No. 21-35905

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UPPI LLC,

Relator-Appellant,

v.

CARDINAL HEALTH, INC.; CARDINAL HEALTH 414 LLC, DBA Cardinal Health Nuclear Pharmacy Services; CARDINAL HEALTH 200 LLC; D'S VENTURES LLC, DBA Logmet Solutions LLC; CARING HANDS HEALTH EQUIPMENT & SUPPLIES LLC; OBIE B. BACON; DEMAURICE SCOTT; OTHER UNNAMED SMALL BUSINESS FRONT COMPANIES; UNNAMED INDIVIDUALS,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Washington
Case No. 2:17-cv-00378-RMP (Hon. Rosanna Malouf Peterson)

APPELLANT'S PRINCIPAL BRIEF

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel of record certifies that Appellant UPPI LLC has no parent companies and no publicly held corporation owns ten percent or more of its stock.

Dated: January 28, 2022

/s/ Tejinder Singh

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INTRODUCTION

This is a False Claims Act ("FCA") case at the pleading stage. Relator-appellant UPPI LLC ("UPPI") is a membership organization dedicated to advancing the professionalism of the radiopharmaceutical (also called the nuclear pharmacy) industry. Its members are individual, small-business, and university-based nuclear pharmacies that supply radiopharmaceutical products. UPPI's First Amended Complaint ("FAC," 3-ER-321–383) alleges that defendants-appellees fraudulently obtained contracts to supply these products to the Government—most particularly the United States Department of Veterans Affairs ("VA")—and billed the Government millions of dollars under those contracts.

Specifically, defendants orchestrated a scam commonly known as a "rent-a-vet" scheme. Under this scheme, a business that wants to win a government contract, but doesn't want to compete fairly for it, finds a veteran-owned business that is eligible for preferential treatment in government contracting, but can't actually perform the contract. The veteran-owned business exploits contracting preferences to bid on and win the contract; the ineligible business does all the work and keeps almost all the money—paying just a little bit (the "rent") to the veteran-

owned business. The ineligible business wins by avoiding competition. The veteran-owned business wins easy rent. The Government loses big: the integrity of its preference programs is undermined; the intended beneficiaries of those programs suffer; the Government loses the benefit of fair competition; and it pays rent money to a veteran-owned business for doing nothing.

Rent-a-vet schemes are flatly illegal. Statutes, regulations, and government contracts all include terms designed to prevent them. The Government has also prosecuted the perpetrators of such schemes criminally. Most important for present purposes, the Government pursues FCA cases against these schemes, typically under the theories of promissory fraud and implied false certification.

Under the theory of promissory fraud, "liability will attach to each claim submitted to the government under a contract" that "was originally obtained through false statements or fraudulent conduct." *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1173 (9th Cir. 2006). Cases applying this theory recognize that "making a promise that one *intends* not to keep is fraud," and so when a defendant "agree[s] in writing" to comply with a legal requirement, with no intention of

complying, the ensuing claims for payment are false under the FCA. *See id*. at 1174–75 (quotation marks omitted). This theory covers rent-a-vet schemes where veteran-owned businesses: (1) induce the Government to award contracts to them by lying about their ability and intention to perform contractual requirements; and/or (2) lie about their intention to comply with restrictions that preclude them from using large, ineligible businesses to perform the contractual requirements or manufacture components of the products being supplied.

The theory of implied false certification works similarly, holding that when a defendant makes claims for payment, but knowingly fails to disclose noncompliance with material statutory, regulatory, or contractual requirements, the claims for payment are false. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 180 (2016). This applies to rent-a-vet schemes because the legal requirements discussed above are material to the Government's contracting and payment decisions.

In this case, defendants Caring Hands and Logmet[1] are Service Disabled Veteran Owned Small Businesses (SDVOSBs), which are entitled to the strongest preferences in government contracts—especially vis-à-vis the VA. These defendants exploited SDVOSB preferences to win contracts to supply radiopharmaceuticals to VA hospitals—but never planned to do any meaningful work on the contracts. Instead, the SDVOSB defendants were mere fronts for defendant Cardinal,[2] a Fortune 15 megafirm, which did essentially all the work and kept almost all the money. Indeed, the SDVOSB defendants never touched the radiopharmaceutical products themselves; all they did was bill the VA after the fact, and then pass on most of the money to Cardinal.

UPPI alleges that defendants perpetrated this scheme using four sets of false statements: (1) false statements while the VA was deciding whether to restrict competition for these contracts to SDVOSBs; (2) false statements responding to the VA's solicitations; (3) false promises in the

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[1] Caring Hands includes Caring Hands Health Equipment & Supplies LLC and its owner, Obie B. Bacon. Logmet includes Logmet Solutions LLC and its owner, DeMaurice Scott.

[2] Cardinal includes Cardinal Health, Inc., Cardinal Health Nuclear Pharmacy Services, and Cardinal Health 200 LLC.

contracts themselves; and (4) false statements during the performance of the contracts (including but not limited to the invoices). More specifically, the SDVOSB defendants misrepresented their ability and intention to perform the contractual requirements, at times referring to themselves as "distributors" even though they didn't distribute the products, and at other times describing facilities they didn't have or roles they didn't play. Moreover, none of the defendants ever disclosed to the Government the SDVOSBs' true role as mere billing intermediaries for Cardinal. As an outsider, UPPI does not have access to all the communications between defendants and the Government. However, UPPI has seen critical documents—including the contracts themselves, which contain, in black and white, promises that UPPI alleges were false when made.

The district court nevertheless dismissed UPPI's complaint, finding that UPPI failed to plead the elements of falsity and materiality, and also conspiracy. In the district court's view, the false promises in the contracts were irrelevant as a matter of law, and the remaining statements UPPI identified were not specific enough to state a claim for fraud. For the reasons explained in detail in this brief, the district court's decision was erroneous and should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The court entered final judgment in defendants' favor on September 29, 2021. 1-ER-26. UPPI timely appealed on October 28, 2021. 3-ER-389. This Court has jurisdiction under 28 U.S.C. § 1291.

STATUTORY AND REGULATORY AUTHORITIES

Relevant statutory and regulatory authorities appear in the addendum to this brief.

ISSUES PRESENTED

1. UPPI alleges that the SDVOSB defendants, in collaboration with Cardinal, made false representations and material omissions during the market research, bidding, contracting, performance, and billing for the relevant contracts by representing that the SDVOSB defendants would perform the contracts, knowing that they intended to pass on essentially all the work and almost all the money to Cardinal. Do such allegations plead the element of falsity, including (1) making false statements; and (2) presenting false claims under the theories of promissory fraud and implied false certification?

2. UPPI's complaint alleges that the Government would not have contracted with or paid the SDVOSB defendants had it known the true

intended division of labor between them and Cardinal. Do such allegations adequately plead the element of materiality?

