-cash benefit payments by providing bank account statements or third-party payroll

service provider reports documenting the amount of cash compensation paid to employees; tax forms or equivalent third-party payroll service provider reports for the covered period; and payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee group benefit plans included in the borrower's forgiveness amount. (Lowe Decl. Ex. 2, ¶ 24; *see id.* Ex. 10.) In its application, Defendant certified that it had used its requested forgiveness amount "to pay costs that are eligible for forgiveness" such as payroll costs to retain employees. (Lowe Decl. Ex. 25, at 3; RSUF ¶ 33.) .

On March 1, 2021, SBA's Office of Financial Program Operations (the "OFPO") notified Dallas Capital that it was conducting a review of Defendant's First Draw PPP Loan. (SGI ¶ 89.) SBA accordingly requested that Dallas Capital transmit Defendant's borrower application form and all supporting documentation that Defendant was required to submit with its loan forgiveness application. (*Id.*)

The OFPO issued five more requests to Dallas Capital for further information thereafter. (*See id.* ¶¶ 90-94.) On March 10, 2021, it first asked Dallas Capital to provide Defendant's 2019 IRS Form 1065, including K-1s. (*Id.* ¶ 90.) The next day, the OFPO requested that Dallas Capital provide Defendant's affiliation worksheet. (*Id.* ¶ 91.) On March 24, 2021, it asked for Defendant's 2020 Q4 wage report (Statement of Deposits and Filings). (*Id.* ¶ 92.) On April 15, 2021, the OFPO requested the following documents: 2019 IRS Form 941s for all quarters; 2020 IRS Form 941s for Q2 and Q3; 2019 Employer's Quarterly Report (C-3) for all quarters; 2020 Employer's

Quarterly Report (C-3) for quarters Q2 and Q3; a detailed employee report showing employees grossing over 100k for 2019;and a detailed employee report showing employees grossing over 100k for 2020 the covered period of Defendant's First Draw Loan . (*Id.* ¶ 93.) Finally, on April 19, 2021, the OFPO asked Dallas Capital to provide Defendant's employee health and retirement contributions for year 2019. (*Id.* ¶ 94.)

The SBA approved Defendant's forgiveness application for its First Draw PPP Loan on April 26, 2021, and Defendant's First Draw PPP Loan was forgiven. (*Id.* ¶ 95; RSUF ¶ 74.) Defendant did not remove the loan's funds from its segregated account at Dallas Capital until May 2021. (RSUF ¶ 73.) Defendant nevertheless satisfied all of its payroll obligations in 2020 and the first four months of 2021. (*Id.* ¶ 75.)

c. Defendant's Second Draw PPP Loan

On January 14, 2021, Defendant applied for a "Second Draw" PPP Loan of $1,400,611 through Dallas Capital. (SGI ¶¶ 23, 77.) Defendant had 114 employees when it applied for the loan, though it reported having 110 employees on its application. (*Id.* ¶¶ 78, 85; Lowe Decl. Exs. 16, 29.) Since Second Draw PPP Loan borrowers were allowed to utilize the same payroll data they used for their First Draw PPP Loans, Dallas Capital relied on the payroll documentation Defendant provided for its First Draw PPP Loan to demonstrate Defendant's qualifying payroll costs. (SGI ¶ 79.)

Defendant again represented in its application that it had average monthly employment costs of $560,244. (RSUF ¶ 29; SAC ¶ 7; Davis Decl.

Ex. L, at 2.) Defendant also "certif[ied] in good faith" that "[c]urrent economic uncertainty ma[de] th[e] loan request necessary to support [its] ongoing operations . . . ." (Davis Decl. Ex. L, at 3; *see* RSUF ¶ 80.) The application further confirmed that "[a]ll loan proceeds [would] be used only for business-related purposes as specified in the loan application and consist with the Paycheck Protection Program Rule." (Davis Decl. Ex. L, at 3; *see* RSUF ¶ 31.) Finally, Defendant certified that it would use the full loan amount of its First Draw PPP Loan "before the Second Draw Paycheck Protection Program Loan [wa]s disbursed . . . ." (Davis Decl. Ex. L, at 3; *see* RSUF ¶ 32.)

Dallas Capital approved Defendant's Second Draw PPP Loan on January 21, 2021, and the proceeds were disbursed to Defendant that month. (SGI ¶ 82; RSUF ¶ 82.) The "covered period" for the loan was January 21, 2021, through July 7, 2021. (SGI ¶ 83.) Defendant paid more than $4.6 million in wages to its employees during the covered period. (*Id.* ¶ 84.)

Sherman Bridge also applied for and obtained a Second Draw PPP Loan of $184,990. (*Id.* ¶ 86.) It again had 10 employees when Defendant applied for a Second Draw PPP Loan. (*Id.* ¶ 85.)

d. Defendant's Second Draw Loan Forgiveness Application

Defendant applied for forgiveness of its Second Draw PPP Loan on November 12, 2021. (*Id.* ¶ 96.) Defendant again certified that it had used

its Second Draw PPP Loan proceeds "to pay costs that are eligible for forgiveness" like payroll costs to retain employees. (Lowe Decl. Ex. 33, at 3; RSUF ¶ 33.)

The OFPO subsequently requested that Dallas Capital transmit Defendant's borrower application form and all supporting documentation that Defendant submitted with its loan and loan forgiveness application. (SGI ¶ 97.) This supporting documentation included payroll documentation demonstrating Defendant's qualifying monthly payroll costs, . (*Id.*) On November 16, 2021, the OFPO made an additional request that Dallas Capital provide (1) a lender or borrower worksheet showing how the loan amount was calculated, along with all supporting documentation validating those figures; and (2) a report showing the total amount of wages per employee in excess of $100,000 for Defendant's max loan calculation. (*Id.* ¶ 98.)

On November 22, 2021, SBA approved Defendant's forgiveness application for its Second Draw PPP Loan, and the loan was forgiven. (*Id.* ¶ 99; RSUF ¶ 83.) Defendant removed the loan's funds from its segregated account on November 23, 2021. (RSUF ¶ 84.)