3. UPPI alleges that the SDVOSB defendants and Cardinal collaborated to perpetrate the foregoing frauds, agreeing to an unlawful division of labor and proceeds from fraudulently obtained government contracts. Does UPPI's complaint adequately plead a conspiracy to violate the FCA?

STATEMENT OF THE CASE

I. Legal Background

A. Government Contracting Principles

The federal Government operates a massive procurement apparatus, spending billions (and sometimes trillions) of dollars every year to obtain goods and services from private contractors. The general rule in such acquisitions is that the Government seeks out the most competitive bid—and that is especially true when the Government deals with large, well-established businesses. However, the Government also has preferential programs for small businesses seeking contracting opportunities. These preferences are designed to distribute opportunity in recognition of the fact that small businesses are important to our economic vitality. *See generally* 15 U.S.C. §§ 631, 631a.

1. Contracting preferences for SDVOSBs, and attendant restrictions on subcontracting

Two parallel programs grant contracting preferences to SDVOSBs. The first is the Government-wide SDVOSB program administrated by the Small Business Administration ("SBA"). This program requires at least three percent of all federal contracting dollars to be awarded to SDVOSBs. 15 U.S.C. § 644(g)(1)(A)(ii). To achieve this goal, an agency can set aside a contract so that only SDVOSBs may bid "if the contracting officer has a reasonable expectation that not less than [two]" SDVOSBs "will submit offers and that the award can be made at a fair market price." *Id.* § 657f(d). If the contracting officer does not expect that two or more SDVOSBs are going to bid, he can still award a "sole source contract" to an SDVOSB under certain conditions relating to the business's track record and the contract price. *Id.* § 657f(c). Agencies also try to achieve their SDVOSB contracting goals in unrestricted contracts, effectively giving SDVOSBs bonus credit due to their status. *See id.* § 644(g)(2)(E)(i).

The VA has its own SDVOSB preference program. *See* 38 U.S.C. §§ 8127–28. The relevant statutory provisions permit restricted competition on terms resembling the SBA's terms. *See id.* § 8127(c), (d)

(permitting sole source contracts and restricted competition). The principal difference is that under the VA's program, restricted competition is *mandatory* if the contracting officer has a reasonable expectation that two or more SDVOSBs will bid and that the award can be made at a fair and reasonable price that offers best value to the United States. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 164 (2016); 48 C.F.R. § 819.7005. The VA's program also includes an "order of priority" that places SDVOSBs at the top of the list for contracts. *See* 48 C.F.R. § 819.7004. For all contracts (whether restricted or not), the agency can give preferential credit to SDVOSBs. *See id.* § 852.215-70.

To ensure that these preferences are not abused, the Government imposes limitations on eligibility for SDVOSB preferences and on how SDVOSBs perform their contracts. Quite obviously, large businesses that are not owned and controlled by service-disabled veterans are ineligible for these preferences. Moreover, the SBA's regulations generally prohibit SDVOSBs from subcontracting work under set-aside contracts to large businesses. *See* 13 C.F.R. § 125.6(a). This includes the "nonmanufacturer rule," which provides that if a small business is not the manufacturer of the product it contracts to supply, it must purchase the product from

another comparable small business unless it first obtains a waiver permitting it to purchase the product from a large business. *See id.* § 125.6(a)(2)(ii); 48 C.F.R. § 19.102(f) (2012); *see also* 3-ER-337.

Under both the SBA and VA programs, if the contract is set aside or restricted, restrictions on subcontracting *must* be incorporated into the contract as a matter of law. *See* 15 U.S.C. § 657s(a)(2), (4) (requiring such restrictions for any contract awarded under Section 657f (the SBA's SDVOSB set-aside program)); 48 C.F.R. § 852.219-10 (a mandatory clause in VA set-aside contracts that incorporates the nonmanufacturer rule codified at 48 C.F.R. § 19.102(f)); *id.* § 52.219-27 (an alternative clause stating the same requirement). Contracting officers sometimes also include subcontracting restrictions in contracts that are not expressly set aside or otherwise limited to SDVOSBs. For example, one of the contracts in this case was marked "unrestricted," 2-ER-122, but still included subcontracting restrictions , 2-ER-138, 145 (incorporating "Notice of Total Small Business Set-Aside," and "Limitations on Subcontracting.").

2. The contracting process

When the VA is considering issuing a procurement contract, it begins by conducting market research to determine whether small businesses are capable of performing the contract requirements and interested in bidding—because if so, then the VA may have to set aside or otherwise restrict the contract. *See* 3-ER-335–36; 48 C.F.R. § 10.001(a)(3) (explaining how the Government uses market research, including to "[d]etermine if sources capable of satisfying the agency's requirements exist," and to "[d]etermine whether the acquisition should utilize any of the small business programs"). For this process, contracting officers review past contracts and solicitations, review past market research reports, tap their own knowledge and contacts, attend trade shows and conferences, read industry publications, and also search registries of contractors. *See* 48 C.F.R. § 10.002(b)(2). The contracting officer then typically contacts potentially capable small businesses to gauge their ability to perform and their interest in bidding on the contract. "At this point in the process, Government contracting officers typically take contractors at their word about whether they can perform

the contract obligations; they do not look behind those statements." 3-ER-335–36.

Based on market research, the Government will issue a solicitation for bids or proposals, which may be restricted to small businesses, *e.g.*, SDVOSBs, or not, depending on what the market research shows. 3-ER-336. Regardless, contractors that want to win the contract must respond to the solicitation—including by explaining their ability to perform the contract requirements, and providing pricing.

Based on the contractors' responses, the Government chooses a contractor and executes a contract. The contracts in this case were to provide specified radiopharmaceutical products to VA hospitals. On the front page of each contract is a field where the contract specifies whether the solicitation was set aside, or was instead unrestricted. *See, e.g.*, 2-ER-38.[3] Then, the contracts specify the scope of work, *i.e.*, which radiopharmaceutical products are being ordered, how quickly deliveries are to be made, and other technical requirements. *See* 2-ER-42–44. The

[3] This is a citation to Caring Hands' contract to supply radiopharmaceuticals to the VA in Durham, North Carolina (2-ER-38–58), offered as an illustrative example of what the contracts look like.

contracts also incorporate certain clauses required by law, such as 48 C.F.R. § 52.219-27, the "Notice of Service-Disabled Veteran-Owned Small Business Set-Aside," which imposes additional requirements (including restrictions on subcontracting like the nonmanufacturer rule). These clauses—which are required by law in every set-aside contract, are sometimes incorporated using check-boxes, *e.g.*, 2-ER-50, and other times reproduced in the contract text, *e.g.*, 2-ER-81–82.

After the contract is awarded, the performance phase begins. The contractor supplies the products and bills the Government.

As explained in greater detail below, UPPI alleges that defendants misled the Government during the market research, solicitation, contracting, and performance phases of their agreements with the Government, and then billed the Government.