3. <u>The Small Business Administration's Knowledge of Relators' Allegations and Its Ability to Review</u>

The SBA currently retains the authority to review the borrower eligibility, loan amount, use of proceeds, and loan forgiveness amount of any PPP loan at any time. (SGI ¶¶ 60-61, 63.) If the SBA determines that a borrower

is ineligible for a PPP loan or forgiveness, it can seek repayment of the outstanding loan balance, among other remedies. (*Id.* ¶ 62.)

The SBA has been made aware of this lawsuit and has reviewed all of the SAC's allegations related to Defendant's PPP loan and loan forgiveness applications. (*Id.* ¶¶ 100-01.) It has not reconsidered its PPP loan forgiveness decisions, requested further review of either of Defendant's PPP loans, or asked Defendant to return any of its PPP loan proceeds. (*Id.* ¶ 103.)

B. Disputed Facts

The parties do not dispute any facts material to the resolution of this Motion.

IV. DISCUSSION

Relators bring the following two claims against Defendant under the FCA: (1) knowingly presenting, or causing to be presented, false or fraudulent claims for the government's payment or approval under 31 U.S.C. § 3729(a)(1)(A); and (2) knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim under § 3729(a)(1)(B). (SAC 17-18.) "A claim under the False Claims Act requires a showing of '(1) a false statement or fraudulent course of conduct, (2) made with the scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due.'"[5] *U.S. ex rel. Campie*

[5] Relators present a somewhat novel argument that § 3729(a)(1)(A) does not include a materiality requirement based on the absence of the word

v. Gilead Scis., Inc., 862 F.3d 890, 899 (9th Cir. 2017) (quoting *U.S. ex rel. Hendow v. Univ. of Phx.*, 461 F.3d 1166, 1174 (9th Cir. 2006)).

Defendant devotes most of its Motion to challenging the first three elements of Relators' claims. The Court addresses each in turn.

A. Falsity

"The FCA does not define false." *United States v. Bourseau*, 531 F.3d 1159, 1164 (9th Cir. 2008). "Rather, courts decide whether a claim is false or fraudulent by determining whether a defendant's representations are accurate in light of applicable law," and "[a]pplicable law is subject to judicial interpretation." *Id.* (citing *U.S. ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 (9th Cir.1999)). Courts must further "interpret the FCA broadly, in keeping with the Congress's intention 'to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" *Winter ex rel. U.S. v. Gardens Reg'l Hosp. & Med. Ctr., Inc.*, 953 F.3d 1108, 1116

"material" in that provision along with the word's presence in other FCA provisions. (*See* Opp'n 22-23.) This argument, however, ignores this Circuit's consistent holdings that materiality is an element of § 3729(a)(1)(A) claims, including after the 2009 FCA amendment Relators cite, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009). *See Campie*, 862 F.3d at 898-99 (9th Cir. 2017) (including materiality as an element of § 3729(a)(1)(A) and § 3729(a)(1)(B) claims); *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1047 (9th Cir. 2012) (citing materiality for a § 3729(a)(1)(A) claim); *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 44 F.4th 838, 845 (9th Cir. 2022); *see also Universal Health Servs., Inc. v. U.S. ex rel. Escobar* (*Escobar I*), 579 U.S. 176, 193 (2016) (referencing "§ 3729(a)(1)(A)'s materiality requirement"). Indeed, the one case Relators cite to support this argument itself broadly concludes "that the FCA includes a materiality requirement." *United States v. Bourseau*, 531 F.3d 1159, 1170 (9th Cir. 2008). The Court will follow this Circuit's practice in recognizing a materiality element in both § 3729(a)(1)(A) and § 3729(a)(1)(B) claims.

(9th Cir. 2020) (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)). "[T]he Supreme Court 'has consistently refused to accept a rigid, restrictive reading' of the FCA . . . and has cautioned courts against 'adopting a circumscribed view of what it means for a claim to be false or fraudulent[.]'" *Id.* (quoting *Universal Health Servs. v. U.S. ex rel. Escobar* (*Escobar I*), 579 U.S. 176, 192 (2016)).

1. Payroll Costs[6]

Defendant first challenges Relators' theory of liability that Defendant falsely reported payroll expenses on its PPP loan applications since it was reimbursed for such costs by New Western's regional offices. Defendant contends that the CARES Act and subsequent SBA rules and guidance defined payroll costs such that Defendant's undisputed payment of employee salaries from its bank account and issuance of W-2s necessarily fulfilled PPP requirements. Thus, according to Defendant, its listing of payroll costs on its PPP loan applications could not be false despite those costs being reimbursed.

[6] The Court disagrees with Defendant's contention in its Reply that its arguments regarding payroll costs also address Relators' third theory of liability. (*See* Reply 7.) Relators' third theory of liability is that Defendant falsely certified that all of its SBA loan proceeds would be used only for business-related purposes as specified in its loan applications and consistent with the Paycheck Protection Program Rule. (RSUF ¶ 31; SAC ¶ 8; Lowe Decl. Ex. 21, at 3.) Defendant's arguments on payroll costs generally address the appropriate definition of payroll costs under the PPP and therefore do not resolve whether Defendant appropriately *used* its PPP loan proceeds. (*See* Mot. 14-15.)