B. The False Claims Act

The FCA creates civil liability for "any person who" "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval"; who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent

claim"; or who conspires to violate the statute. 31 U.S.C. § 3729(a)(1)(A)-(C).

In enacting the FCA, "Congress wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003) (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)). Thus, "liability will attach to each claim submitted to the government under a contract" that "was originally obtained through false statements or fraudulent conduct." *Hendow*, 461 F.3d at 1173; *see also United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 904 (9th Cir. 2017). The FCA also reaches "half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information." *Escobar*, 579 U.S. at 188.

The FCA authorizes suits by private persons, known as *qui tam* relators, on the Government's behalf. *See* 31 U.S.C. § 3730(b)(1). After a relator sues, the Government can intervene, or instead confer the right to prosecute the action on the relator. *See id.* § 3730(b)(4). The Government receives the lion's share of any recovery (at least 70%); the relator keeps the rest. *See id.* § 3730(d). By providing a financial

incentive for private parties to redress fraud on the Government, the *qui tam* provisions "encourage any individual knowing of Government fraud to bring that information forward." S. Rep. No. 99-345, at 2 (1986).

II. UPPI's Allegations

A. Defendants Made False Statements and Omissions

UPPI alleges that Caring Hands and Logmet are small businesses that are incapable of compounding, taking possession of, storing, delivering, or otherwise supplying radiopharmaceuticals—which are complicated, dangerous products that must be compounded by licensed and trained professionals in specialized facilities and then delivered on short notice. 3-ER-341, 3-ER-351–54.

Notwithstanding their inability to supply these products, starting in 2013, the SDVOSB defendants bid on and received contracts to supply radiopharmaceuticals to VA hospitals in seven cities. The complaint identifies these contracts by providing contract numbers, locations, and date ranges. For Caring Hands, these included contracts with VA facilities in Durham (Jan. 2014 – Dec. 2015), Columbia (Sept. 2014 – Jan. 2020), Miami (Oct. 2014 – Jan. 2016), Birmingham (Apr. 2015 – Sept. 2016), and San Antonio (Jan. 2017 – at least the date of the complaint).

3-ER-344–46 (¶ 58 & nns. 2–5). For Logmet, this included contracts in Albuquerque (Jan. 2017 – Sept. 2017) and Denver (Feb. 2016 – at least the date of the complaint). 3-ER-347 (¶ 62 & nns. 6–7). It also included radiopharmaceutical contracts with other government agencies. 3-ER-347 (¶ 63).

To make these bids, the SDVOSB defendants had to tell contracting officers that they were capable of meeting the contract requirements, *i.e.*, supplying the required radiopharmaceuticals. The SDVOSB defendants could not honestly make any such representation because they lacked the training, experience, facilities, and licensure to compound and deliver radiopharmaceuticals. 3-ER-351–54. But the SDVOSB defendants falsely represented that they could meet the contract requirements.

The SDVOSB defendants made these representations because they had partnered with Cardinal—an experienced large business that compounds and delivers radiopharmaceuticals—before bidding on the contracts. 3-ER-328–29, 3-ER-354. The essence of the scheme was that the SDVOSB defendants would win the contracts, but Cardinal would actually supply the products. 3-ER-325–26; 3-ER-342. The SDVOSB defendants would bill the Government, but pass on the vast majority of

the revenue to Cardinal, keeping only a small piece for themselves. 3-ER-326; 3-ER-342. Thus, the only role the SDVOSB defendants played was billing; they did not manufacture or distribute any radiopharmaceuticals. 3-ER-357–58.

The SDVOSB defendants were not transparent with the Government about the minimal role they intended to take. Instead of telling the Government the truth, defendants made the following false statements in furtherance of their fraudulent scheme:

Pre-solicitation false statements. UPPI alleges that when the Government was performing market research to determine whether the contracts could be set aside for SDVOSBs, defendants made false statements material to the Government's decision. 3-ER-356–57. Specifically, Caring Hands and Logmet told the Government they could perform the work, which the Government relied on when it chose to set aside the contracts. 3-ER-356.

The FAC provides two specific examples of these misrepresentations. First, Caring Hands represented to the VA that it was qualified to bid on the Durham contract, the first contract it received. 3-ER-356–57. This false representation was particularly impactful

because the decision to set aside the Durham contract and award it to Caring Hands "created a precedent, paving the way for future set-asides for Caring Hands because future market research would show that Caring Hands had previously been awarded a radiopharmaceutical supply contract." 3-ER-357. Second, Logmet responded to a request for information from the VA during market research related to the Albuquerque, New Mexico contract, falsely representing that it could perform the contract because it "had warehouses and other infrastructure in place" that did not exist, which "resulted in the contract being set aside and then awarded to Logmet." *Id.* These and similar false representations caused the VA to set contracts aside for SDVOSBs.

Fraudulent bids. The FAC alleges that Caring Hands and Logmet submitted false bids for each of the contracts, explicitly or implicitly representing in each bid that they could perform the required work (*i.e.*, *actually* supplying the required radiopharmaceuticals) and that they would comply with all the conditions in the contracts, including limitations on subcontracting. 3-ER-354–56. This allegation is also based on information and belief because UPPI did not have firsthand access to the bids. But it is a fair inference that when the Government actually

awards a contract to a contractor, the contractor has submitted a bid saying that it can meet all of the contractual requirements. Those bids were false because the SDVOSB defendants had already arranged for Cardinal to do all the work under the contracts. 3-ER-354–55.

The district court would eventually conclude that paragraph 95 of the complaint—which related to misrepresentations in bidding—was important. In that paragraph, UPPI alleges that Caring Hands and Logmet "sometimes mentioned Cardinal in their bids" by relying on Cardinal's license from the Nuclear Regulatory Commission or identifying Cardinal as a supplier. 3-ER-355. But UPPI was clear that these statements were misleading because "the SDVOSB Defendants . . . never disclosed the extremely limited role they intended to play. Instead, they stated that they would be acting as authorized distributors, or something similar, implying that they would be taking possession of and delivering radiopharmaceutical products to the Government." *Id*. Not only that, "these limited disclosures of Cardinal's role did not negate the contrary misrepresentations—explicit and implicit—that the SDVOSBs would perform the contracts in accordance with all

requirements, including subcontracting restrictions. And they did not make Cardinal's involvement any more lawful." *Id*.

Contractual promises that were false when made. The FAC details the false promises defendants made when they signed the contracts, agreeing to "comply with all relevant contractual requirements, including requirements to actually perform the supply work, and restrictions on subcontracting, when they had no intention of complying." 3-ER-357. These allegations are substantiated by the contracts themselves—many of which defendants filed on the record as documents subject to judicial notice. *See* 2-ER-36–203; 3-ER-205–73; 3-ER-288–317.

An examination of the contracts shows that defendants made two sets of false promises. First, each contract includes a "Statement of Work" section requiring the defendant to provide radiopharmaceuticals in accordance with a slew of technical and logistical conditions. *See, e.g.*, 3-ER-349–51 (describing the conditions); *see also, e.g.*, 2-ER-42–44, 63–70, 94–99. When they signed those contracts, the SDVOSB defendants promised to fulfill those conditions, knowing that they would not do so.

3-ER-357. Those promises of performance were accordingly false when made.

Second, the contracts incorporate limitations on subcontracting, including the nonmanufacturer rule. Indeed, in the district court, defendants did not dispute that Caring Hands' contracts for Durham, Birmingham, and San Antonio had been set aside, and that those contracts expressly incorporated limitations on subcontracting that prohibited Caring Hands from subcontracting the work to Cardinal. The parties had more of a debate about the remaining contracts, but it is at least a plausible allegation that they too include false promises to comply with limitations on subcontracting. *See infra* pp.47-51.

False statements during performance of the contracts. The FAC also alleges that defendants made multiple false statements during the life of the contracts. 3-ER-357–59. Caring Hands and Logmet submitted claims for payment that were "doubly culpable" because they were all "tainted by the antecedent fraud that resulted in the contracts being awarded to the SDVOSB Defendants" and also falsely implied that Caring Hands and Logmet had performed the contracts in conformity with all applicable requirements and had actually performed meaningful

work on the contracts as suppliers of the radiopharmaceutical products. 3-ER-359.

Caring Hands and Logmet made additional false statements in response to inquiries by the Government. 3-ER-357–58. For example, in 2017, Logmet told the Government that, regarding the Albuquerque contract, it was "providing customer service, scheduling, billing, quality assurance, quality control, and taking care of any other issues that may arise, while Cardinal was supplying the products." 3-ER-358. This was untrue because Logmet was really just "billing the Government; it had no ability to conduct any actual customer service, quality assurance, or quality control." *Id.*

Cardinal played an integral role in the scheme. The FAC also details Cardinal's role in the fraudulent scheme and how it caused Caring Hands and Logmet to make these false representations. *E.g.*, 3-ER-341–42, 359–60. Because radiopharmaceutical products are difficult to prepare and handle and the Government requires specific products to be delivered to specific locations on very tight timeframes, the only way Caring Hands and Logmet (who were woefully unequipped to even prepare bids) could submit successful bids was by consulting with

Cardinal to ensure that it could supply the required products to the required locations so that Caring Hands and Logmet could falsely represent that they would supply them. 3-ER-340, 359–60. Caring Hands and Logmet also consulted with Cardinal to agree on pricing, so as to ensure that the prices charged to the Government were high enough to allow Caring Hands and Logmet to collect a markup over and above Cardinal's price. 3-ER-360. "Cardinal's support was therefore essential" to preparing Caring Hands and Logmet's fraudulent bids. 3-ER-342.

Cardinal was happy to provide this crucial support to the fraudulent scheme. The FAC alleges that Cardinal, "a sophisticated player in this space" with in-depth knowledge of the set-aside program and the legal requirements governing these contracts, used Caring Hands and Logmet as front companies to allow it to obtain contracts while avoiding competition. 3-ER-375–76, 377.

B. Defendants Acted Knowingly

The FAC also alleges that all of these misrepresentations and omissions were made knowingly or recklessly, satisfying the FCA's scienter requirement. *See* 3-ER-373–79. Defendants knew the contractual and regulatory requirements applicable to these agreements

(including the limitations on subcontracting) and knew that Logmet and Caring Hands could not meet these requirements. 3-ER-374. Yet, they nevertheless misled the Government into setting aside these radiopharmaceutical contracts and then awarding them to Caring Hands and Logmet for Cardinal's pecuniary benefit. 3-ER-374–75. Indeed, "Cardinal never intended for the SDVOSB Defendants to do anything more than issue invoices; it planned to do all the substantive work under the contracts itself, using the SDVOSB Defendants as front companies." 3-ER-375. The FAC buttressed these allegations with other indicia of Cardinal's scienter, including Government enforcement action against Cardinal for attempting to unlawfully monopolize the market for radio-pharmaceuticals. *See* 3-ER-376–77.

C. Defendants' Misrepresentations Were Material

UPPI also alleged that defendants' misrepresentations and omissions were material to the Government's decisions to contract with and pay the SDVOSB defendants (and by extension Cardinal).

First, the SDVOSB defendants' false representations that they were willing and able to distribute radiopharmaceuticals led to the contracts being set aside in the first instance, and then awarded to the

SDVOSB defendants. That is because the Government could not set aside a contract for SDVOSBs unless SDVOSBs represented that they could meet the contractual requirements during market research; and the Government would not award a contract to an SDVOSB that could not perform it. 3-ER-362–63. Instead, contracting offers would have considered other potential set-asides (*e.g.*, for woman-owned businesses, minority-owned businesses, or other small businesses) that could have performed the contracts, and the contracts would have gone elsewhere. 3-ER-371–72. Put slightly differently, no reasonable person would have set aside or awarded a government contract to an entity that planned to do no meaningful work under the contract. 3-ER-370–71, 374–75, 378–79.

Second, the SDVOSB defendants' representations regarding their compliance with restrictions on subcontracting were material. That is because "set-aside programs for small and disadvantaged businesses could not function if they were not appropriately limited to those businesses. Instead, small businesses would become pass-throughs for large businesses, which would undermine competition and inflate the Government's costs while failing to actually foster the development of

small businesses. Every reasonable person would regard violations of those limitations as material to contracting decisions made under those programs." 3-ER-370–68. The contracts put into the record by defendants buttress this allegation because many expressly required the contractor to "meet the requirements in [the nonmanufacturer rule] to receive a benefit under this [set aside] program." *E.g.*, 2-ER-81. These requirements make compliance with the nonmanufacturer rule an express condition of payment.

The FAC also outlined a series of Government actions that confirm the materiality of defendants' misrepresentations. It named four specific occasions where the VA either changed set-aside designations or cancelled contracts after bid protests revealed that the requirements of the contracts could not be met, or were not being met, by eligible SDVOSBs. *See* 3-ER-363–67. Indeed, in one of these instances, the VA terminated the radiopharmaceutical contract award to Logmet in Albuquerque after concerns were raised that Logmet was "subcontracting the radiopharmaceutical work required in the contract to a large business," *i.e.*, Cardinal. 3-ER-366.

In addition, the FAC presented other evidence of materiality, including a statute imposing civil penalties on a contractor that misrepresents its status as a small business concern controlled by service-disabled veterans and the Government's repeated assertions of the need to police set-aside programs to crack down on small businesses passing through work to large companies. 3-ER-367–70.