Defendant's evidence, cited definitions, and rules satisfy its burden of production at summary judgment. In calculating their total PPP loan amount, PPP borrowers were limited by statute to requesting 2.5 times "the average total monthly payments by the applicant for *payroll costs*." 15 U.S.C. § 636(a)(36)(E)(i)(I) (emphasis added); *see, e.g.*, Lowe Decl. Ex. 21, at 2 (providing Defendant's First Draw PPP Loan application form which required Defendant to perform this specific calculation). The CARES Act specifically defined "payroll costs" as including, among other categories of expenses, "the sum of *payments* of any compensation with respect to employees." *Id.* § 636(a)(36)(A)(viii)(I) (emphasis added). When Defendant completed its First Draw PPP Loan application, the application's instructions provided a similar definition for payroll costs as "*compensation to employees* . . . in the form of salary, wages, commissions, or similar compensation." (Lowe Decl. Ex. 21, at 4 (emphasis added).) The SBA subsequently issued an Interim Final Rule and further guidance providing compatible definitions of the term. *See* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (April 15, 2020) ("f. What qualifies as 'payroll costs?' Payroll costs consist of compensation to employees . . . in the form of salary, wages, commissions, or similar compensation . . . ."); U.S. Small Bus. Admin., Paycheck Protection Program Loans: Frequently Asked Questions (FAQs) (April 24, 2020), Lowe Decl. Ex. 3 ("Payroll costs includes *all cash compensation paid to employees*, subject to the $100,000 annual compensation per employee limitation." (emphasis added)). The CARES Act further expressly excluded certain cost categories from its definition of payroll costs, none of which

addressed employee compensation reimbursed by subsidiaries or affiliates. *See* 15 U.S.C. § 636(a)(36)(A)(viii)(II).

This consistent statutory and regulatory guidance makes clear that, when calculating their average monthly payroll for purposes of securing PPP loans, borrowers were meant to assess their payroll costs based on whether they had *paid* employees, rather than whether they actually had borne the costs of those expenses due to their business structure. Since the parties do not dispute that Defendant paid its employees' salaries out of its own bank account and issued annual W-2s reflecting its payment of those wages, Defendant has demonstrated its full compliance with PPP requirements regarding its reporting of payroll costs in its loan applications.

Relators do not proffer any contrary interpretation of the statutory definition of "payroll costs," nor do they argue that borrowers should have disregarded it in favor of assessing whether they actually were bearing the financial burden of compensating employees. Relators instead rebut Defendant's argument by directing the Court to the specific payroll-related certifications Defendant made in its two loan applications (*see* RSUF ¶ 22; Davis. Decl. Ex. F, at 6:13-18), but even that language harmonizes with the payment-centric definitions of payroll costs discussed above in requiring borrowers to verify that they "had employees for whom [they] *paid* salaries and payroll taxes . . . ." (Lowe Decl. Ex. 21, at 3, Ex. 29, at 3) (emphasis added). Again, it is undisputed that Defendant paid its employees' salaries; Relators take issue only with the fact that Defendant eventually was reimbursed for those costs by other entities.

Relators also point to Defendant's alleged violation of "guidance that franchisees, rather than franchisors, are the proper recipients of PPP funds." (Opp'n 14.) Setting aside that this argument appears to present a separate theory of liability unrelated to Defendant's certification of payroll costs and not fully articulated in Relators' SAC, Relators fail to point to any other concrete evidence that would suggest that Defendant maintained a franchisor-franchisee relationship violative of PPP requirements. Their reference to the PPP's franchisor-franchisee guidance therefore fails to create a genuine issue of triable fact as to their theory regarding Defendant's payroll expenses. *See Nissan*, 210 F.3d at 1107 ("[Once] the moving party, carried its initial burden of production . . . the nonmoving part[y], w[as] obliged to produce evidence in response.").

Relators further state that they will put forth an expert witness at trial who will testify that Defendant had no payroll expenses as a matter of accounting. This expert testimony, however, would be irrelevant since it would not provide insight into whether Defendant had eligible payroll costs, i.e., "payments of . . . compensation with respect to employees" as defined by the PPP, 15 U.S.C. § 636(a)(36)(A)(viii)(I). This inquiry instead is answered by the CARES Act and subsequent PPP regulations and guidance, as discussed above.

Summary judgment therefore is GRANTED in favor of Defendant as to Relators' claims insofar as they rely on Relators' first theory of liability regarding Defendant's certification of payroll costs and payments on its two PPP loan applications.

2. Economic Uncertainty

Defendant next argues that its certifications of economic uncertainty in its PPP loan applications could not constitute falsities for purposes of the FCA.

In applying for both its First and Second Draw PPP Loans, Defendant certified that "[c]urrent economic uncertainty ma[d]e th[e] loan request necessary to support [its] ongoing operations . . . ." (*See* Lowe Decl. Ex. 21, at 3, Ex. 29, at 3.) These certifications were derived from statutory "[b]orrower requirements" in the CARES Act, which required eligible PPP loan recipients to "make a good faith certification . . . that the uncertainty of current economic conditions ma[d]e[] necessary the loan request to support the[ir] ongoing operations . . . ." 15 U.S.C. § 636(a)(36)(G).

As Defendant notes, on May 13, 2020—roughly a month after Defendant's First Draw PPP Loan application was approved—the SBA issued guidance in the form of a series of Frequently Asked Questions "intend[ed] to provide timely additional guidance to address borrower and lender questions concerning the implementation of the Paycheck Protection Program . . . ." U.S. Small Bus. Admin., Paycheck Protection Program Loans: Frequently Asked Questions (FAQs) (May 13, 2020), Lowe Decl. Ex. 7 [hereinafter FAQ 46]. The guidance included FAQ 46, which read in relevant part:

> **Question:** How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?

> **Answer:** When submitting a PPP application, all borrowers must certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: Any borrower that, together with its affiliates received PPP loans with an original principal amount of less than $2 million *will be deemed to have made the required certification concerning the necessity of the loan request in good faith.*

Id. at 2 (footnote omitted) (italics added).

Though FAQ 46 stated that it "[did] not carry the force and effect of law independent of the statute and regulations on which it [wa]s based," *id.* at 2 n.2, the SBA later "codif[ied] the safe harbor contained in FAQ 46" pertaining to the PPP's economic uncertainty certification in an Interim Final Rule, which went into immediate effect when it was issued on January 14, 2021. Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, 86 Fed. Reg. 3692, 3692-94, 3706 & n.87 (Jan. 14, 2021). The rule read as follows:

> **13. Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan Request**
>
> The CARES Act requires each applicant applying for a PPP loan to certify in good faith "that the uncertainty of current economic conditions makes necessary the loan request to support the

> ongoing obligations" of the applicant. SBA, in consultation with the Department of the Treasury, issued additional guidance on May 13, 2020 concerning how SBA will review the required good-faith certification. *See* FAQ 46 (posted May 13, 2020). This guidance included a safe harbor providing that any PPP borrower, together with its affiliates, that received PPP loans with an original principal amount of less than $2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.