III. Procedural History and the Decision Below

UPPI filed its original complaint on November 14, 2017. 3-ER-395. The Government declined to intervene on May 6, 2020. 3-ER-396. UPPI filed the FAC on August 25, 2020, asserting three causes of action in separate counts. 3-ER-380–83. Count I alleges that defendants knowingly presented or caused to be presented false or fraudulent claims to the government, in violation of 31 U.S.C. § 3729(a)(1)(A). 3-ER-380. Count II alleges that defendants knowingly made, used, or caused a false record or statement material to a false or fraudulent claim, in violation of 31 U.S.C. § 3729(a)(1)(B). 3-ER-381. Count III alleges that defendants knowingly conspired to commit a violation of subsections (a)(1)(A) and (a)(1)(B), in violation of 31 U.S.C. § 3729(a)(1)(C). 3-ER-382.

Cardinal, Caring Hands, and Logmet each separately moved to dismiss. 3-ER-399. UPPI opposed defendants' motions, *id.*, and the Government filed a statement of interest agreeing that UPPI's complaint adequately pleads FCA violations with the requisite particularity pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). *Id.* (docket entry 67).

On September 29, 2021, the district court dismissed the FAC. 1-ER-25. The court concluded that the FAC failed to plead falsity with the particularity required by Rule 9(b). 1-ER-20. Without addressing most of the FAC's specific allegations, it characterized the FAC's falsity allegations as "devoid of the specific statements that the plaintiff contends were fraudulent, the identity of the speaker, where and when the statements were made, or why the specific statements were fraudulent." 1-ER-18 (cleaned up).

The district court also brushed aside the specific contractual promises (*e.g.*, requirements to perform the contracts, and limitations on subcontracting), holding that "the Court does not find Relator's digression into whether the supply contracts must legally have contained a subcontracting limitation relevant to whether Relator sufficiently

pleaded fraud, because contractual requirements have no bearing on the truthfulness of Defendants' statements or representations." 1-ER-20.

Citing the FAC's allegation that Caring Hands and Logmet might have made limited references to Cardinal in their bids (and not addressing the FAC's allegations concerning how limited and misleading these references were), the district court also stated that it did not find the FAC's allegations that the Government relied on defendants' misrepresentations "plausible" because "the FAC reflects that the VA was aware of Cardinal Health's involvement at the time that the VA awarded and paid claims on the contracts." 1-ER-21.

The district court further concluded that the FAC did not plausibly allege materiality. 1-ER-22. According to the court, the FAC "concedes that the VA paid claims despite knowing that Cardinal Health was supplying radiopharmaceuticals through the VA contracts with the SDVOSB Defendants." *Id.* The court again cited the allegation that Caring Hands and Logmet made passing references to Cardinal in their bids, inferring from this single allegation that the VA had full visibility into and actual knowledge of defendants' scheme. 1-ER-22–23. The court further stated that "the ongoing payment of claims by the VA after the

Government declined to intervene in this case further supports a finding that Defendants' alleged wrongdoing was immaterial to the Government's performance of the contracts." 1-ER-23. Accordingly, the court dismissed Counts I and II (UPPI's false claim and false statement allegations). The court further held that Count III (the conspiracy claim) "automatically fails alongside [UPPI's] other FCA claims based on Relator's failure to allege falsity and materiality." 1-ER-24.

Accordingly, the district court dismissed the FAC and entered final judgment on September 29, 2021. 1-ER-26. UPPI timely appealed. 3-ER-389.

SUMMARY OF THE ARGUMENT

The district court erred in holding that the FAC fails to plead the elements of falsity and materiality, and the tort of conspiracy.

I.A. The FAC alleges that the SDVOSB defendants made repeated false statements and material omissions during market research, bidding, performance, and billing, which either stated or suggested that they intended themselves to furnish the required radiopharmaceuticals, when they had no intent to do so. At a minimum, these included representations that the SDVOSB defendants intended to act as

"distributors," as well as representations that they had warehouses and other infrastructure that they did not have. The SDVOSB defendants also never disclosed that Cardinal would play the outsized role it did in the performance of the contracts, *i.e.*, that Cardinal would do essentially all the work. These false statements were to induce the Government to set aside contracts or otherwise preferentially award them to the SDVOSB defendants, all pursuant to a rent-a-vet scheme under which Cardinal could effectively win the contracts without undergoing fair competition, and the SDVOSB defendants would receive rent for assisting Cardinal. Those allegations are sufficiently particular to provide defendants with notice of the claims against them and dispel any notion that this is a spurious lawsuit. They also plausibly state claims of fraud under both the "false statements" theory and the promissory fraud theory.

B. In addition to the false statements listed above, the SDVOSB defendants made contractual promises to perform the work (*i.e.*, deliver the radiopharmaceuticals) and to abide by limitations on subcontracting (*e.g.*, the nonmanufacturer rule) that were false when made because the SDVOSB defendants intended at the time to pawn off the work to

Cardinal. It is black-letter law that a false contractual promise, standing alone, adequately pleads a claim for promissory fraud. And there is no particularity issue because the contracts themselves, including the false promises, backed by the SDVOSB defendants' signatures, are in the record. The contracts also lend plausibility to the other allegations of false statements because they are the culmination of a campaign of dishonesty.

C. The SDVOSB defendants' invoices for payment were false claims under the theories of promissory fraud and implied false certification. The invoices were tainted by the fraud during contracting (promissory fraud). They also implicitly represented that the SDVOSB defendants had complied with all material contractual and regulatory conditions, including providing the goods ordered under the contracts (implied false certification).

D. The district court erred in holding that the SDVOSB defendants were honest with the Government about Cardinal's role. The district court based that finding on cherry-picked excerpts from paragraph 95 of the FAC. But the FAC—including that paragraph—emphatically denies that defendants were honest with the Government. Contrary to the

district court's interpretation, paragraph 95 is not a concession that defendants were truthful; it is an allegation that they told misleading half-truths. In reaching the contrary conclusion, the district court refused to read the FAC's allegations in UPPI's favor, and improperly drew inferences in defendants' favor.

II.A. The FAC also pleads the element of materiality. Specifically, it alleges that but for defendants' deception, the radiopharmaceutical contracts would never have been awarded to the SDVOSB defendants. That point is intuitive: Why would the Government knowingly award contracts to businesses that had no ability to perform them, and no intent to do so? The FAC explains that the Government takes both ability to perform and intention to abide by subcontracting limitations seriously, such that if the Government had known the roles the SDVOSB defendants and Cardinal intended to play, it would not have awarded the contracts to the SDVOSB defendants.

B. The district court found otherwise on two erroneous grounds. First, the court again drew inferences in defendants' favor, concluding that the Government has knowledge of defendants' behavior, but has not canceled the relevant contracts or sanctioned them. That allegation

appears nowhere in the complaint. On the contrary, the complaint alleges that the Government learned of the SDVOSB defendants' limited role only once—when it inquired into what Logmet was doing to fulfill its Albuquerque contract, and that Logmet lost that contract after its true role was revealed. That allegation supports materiality. And aside from that one instance, the FAC alleges that the Government did not know what defendants were doing, and therefore provides no basis to infer that the Government knowingly acquiesced in their arrangement.