Id. at 3706.

This rule is conclusive on Defendant's potential liability for its economic uncertainty certifications. 15 U.S.C. § 636(a)(36)(G) required PPP borrowers to "make a good faith certification" that current economic uncertainty made their PPP loans necessary. The SBA effectively absolved borrowers with principal loan amounts of less than $2 million of this requirement via its rulemaking process by later "deem[ing] [them] to have made the required certification . . . in good faith." 86 Fed. Reg. at 3706. Since it is undisputed that both of Defendant's principal PPP loan amounts were less than $2 million,[7] its economic uncertainty certifications necessarily

[7] The SBA clarified in later guidance that "loan amounts received by borrowers for First Draw PPP Loans and Second Draw PPP Loans w[ould] not be aggregated" for purposes of the economic uncertainty certification. U.S. Small Bus. Admin., Paycheck Protection Program Loans: Frequently Asked Questions (FAQs) (Mar. 3, 2021), Lowe Decl. Ex. 8, at 6. It also affirmatively extended the economic uncertainty safe harbor to Second Draw PPP Loans. *See id.* at 2, 4-5.

were made in good faith, and therefore could not be false, per the applicable SBA rules.[8]

Relators argue that FAQ 46 did not protect borrower actions or carry the force of law, but these arguments were nullified once the SBA's Interim Final Rule went into effect codifying FAQ 46's safe harbor. Relator also argues that the SBA reserved its right to undertake review "[f]or a PPP loan of any size . . . ." (Opp'n 17), but this argument does not annul the authority of the SBA's Interim Final Rule. Instead, the rule's existence makes clear that, despite reserving its broad right to review borrower loans of any size, the SBA nevertheless expressly limited its review of loans under $2 million on the specific issue of whether such borrowers had certified their economic necessity in good faith.

Given the analysis above, Defendant is entitled to summary judgment in its favor as to Relators' claims to the extent they are based on Relators' second theory of liability regarding Defendant's economic uncertainty certifications. The Court accordingly GRANTS summary judgment in Defendant's favor on Relators' claims as to this theory.

[8] Even assuming Sherman Bridge was Defendant's affiliate as Relators contend, *see infra* Section IV.B.3, Defendant's principal loan amounts would not have eclipsed the safe harbor's $2 million limit, as the parties agree that Sherman Bridge's First and Second Draw PPP Loan amounts were each $184,990. (SGI ¶¶ 75, 86.)

3. Proper Use of PPP Proceeds

Defendant also attacks Relators' third, fourth, and fifth theories of liability regarding Defendant's certifications on its loan and loan forgiveness applications that it would use PPP funds only for eligible expenses and prior to the disbursement of its Second Draw PPP Loan funds and any application for loan forgiveness.

Both of Defendant's PPP loan applications required it to certify that "[a]ll SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule," i.e., "to retain workers and maintain payroll . . . ." (Lowe Decl. Ex. 21, at 3, Ex. 29, at 3.) Defendant's Second Draw PPP Loan application also made Defendant certify that it would "use[] the full loan amount . . . of [its] First Draw . . . Loan only for eligible expenses" and "before the Second Draw Paycheck Protection Program Loan [wa]s disbursed . . . ." (Lowe Decl. Ex. 29, at 3.) Both of Defendant's loan forgiveness applications also required it to certify that "[t]he dollar amount for which forgiveness is requested . . . was used to pay costs that are eligible for forgiveness" such as "payroll costs to retain employees." (Lowe Decl. Ex. 25, at 3, Ex. 33, at 3.)

Defendant argues "[t]o properly use its PPP funds, all [it] had to do was pay its employees' salaries during the 'covered periods' in excess of the loan amounts." (Mot. 21.) Defendant cites no authority or evidence supporting this specific proposition, and the assertion appears to mischaracterize the more generalized authority Defendant does reference.

15 U.S.C. § 636(a)(36)(F), for example, regards "[a]llowable *uses* of covered loans" and contemplates "eligible recipient[s] . . . *us*[*ing*] *the proceeds* of [a] covered loan" for payroll costs. (Emphasis added.) Defendant also points to the SBA's March 3, 2021 "FAQ," but the relevant portion of that guidance only verifies that "*[t]he amount of forgiveness* of a PPP loan depend[ed] on [a] borrower's payroll costs over the applicable forgiveness covered period," not that a borrower's use of PPP funds necessarily was proper because it had paid such costs. U.S. Small Bus. Admin., Paycheck Protection Program Loans: Frequently Asked Questions (FAQs) (March 3, 2021), Lowe Decl. Ex. 8, at 3 (emphasis added). Additionally, though the SBA required borrowers to submit "[d]ocumentation verifying . . . eligible cash compensation . . . from the Covered Period" to secure loan forgiveness (Lowe Decl. Ex 10, at 14), this fact does not negate the explicit certifications the SBA required Defendant to make in its various loan and forgiveness applications, nor does it foreclose the possibility that certain borrowers could have covered their payroll costs during the relevant period via non-PPP means while unlawfully misappropriating their PPP proceeds for ineligible purposes.

The CARES Act, moreover, appears to demonstrate a preoccupation with borrowers using the specific proceeds of their PPP loans for eligible purposes. The Act's "[b]orrower requirements," for example, require borrowers to "acknowledg[e] that [the program's] funds will be *used to retain workers and maintain payroll*. . . ." 15 U.S.C. § 636(a)(36)(G)(II) (emphasis added). The Act also details "[a]llowable uses of covered loans," which permit eligible recipients to "use *the proceeds* of [a] covered loan" for payroll

costs. *Id.* § 636(a)(36)(F) (emphasis added); *see also id.* § 636(a)(36)(F)(vi) (prohibiting "*proceeds* of a covered loan" from being used for lobbying activities (emphasis added)); *id.* § 636(a)(36)(P)(ii) (preventing agents who assist in preparing loan applications from being "paid out of the proceeds of a covered loan"). The program's operative loan forgiveness provisions further contain references to use of actual PPP loan proceeds for payroll costs, rather than mere payment of such costs. *See id.* § 636m(e)(3)(B) (requiring borrowers to certify that forgiveness amounts were "used to retain employees"); *id.* § 636m(d)(8) (limiting borrowers to "*us[ing]* at least 60 percent of the covered loan amount for payroll costs" (emphasis added)); *see also id.* § 636(a)(37)(J)(ii) (adopting generally the eligibility parameters expressed in § 636m for PPP loan forgiveness eligibility). This statutory framework combined with Relators' proffered evidence that Defendant segregated its PPP proceeds in a dedicated bank account until after each of its loans was forgiven (RSUF ¶¶ 73, 75, 84), create a triable issue of fact as to the falsity of Defendant's certifications regarding its timely use of PPP funds for eligible purposes.

Defendant's reliance on the legal principle that money is fungible does not persuade the Court to hold otherwise, as the authorities it cites are inapposite to the Court's falsity analysis. *United States v. Sperry Corp.*, for example, cited the fungibility of money for the sole purpose of distinguishing a statutory government fee from "real or personal property" in determining whether the fee was a "physical appropriation[] of property" under the Takings Clause. 493 U.S. 52, 52, 61-62 & n.9 (1989). *See also Nickel v. Bank of Am. Nat'l Tr. & Savings Ass'n*, 290 F.3d 1134, 1137-38 (9th Cir.

2002) (referencing the principle to conclude that the traceability of misappropriated trust funds was not a requisite for plaintiffs to secure disgorgement of a bank's profits under a California Probate Code provision); *U.S. ex rel. Mei Ling v. City of Los Angeles*, 389 F. Supp. 3d 744, 768 (C.D. Cal. 2019) (citing the principle to suggest that a city could be liable for unjust enrichment despite it passing relevant funds on to developers). Further, in *United States ex rel. Englund v. Los Angeles County*—the only relevant FCA case Defendant cites—the fungibility of money had no bearing on analyzing the falsity of the claim at issue in that case. No. 2:04-cv-00282-LKK-JFMx, 2006 WL 3097941, at *10 (E.D. Cal. Oct. 31, 2006). Instead, government administrators of a Medicaid funding scheme had referenced the principle in deposition testimony only to communicate both their inability to trace issued funds and their ultimate knowledge of potential fund misappropriation. *Id.* at *8-9, *13-14. Defendant presents no similar evidence here that would compel the Court to deviate from the contrary statutory guidance discussed above.

District Courts in this Circuit have been instructed to interpret the FCA broadly to reach various types of fraud. Given the CARES Act's specific emphasis on the use of PPP proceeds to retain workers and Defendant's concession that it kept its PPP loan proceeds sequestered until well after it had paid employees and sought forgiveness for each of its loans, granting summary judgment in favor of Defendant as to Relators' claims under Relators' third, fourth, and fifth theories of liability is inappropriate.

B. Materiality

Defendant next challenges the materiality of Relators' claims. A false statement or claim is material under the FCA if it "ha[s] 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). "[M]ateriality [further] look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Escobar I*, 579 U.S. at 192 (citation omitted). "No 'single fact or occurrence' determines materiality . . . ." *Winter*, 953 F.3d at 1121 (quoting *Escobar I*, 579 U.S. at 191). Instead, multiple factors inform materiality analysis, such as whether the government expressly identifies a provision as a condition of payment, whether compliance is minor or insubstantial, whether the alleged violation goes to the essence of the bargain, and how the government responds to claims when it has knowledge of violations. *Escobar I*, 579 U.S. at 193 n.5, 194-95.

"The materiality standard is demanding." *Id.* at 194. Indeed, "[t]he False Claims Act is not 'an all-purpose antifraud statute,' . . . or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Id.* "By enforcing [the materiality] requirement rigorously, courts . . . ensure that government contractors [do] not face 'onerous and unforeseen FCA liability' as the result of noncompliance with any of 'potentially hundreds of legal requirements' . . . ." *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 333 (9th Cir. 2017) (citation omitted).

1. False Number of Employees on First Draw PPP Loan Application

Defendant argues the immateriality of it specifically listing 41 employees on its First Draw PPP Loan application when it had 142 employees. Defendant contends, among other things, that the payroll documentation it provided in its First Draw PPP Loan application undisputedly supported its average monthly payroll costs of $560,244, which clarified that its listing of 41 employees was in error. It further argues that its listing of 41 employees on its first PPP application would have served only to decrease its loan amount and therefore was not material to the SBA approving its requested loan amount of $1,400,611.

Three statutory requirements guide the analysis of whether Defendant listing an incorrect number of employees was material or not to the government's decision to issue PPP loan proceeds. First, as the parties make clear, the PPP limited Defendant's maximum loan amount to 2.5 times its average total monthly payroll costs, *see* 15 U.S.C. § 636(a)(36)(E), which were defined to include salaries and wages, group health insurance costs, retirement benefit costs, and state and local employee compensation taxes, among other costs, *id.* § 636(a)(36)(A)(viii). Second, borrowers were not permitted to include "the compensation of an individual employee in excess of $100,000 on an annualized basis" as part of their payroll costs, *id.* § 636(a)(36)(A)(viii)(II)(aa), meaning that the monthly employment costs for any particular employee could not exceed $8,333.33. Third, "any business concern" was "eligible to receive a covered [First Draw PPP] loan if the business concern . . . employ[ed] not more than the greater of . . . 500

employees; or" an established administrative size standard. *Id.* § 636(a)(36)(D)(I).