Second, the court inferred from the fact that the Government did not intervene in this case that the Government regards the violations as immaterial. That is an impermissible inference under a large body of well-established and persuasive case law. The Government's intervention decisions are based on a multitude of factors, many unrelated to the merits. Courts are not supposed to draw any inferences from them.

III. The district court further held that because UPPI's false claim and false statement allegations failed as a matter of law, its conspiracy allegations also failed. This, too, was error. A conspiracy requires an agreement to violate the FCA, coupled with an act in furtherance of that

agreement. The FAC alleges that the SDVOSB defendants agreed with Cardinal to win these contracts by fraud, and all the defendants carried out that plan in collaboration with each other. That is enough to state a claim for conspiracy if *any* of UPPI's other allegations state a cognizable claim for fraud.

STANDARD OF REVIEW

This Court "review[s] de novo a district court's order granting a Rule 12(b)(6) motion to dismiss," "[c]onstruing the complaint in the light most favorable to the plaintiffs, and drawing all reasonable inferences from the complaint in the plaintiffs' favor." *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 784, 787 (9th Cir. 2012) (citation omitted). To satisfy Federal Rule of Civil Procedure 8, a complaint need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

This Court takes a purposive approach to Rule 9(b)'s requirement that circumstances constituting fraud must be stated with particularity. Under this Court's cases, "Rule 9(b) serves two principal purposes": (1) providing defendants with "notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against

the charge and not just deny that they have done anything wrong"; and (2) protecting defendants from "false or unsubstantiated charges" "[b]y requiring some factual basis for the claims" of fraud. *United States ex rel. Swoben v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1180 (9th Cir. 2016) (quotation marks omitted). If a "complaint adequately pleads the circumstances of fraud to satisfy the dual purposes of Rule 9(b)," it is sufficient—regardless of the "particular means" the complaint employs *Id.* at 1183 n.11. Thus, Rule 9(b) "does not require absolute particularity or a recital of the evidence," and "a complaint need not allege a precise time frame, describe in detail a single specific transaction or identify the precise method used to carry out the fraud." *Id.* at 1180 (quotation marks omitted). Instead, the allegations should be evaluated on a case-by-case basis, measured against the purposes of the rule.

Finally, under these pleading rules, it is not necessary for UPPI "to provide a factual basis for every allegation," nor for each allegation "taken in isolation," to provide "all the necessary information." *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1173 (10th Cir. 2010). "Rather, to avoid dismissal under Rules 9(b) and 8(a),

plaintiffs need only show that, taken as a whole, a complaint entitles them to relief." *Id*.

ARGUMENT

This case involves claims under the false certification theory, the promissory fraud theory, and the FCA's conspiracy provision. "[U]nder either the false certification theory or the promissory fraud theory, 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." *Hendow*, 461 F.3d at 1174. "The essence of a conspiracy is an agreement between the defendant and one or more persons to commit . . . an act that violates the FCA." Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 4:8 (Westlaw Apr. 2021 update).

The district court dismissed UPPI's implied certification and promissory fraud claims on falsity and materiality grounds, and disposed of UPPI's conspiracy claim as an afterthought. These holdings are erroneous.

I. The FAC Plausibly Pleads Falsity with Particularity

As explained above, UPPI has alleged that defendants falsely represented that the SDVOSB defendants were capable of performing the contracts, that they planned to act as distributors under the contracts, and that they would comply with limitations on subcontracting including the nonmanufacturer rule. On the other hand, they omitted that the SDVOSB defendants intended to act only as billing intermediaries for Cardinal, which intended to do essentially all of the work and receive almost all of the benefit under the contracts. These allegations—taken as a whole—plausibly state claims for promissory fraud and implied false certification, and they do so with the requisite particularity.

A. The FAC Pleads False Claims During Market Research and Bid Solicitation With Ample Particularity

The FAC alleges that defendants engaged in a fraudulent course of conduct that operated from pre-solicitation market research all the way through performance of the contracts, with misrepresentations at every juncture. These false statements began with the representations that Caring Hands and Logmet made concerning their ability to perform the contracts to VA contracting officers during market research and in their bids. Although these statements are not reproduced verbatim in the FAC,

the FAC includes enough detail to satisfy the dual purposes of Rule 9(b), *i.e.*, providing notice of the allegations, and providing assurance that this is not a spurious suit. That is especially true when these allegations are combined with the contracts, which show in clear terms the culmination of the market research and bidding process.

First, Caring Hands and Logmet told the Government during market research phase that *they*—not Cardinal—could supply the required radiopharmaceutical products and meet all the requirements associated with doing so. 3-ER-349–51; *see supra* pp.17-18. The FAC buttressed these allegations with specific examples, explaining that Caring Hands falsely told the Government it could meet the requirements of the contract for products at the VA facility in Durham, and that Logmet falsely told the Government it had "had warehouses and other infrastructure in place that would allow it to deliver the specified products rapidly." 3-ER-356–57. At other times, defendants represented that they would be distributors, with no intention of doing so. 3-ER-348, 355. And during the performance phase, Logmet dishonestly responded to the Government's investigation of the Albuquerque contract by claiming it was handling "customer service, scheduling, billing, quality

assurance, quality control, and taking care of any other issues that may arise." 3-ER-358.

These allegations tell defendants what statements were made, the timeframe in which these false statements occurred, and how these statements impacted the ultimate contract awards. Thus, defendants have more than enough information to understand the nature of these allegations and defend against them. They can examine their statements made to the Government in connection with these specific contracts (which are identified by contract number), gather and review relevant documents, and respond accordingly. Nothing more is required.

Second, the FAC alleges that Cardinal worked behind the scenes to orchestrate the fraudulent submission of bids for each of the contracts, with Logmet and Caring Hands fronting the scheme by representing that they could perform all the contracts' requirements. 3-ER-354–56. These allegations specify the precise contracts, *see* 3-ER-344–47 & nn. 1-7, the precise documents (the bids for each of these contracts), 3-ER-354, and the relevant time period (the bidding phase for each contract), 3-ER-351. If defendants want to dispute these allegations, they can simply produce the bid submissions for these contracts. That is enough to satisfy Rule

9(b) under this Court's precedents. *See Swoben*, 848 F.3d at 1180 (explaining that "[b]road allegations that include no particularized supporting detail do not suffice," but "statements of the time, place and nature of the alleged fraudulent activities are sufficient" (internal quotation marks omitted)).