Defendant's First Draw PPP Loan at least facially complied with these requirements.[9] The parties agree that Defendant had 142 employees when it applied for its first loan (SGI ¶ 70)—an employee total well below the statutory eligibility limit. Defendant listed $560,244 in average monthly payroll costs in its application, which would have placed Defendant's monthly individual employment costs far below the $8,333.33 limit given its 142 employees. Defendant also requested a loan amount of $1,400,611, which was precisely 2.5 times its asserted average monthly payroll costs of $560,244.

The only perceivable issue regarding Defendant's number of employees, therefore, was that its application listed 41 employees instead of 142. Though the SBA could have declined Defendant's application since its error technically led it to exceed the particularized monthly employee cost limit of $8,333.33, it is not "sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance." *Escobar I*, 579 U.S. at 194. Otherwise, as Defendant suggests, had the SBA been aware of Defendant's mistake, it only would

[9] This, of course, assumes that the payroll costs Defendant asserted in its first application were legitimate and not false statements themselves. *See supra* Section IV.A.1. The Court's analysis in this section should not be read as a ruling on any of Relators' other theories of liability, including whether Defendant had actual payroll expenses when it applied for its first PPP loan or whether the loan's proceeds only would be used to retain workers and on other eligible expense categories.

have been induced to *reduce* the loan proceeds it issued to Defendant rather than increase Defendant's loan amount. In other words, if Defendant had reported its undisputed number of 142 employees correctly, it would have received the exact same loan amount it actually received. The discrepancy between 41 and 142 employees, therefore, was not material since it was not capable of influencing the SBA's payment of loan proceeds.[10] *See U.S. ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1169 (10th Cir. 2010) ("[A] false certification . . . is actionable under the FCA only if it leads the government to make a payment which, absent the falsity, it may not have made."); *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1056 (11th Cir. 2015).

Aside from dismissing Defendant's cited case law and incorrectly contending that § 3729(a)(1)(A) of the FCA does not contain a materiality element, *see supra* note 6, Relator chides Defendant for referencing declarations it procured from SBA employees and for otherwise failing to provide a "holistic, totality-of-the-circumstances materiality analysis" for Relators' theory. (Opp'n 23-24.) Relators do not, however, provide any of their own evidence or arguments regarding Defendant's listed number of employees that would either further inform the Court's materiality analysis or rebut the statutory rules and evidence Defendant presents. Defendant's proffered evidence and the relevant statutory requirements thus remain

[10] To the extent Sherman Bridge was Defendant's affiliate and counted toward Defendant's total number of employees, the Court's analysis would not change since the parties agree that Sherman Bridge had only 10 employees when Defendant applied for both of its PPP loans. *See supra* Section IV.B.3; SGI ¶¶ 74, 85.

persuasive on whether a genuine issue of material fact exists as to the immateriality of Defendant listing 41 employees in its application.

Again, the materiality standard for FCA claims is whether a statement "ha[s] 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). It is further a "demanding" standard, and "[a] misrepresentation cannot be deemed material merely because the Government designates compliance with a particular . . . requirement as a condition of payment." *Escobar I*, 579 U.S. at 194. Relators have shown only that the PPP loan application required Defendant to list its number of employees and that Defendant's application mistakenly stated that it had 41 employees instead of 142. Since such a discrepancy could not have influenced the SBA to pay out additional loan proceeds, this showing is insufficient to demonstrate that Defendant's statement was material under the FCA. As such, summary judgment is GRANTED in favor of Defendant as to Relators' two claims insofar as they rely on Relators' sixth theory of liability regarding Defendant listing a false number of employees in its First Draw PPP Loan application.

2. Omission of Affiliates on First and Second Draw PPP Loan Applications

Defendant's next argument on materiality regards Relators' seventh theory of liability, which alleges that Defendant falsely stated in its loan forgiveness applications that none of its affiliates had obtained PPP loans when Sherman Bridge had, in fact, done so. Defendant argues that, assuming Sherman Bridge was its affiliate for PPP purposes, its

nondisclosure of that entity was immaterial because the SBA sought affiliate information only to determine whether applicant borrowers' total number of employees remained under the relevant statutory limits when combined with their affiliates.

To make its point, Defendant cites SBA Form 3511 titled "Paycheck Protection Program Affiliation Worksheet." (Lowe Decl. Ex 11.) The worksheet's stated purpose is to collect information from PPP borrowers who may have affiliates, and it asks borrowers "to provide information regarding the size standard that you (Borrower) used when making your eligibility certification and regarding the size of your affiliates." (*Id.* at 2.) The worksheet goes on to request affiliate information "depending on the size standard" the borrower indicated in a previous section. (*Id.* at 5.)

Defendant pairs this worksheet with the declaration of SBA attorney Kandace Zelaya, who avers that borrowers that "were part of single corporate group" "were eligible to receive PPP loans if they satisfied the size standard[s]" of no more than 500 employees for First Draw PPP Loans and 300 employees for Second Draw PPP Loans.[11] (*Id.* ¶¶ 27, 29.) Zelaya's declaration further states "[a] business was not disqualified from the PPP merely because it had affiliates. If the business had affiliates, it had to include the employees . . . of the applicant business and all of its affiliates *when determining its size under the applicable size standard* when certifying it was eligible for the PPP loan." (*Id.* ¶ 28 (emphasis added).) Since the

[11] These employee limits were also provided by statute under the CARES Act. *See* 15 U.S.C. §§ 636(a)(36)(D)(I), (37)(A)(iv)(aa).

SBA sought affiliate information to determine borrower size, and since the parties agree that Sherman Bridge had 10 employees while Defendant had 142 or fewer employees at all relevant times (SGI ¶¶ 74, 78, 85), Defendant reasons that including Sherman Bridge as an affiliate could not have influenced the SBA's payment or forgiveness of PPP loan proceeds because Defendant's employee numbers nevertheless would have met PPP eligibility limits. Based on this evidence and reasoning, the Court finds Defendant has satisfied its burden of production on Relators' claims as to the theory of Defendant omitting affiliate information from its loan applications.

Relators respond by critiquing Defendant for "fail[ing] to undergo [a] holistic, totality-of-the-circumstances materiality analysis" or offering any "evidence of how the government contemporaneously treated other applications where it knew the applicant failed to identify one or more affiliates." (Opp'n 24-25.) In doing so, Relators once again fail to provide any evidence of their own to counter Defendant's argument or establish a genuine issue of material fact as to the materiality of Defendant's omission of affiliate information. Relators further cite no authority suggesting that evidence of the government's contemporaneous treatment of other applicants is *required* to establish materiality of a particular false statement. Indeed, *Escobar I* suggests that such evidence is not always necessary. 579 U.S. at 193 (stating that "proof of materiality *can* include, but is not necessarily limited to" evidence of the government's treatment of similar noncompliance (emphasis added)).

The Court accordingly GRANTS summary judgment in Defendant's favor as to Relators' claims regarding Relators' seventh theory of liability.

3. The SBA's Review and Inaction

Defendant also argues that the SBA's inaction throughout Defendant's PPP application process and the pendency of this litigation demonstrates that the false statements Relators allege were not material to the government's decision to permit Defendant to secure PPP loans and forgiveness. Specifically, Defendant cites declarations from two SBA employees that it procured in discovery as relevant to its argument.

The first declaration is from Martin Andrews, the SBA's Deputy Director of its Office of Financial Program Operations ("OFPO"). (Lowe Decl. Ex.1.) Among other things, Andrews's declaration details the separate reviews the SBA conducted as part of Defendant's loan forgiveness process. (*See id.* ¶¶ 4-19.) Andrews describes that, during the review of Defendant's First Draw PPP Loan, Defendant provided all documentation the SBA requested, which included providing documents in response to specific follow-up requests from the SBA. (*Id.* ¶¶ 7-12.) These follow-up requests sought, among other things, 2019 and 2020 quarterly reports, a 2020 Q4 wage report, and detailed employee reports corresponding to the loan's covered period. (*Id.* ¶¶ 8-12.) Andrews attests to a similar process regarding the SBA's review of Defendant's Second Draw PPP Loan, namely that Defendant provided all requested documentation and subsequently complied with follow-up requests for a loan amount calculation worksheet and an employee wage report related to Defendant's maximum loan

calculation. (*Id.* ¶¶ 17-19.) Andrews's declaration concludes by confirming that the SBA "has been made aware of this lawsuit" and "reviewed all of the allegations in the Second Amended Complaint." (*Id.* ¶¶ 20-21.) Andrews states that "[t]o date, SBA's loan forgiveness decisions have not been reconsidered, SBA has not requested a further review of either of [Defendant]'s two PPP loans, and . . . has not asked Defendant to return any of the PPP loan proceeds." (*Id.* ¶ 22.)

The second declaration is from Kandace Zelaya, an SBA attorney. (Lowe Decl. Ex. 2.) Aside from reiterating many of Andrews's statements and citing various statutory and regulatory provisions relevant to the Court's analysis here, Zelaya's declaration cites "SBA Form 3508," a PPP loan forgiveness calculation form, to state the following:

> Loan forgiveness applicants were instructed to "verify[] the eligible cash compensation and non-cash benefit payments" by providing "Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees," "Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period," and "Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee group health, life, disability, vision or dental insurance and retirement plans that the Borrower included in the forgiveness amount."

(*Id.* ¶ 24; *see* Lowe Decl. Ex. 10.)

The Court agrees with Defendant that the government's behavior in this case demonstrates the immateriality of Defendant's alleged false statements. *See United States ex rel. Janssen v. Lawrence Mem'l Hosp.*, 949 F.3d 533, 542 (10th Cir. 2020) ("[T]he Government's actual behavior in *this* case suggests [relator]'s allegations are immaterial.") As covered above, to secure PPP loan proceeds, the SBA required Defendant to demonstrate payroll costs defined as "the sum of payments of any compensation with respect to employees . . . ." 15 U.S.C. § 636(a)(36)(E)(i)(I). Defendant used its payroll provider's record of gross wages that it had paid its employees in 2019 to demonstrate these costs for both loans, and its lender certified that Defendant had provided the necessary documents for this purpose. When it came time to apply for forgiveness for each loan, the SBA separately reviewed each of Defendant's forgiveness applications and sought payroll provider records documenting "the amount of cash compensation paid to employees" for each loan's covered period. Having already paid employee wages well in excess of its loan amounts, Defendant again undisputedly provided all of the financial documents necessary to fulfill SBA's forgiveness requirements and further complied with various follow-up requests from the SBA for additional documents related to Defendant's wage payments and loan calculation. Both of Defendant's loans ultimately were forgiven.

Defendant's undisputed compliance with this thorough and interactive SBA review process suggests that Relators' remaining alleged false statements were not material to the SBA providing loans and forgiveness to Defendant. Via lender certifications and its own loan forgiveness review

process, the SBA essentially "ha[s] already examined [Defendant] multiple times over and concluded that neither administrative penalties" nor return of Defendant's loan proceeds "was warranted." *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445, 447 (7th Cir. 2016) (citation omitted); *United States ex rel. Berg v. Honeywell Int'l, Inc.*, 740 F. App'x 535, 538 (9th Cir. 2018) (citing the government's knowledge of results from its own audit in holding that no triable issue existed as to FCA materiality).

No evidence further suggests that, in processing and reviewing Defendant's loan and forgiveness applications, the SBA concerned itself with tracing how Defendant managed its specific loan proceeds, though such information would have been substantially relevant to determine whether Defendant had complied with the three remaining certifications at issue in this case regarding its use of proceeds. Instead, the SBA simply sought financial documents verifying compensation paid to employees during the covered period for each loan, and Defendant complied by responding with sufficient documentation demonstrating wages it undisputedly had paid to employees. "The government [therefore] had the information that it wanted," *U.S. ex rel. Thomas v. Siemens AG*, 991 F. Supp. 2d 540, 583 (E.D. Pa.), *aff'd*, 593 F. App'x 139 (3d Cir. 2014); *see id.* at 596, to assess Defendant's eligibility and use of PPP funds, and it decided to issue funds and grant forgiveness to Defendant despite the possibility that Defendant had not used its specific loan proceeds to pay wages or moved the funds before seeking another loan or forgiveness. The SBA did so, moreover, despite clearly demonstrating its ability to further investigate Defendant's payroll management by requiring Defendant to

acquiesce to follow-up requests for financial documentation during the forgiveness review process. "This evidence . . . is fatal to [Relators'] claim[s]." *Siemens*, 991 F. Supp. 2d at 596.