The only way the FAC could have been more precise is if UPPI were to allege the exact date each bid was submitted or the word-for-word contents of each bid. But Rule 9(b) does not require such granularity. To the contrary, the particularity standard "does not require absolute particularity or a recital of the evidence," and "a complaint need not allege a precise time frame, describe in detail a single specific transaction or identify the precise method used to carry out the fraud." *Id.* (internal quotation marks omitted).

The Seventh Circuit's recent decision in *United States ex rel. Prose v. Molina Healthcare of Illinois, Inc.*, 17 F.4th 732 (7th Cir. 2021), is instructive. There, the *qui tam* relator was a contractor for the defendant who discovered that the defendant had promised to provide certain services to the Government's beneficiaries, but was not providing those services and was billing the Government for them anyway. *Id.* at 738. His

complaint also asserted promissory fraud based on the Government's decision to renew its contract with the defendant. As an outsider to those negotiations, the relator did not have "any details about the contract-renewal negotiations between [the defendant] and [the Government]." *Id.* at 741. But the Seventh Circuit held that Rule 9(b) "does not require such granular detail." *Id.* Instead, it was enough for the relator to "allege[] circumstantial evidence of promissory fraud" by describing "the beneficiaries, the time period, the mechanism for the fraud, and the financial consequences." *Id.*

UPPI's complaint plainly does at least that much. It alleges that the SDVOSB defendants were incapable of performing the contracts on their own, and that they had no intention of even attempting to do so because they were acting as fronts for Cardinal. It also alleges that the VA will only set aside contracts and award them to SDVOSBs if SDVOSBs indicate that they can meet the contractual requirements. From the fact that the contracts were awarded to the SDVOSB defendants, it is a fair inference that the SDVOSB defendants falsely represented their ability and intention to comply with the contracts

during the market research and bidding phases. That is the same sort of circumstantial evidence the court found sufficient in *Prose*.

B. The False Promises in the Contracts Are Undeniably Adequately Pled

Further, the FAC adequately pleads that the false promises embodied in the contracts themselves constitute promissory fraud because defendants made those promises knowing that they would not keep them. The complaint identifies the contracts with particularity, listing the contract number, dates, and the city for which the contract was awarded, and further describes the contracts' material terms—including the scope-of-work requirements and the limitations on subcontracting that defendants knowingly violated. There is no doubt that these allegations were sufficiently particular to provide defendants with sufficient notice of the claims against them because defendants reproduced many of the contracts alongside their own motions to dismiss. Thus, many of defendants' allegedly false contractual promises are already in the record, in black and white, along with defendants' own signatures.

The allegation that the statements in the contracts were false is also plausible. The contracts include two relevant sets of promises—the

statement of work requiring the contractor to deliver radiopharmaceuticals according to specific conditions, and clauses such as the nonmanufacturer rule that preclude the contractor from using large businesses to do the work. The SDVOSB defendants abided by neither set of conditions. They did not deliver the radiopharmaceuticals themselves, and they passed on all the work to Cardinal in violation of the limitations on subcontracting.

The district court simply ignored these false statements, holding that "contractual requirements have no bearing on the truthfulness of Defendants' statements or representations." 1-ER-20. That is wrong as a matter of law.[4] The terms of a contract are themselves statements, and

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[4] The sole authority the district court cited, *United States ex rel. Berg v. Honeywell Int'l, Inc.*, 740 F. App'x 535 (9th Cir. 2018), is nonprecedential and inapposite. In that case, decided at the summary judgment stage, the defendant fully disclosed the assumptions behind certain calculations to the Government, but the relator argued that the defendant had used the wrong assumptions. *Id.* at 537–38. The court held that the defendant's statements were "not objectively false or fraudulent" because the defendant told the Government in its proposals that it planned to use incorrect and legally non-compliant assumptions. *Id.* at 537. This case is different. It comes to the Court at the pleading stage, and the FAC does not concede that defendants fully disclosed their intent not to comply with the contractual terms. Further, *Berg* was decided before this Court clarified in subsequent precedential decisions that a

by signing the contracts, defendants made those statements. If those statements were false when made, then they are actionable under the FCA. As this Court has explained, fraud is committed at the moment of contracting if, "when the promise was made, the defendant secretly intended not to perform or knew that he could not perform." *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 692 (9th Cir. 2011) (citing and quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir.1993)). As the Seventh Circuit similarly explained, "[s]imple breach of contract is not fraud, but making a promise while planning not to keep it *is* fraud," and where a "complaint alleges the promise, the intent not to keep that promise, and the details of non-conformity," "[w]hat else might be required" under Rule 9(b)? *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853–54 (7th Cir. 2009) (emphasis in original).

This Court's decision in *Hendow* is instructive. There, the defendant university agreed, in a contract with the Department of

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statement need not be "objectively false" to be actionable under the FCA. *See Winter ex rel. United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc.*, 953 F.3d 1108, 1113 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1380 (2021) ("Congress imposed no requirement of proving 'objective falsity,' and we have no authority to rewrite the statute to add such a requirement.").

Education, to comply with a regulation called the incentive compensation ban, knowing it would not comply. *See* 461 F.3d at 1169. The Court found this conduct to be actionable under the promissory fraud theory because the complaint alleged that the university was violating "a statutory requirement, the incentive compensation ban, to which it agreed in writing." *Id*. at 1174–75. The defendant argued "that the incentive compensation ban is nothing more than one of hundreds of boilerplate requirements with which it promises compliance." *Id*. at 1175. This Court recognized that "[t]his may be true," but held that "fraud is fraud, regardless of how 'small.'" *Id*. It determined that the incentive compensation ban was a material condition of participation in student loan programs, and allowed the case to proceed. *See id*. at 1175–77.

Defendants' false promises to comply with the nonmanufacturer rule are indistinguishable from the defendant's false promises to comply with the incentive compensation ban in *Hendow*. The motion to dismiss should be denied for the same reasons.

The parties debated whether limitations on subcontracting applied to some of the contracts that defendants put in the record, but defendants did not contest that Caring Hands' contracts for Durham, Birmingham,

and San Antonio had been set aside, and that those contracts expressly incorporate limitations on subcontracting that prohibit Caring Hands from subcontracting the work to Cardinal. Nor did defendants discuss the limitations on subcontracting in the remaining contracts that are not yet part of the record. The FAC's allegations that defendants agreed to these contracts with express limitations on subcontracting while knowing that they would not comply with those limitations is enough to establish falsity with respect to those agreements, and therefore compel reversal on this element.

Moreover, contrary to defendants' arguments, the remaining contracts in the record all contain limitations on subcontracting. Caring Hands' contract for Columbia, awarded in 2014, was set aside for SDVOSBs, 2-ER-60, and provides that "[a]ny service-disabled veteran-owned small business concern (nonmanufacturer) must meet the requirements in 19.102(f) of the Federal Acquisition Regulation to receive a benefit under this [set-aside] program," 2-ER-81 (subsection (f)); 2-ER-82 (subsection (e)). The named rule, 48 C.F.R. § 19.102(f) (2012), requires nonmanufacturers to source products only from small businesses unless they first receive a waiver from the SBA. Caring Hands promised

compliance with this condition, and that promise was false because Caring Hands did not intend to supply the products of a small business, nor obtain a waiver from the SBA.