The SBA's "inaction in the face of detailed allegations from . . . former employee[s] [also] suggests immateriality." *Janssen*, 949 F.3d at 542 (citing *Honeywell*, 740 F. App'x at 538); *see United States ex rel. Lewis v. California Inst. of Tech.*, No. 2:18-cv-05964-CAS-RAOx, 2021 WL 1600488, at *10 (C.D. Cal. Apr. 19, 2021). The parties do not dispute that the SBA retains the current power to review Defendant's loan and forgiveness applications and seek repayments of its loan proceeds, including for issues related to borrower eligibility, loan amounts, use of proceeds, and loan forgiveness amounts. SGI ¶¶ 60, 61, 63; *see* 86 Fed. Reg. 8283, 8294 (Feb. 5, 2021); 85 Fed. Reg. 33010, 33012 (June 1, 2020). Andrews's declaration confirms, however, that the SBA has reviewed all of Relators' allegations but continues to refrain from reevaluating Defendant's applications or requiring reimbursement of its PPP loan funds. The SBA effectively "has done nothing in response" to Relators' FCA allegations, *Janssen*, 949 F.3d at 542, which "casts serious doubt on the materiality of the fraudulent representations that [Relators] allege[]," *D'Agostino v. ev3, Inc.*, 845 F.3d 1, 7 (1st Cir. 2016). *See also Escobar I*, 579 U.S. at 195 ("[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.").

Further, "though not dispositive, continued payment by the federal government after it learns of the alleged fraud substantially increases the burden on the relator in establishing materiality." *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 663 (5th Cir. 2017); *see Escobar I*, 579 U.S. at 195; *Honeywell*, 740 F. App'x at 538; *Lewis*, 2021 WL 1600488, at *10. Here, the SBA has been presented with Defendant's potential false representations and, though Defendant has not sought further loan proceeds because the PPP has ended, the SBA continues to allow Defendant to keep its PPP funds despite having the authority to require reimbursement. It is therefore in an analogous position to government entities that learn of a defendant's potential fraud but continue to issue payments. "This is 'very strong evidence' that the requirements allegedly violated by [Defendant] are not material." *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1034 (D.C. Cir. 2017) (quoting *Escobar I*, 579 U.S. at 195); *see Lewis*, 2021 WL 1600488, at *10.

Relying on cases analyzing a concept known as the "government knowledge inference" generally employed by defendants to demonstrate the absence of a knowing false claim under the FCA's scienter element, Relators argue that the SBA's knowledge of their allegations is either "wholly irrelevant," (Opp'n 12) or applies only when the government knows and approves of the facts underlying an alleged false claim prior to its presentment (*id.* at 11). Setting aside that government knowledge inference analysis is distinct from materiality analysis, as Relators' own cited case explains, *see United States ex rel. Spay v. CVS Caremark Corp.*, 875 F.3d 746, 764 (3d Cir. 2017) ("Although [relator's] argument may well preclude

reliance on the government inference doctrine, it does not undermine our belief that the misstatements here were simply not material to the government's decision to pay . . . ."), this argument ignores the fact that courts nevertheless attribute significant weight to government knowledge of and inaction toward alleged false statements after the filing of FCA claims. *See D'Agostino*, 845 F.3d at 7; *U.S. ex rel. Marshall v. Woodward, Inc.*, 812 F.3d 556, 563 (7th Cir. 2015) ("*To this day*, the government continues to pay . . . ." (emphasis added)); *see also Janssen*, 949 F.3d at 542; *Sanford-Brown*, 840 F.3d at 447, *reconsidering and reinstating on relevant grounds*, 788 F.3d 696, 701, 712 (7th Cir. 2015). Further, as discussed above, Relators overlook the undisputed fact that the SBA currently retains the regulatory authority to review Defendant's applications and seek repayment of its loan proceeds. In essence, Defendant's allegedly false claims remain presented to the SBA, yet the SBA has declined to take corrective action despite its persisting knowledge of their potential falsity. Again, this posture is not meaningfully dissimilar from that of the cases Relators invoke. *See U.S. ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 951 (10th Cir. 2008); *Spay*, 875 F.3d at 756.

Relators' argument accordingly does not dispel the fact that the government's repeated review of and subsequent inaction toward Defendant's loan and loan forgiveness requests constitutes "very strong evidence" of the immateriality of the PPP requirements allegedly violated in this case. *Escobar I*, 579 U.S. at 195. Since Relators provide no persuasive evidence of their own addressing how the remaining allegedly false statements were material to the SBA's decision to issue PPP loans

and forgiveness to Defendant, they have shown only that Defendant has failed to comply with PPP application requirements, but again "misrepresentation[s] cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment." *Escobar I*, 579 U.S. at 194; *see also id.* ("Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance."). No genuine issue of triable fact therefore exists as to the materiality element of Relators' FCA claims, and summary judgment in favor of Defendant is warranted as to all of Relators' presented claims and theories. *See id.* at 195 n.6 ("We reject [relator]'s assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases . . . at summary judgment. The standard for materiality that we have outlined is a familiar and rigorous one."); *see also Kelly*, 846 F.3d at 333 ("Courts can properly dismiss an FCA claim on summary judgment based on a claimant's failure to meet the rigorous standard for materiality under the FCA.").

The Court thus GRANTS summary judgment in Defendant's favor as to Relators' claims regarding all of Relators' theories of liability based on lack of materiality.

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V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion for Summary Judgment as to Relators' claims.

IT IS SO ORDERED.

Dated: 1/3/24

Virginia A. Phillips
Senior United States District Judge