A 2019 follow-on contract, called a "Bridge Contract," was similarly marked as set aside for SDVOSBs, 3-ER-288, and incorporated the nonmanufacturer rule, 3-ER-306 (referencing 48 C.F.R. § 19.102(f)). A cover note also stated that the Bridge Contract would "follow all terms and conditions" of the previous Columbia contract—which also was set aside and incorporated the nonmanufacturer rule, and further identified Caring Hands as a "distributor" of radiopharmaceuticals. 3-ER-287. Two allegations about this contract are therefore plausible. First, it plausibly includes limitations on subcontracting that Caring Hands knew it would not follow. Second, Caring Hands obtained the bridge contract by falsely representing that it would act as a "distributor."

The argument in the other direction is that the Bridge Contract expressly disclaims *different* limitations on subcontracting, names Cardinal as a supplier of the products for the Bridge Contract, and observes that "there are not any small business manufacturers or processors, currently in the market that can reasonably be expected to

offer a product meeting the specifications of the subject bridge contract." 3-ER-287, 295. At most, however, these contrary statements create some ambiguity about the meaning of the Bridge Contract; they do not establish that the contract's set-aside provision and restrictions are meaningless, and of course they cannot change the plain meaning of the 2014 contract.

The parties also discussed Caring Hands' contract for Miami. Two versions of the contract were issued; one in October 2014 and one a month later. Both versions, however, incorporated the clause "Notice of Total Small Business Set-Aside (NOV 2011)," the clause "Limitations on Subcontracting," and a clause to ensure "monitoring and compliance" of limitations on subcontracting. 2-ER-104, 110, 138, 145. The Notice of Total Small Business Set-Aside provided that "[a] small business concern submitting an offer in its own name shall furnish, in performing the contract, only end items manufactured or produced by small business concerns." 48 C.F.R. § 52.219-6(d) (2011). This regulation implements the same statutory nonmanufacturer rule as in SDVOSB set-asides. *See* 15 U.S.C. § 657s(a) (providing that the limitations on subcontracting apply to set-aside contracts under 15 U.S.C. § 644(a)). The only salient

difference between the two contracts is that the first also had a check-box on the front page marking it as "set aside" for small businesses, 2-ER-89, and the second was marked "unrestricted," 2-ER-122. Based on that distinction, defendants argued below that the limitations on subcontracting in the second contract did not work. But accepting that interpretation requires the Court to draw an implausible pro-defendant inference that the contract includes meaningless language—which the Court should not draw at the pleading stage. At a minimum, the inclusion of those restrictions plausibly supports the allegation that Caring Hands falsely represented its intent to abide by these restrictions in order to obtain the contracts in the first instance—which is all that the fraudulent inducement theory requires.

Logmet's Albuquerque contract was also expressly set aside for SDVOSBs. 3-ER-256. For some unknown reason, likely clerical error, check-boxes for limitations on subcontracting were not checked. As explained above, however, every SDVOSB set-aside contract *must* include those limitations as a matter of statute and regulation—and Logmet could not meet them. Moreover, the VA acted as if the limitations on subcontracting applied. During a back-and-forth about Logmet's role

in the contract, "[t]he contracting officer informed Logmet that it had been awarded the contract on the belief that Logmet would be performing 50% of the work. Logmet's contract was terminated shortly after its limited role was revealed." 3-ER-358.

Logmet's Denver contract presents a different issue. That contract was also set aside for SDVOSBs, but Logmet obtained a waiver from the SBA that allowed it to source products from large businesses. For this contract, UPPI alleges different false statements. The waiver describes Logmet as "a small business distributor of radiopharmaceuticals." 3-ER-319. But Logmet did not act as a "distributor" in any recognizable sense of that word. 3-ER-348. It did not, for example, take possession of radiopharmaceuticals and deliver them to the VA. Based on the language used in the waiver, it is highly likely, and at least plausible, that Logmet lied to the VA about what its role would be, representing that it would act as a "distributor" instead of merely as a billing intermediary for Cardinal. 3-ER-348, 366 n.9. UPPI alleges that had Logmet disclosed its actual intended role, a waiver would not have been granted.

Thus, even without anything further, the false promises in the contracts are enough to reverse the decision below. Particularity is not

an issue because the evidence is in the record, and every contract other than Logmet's Denver contract at least plausibly prohibits the SDVOSB defendants from outsourcing their work to Cardinal.

C. Defendants' Invoices Were False Under Both the Promissory Fraud and Implied False Certification Theories

Finally, the FAC alleges additional false statements in the form of invoices that were doubly dishonest because they were tainted by the promissory fraud and also falsely implied that Caring Hands and Logmet were performing the work under the contracts in compliance with all contractual requirements. 3-ER-357–59.

The district court categorized these allegations as "conclusory and unspecific" without further discussion. 1-ER-19 & n2. This is incorrect for at least two reasons. First, this Court has explained that under the "promissory fraud" theory, "liability will attach to each claim submitted to the government under a contract, when the contract or extension of the government benefit was originally obtained through false statements or fraudulent conduct." *Campie*, 862 F.3d at 902 (internal quotation marks omitted). "In other words, subsequent claims are false because of an original fraud (whether a certification or otherwise)." *Id.* (internal

quotation marks omitted). That is precisely the case here: The FAC alleges that all the invoices under the contracts "were tainted by the antecedent fraud" discussed above, which "resulted in the contracts being awarded" to Caring Hands and Logmet. 3-ER-359. In this context, where *all of the claims* are tainted by the antecedent fraud, the specifics that matter are the antecedent false statements; the details of the invoices are unnecessary.

Second, when "a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements," FCA liability attaches if those omissions "render the defendant's representations misleading with respect to the goods or services provided." *Escobar*, 579 U.S. at 187. The invoices submitted by Caring Hands and Logmet are precisely these types of false claims. By sending these invoices in their names, Caring Hands and Logmet falsely represented that *they* were the contractors performing the work. 3-ER-359. These were thus "specific representations" about the source of the "goods or services provided," and Caring Hands and Logmet's noncompliance with the contracts' subcontracting limitations or the requirement that the work be performed by SDVOSBs or small

businesses made these representations "misleading half-truths." *Escobar*, 579 U.S. at 190.

Moreover, these allegations clearly put defendants on notice of the specific documents containing the false statements and enabled them to prepare a defense. If defendants contest that the invoices falsely certified compliance with the contracts and the regulations applicable to those contracts, they can put those invoices into the record to counter the allegations. And if they dispute that they falsely represented to the Government that they were doing more work under the contracts than they were really doing, they can simply put those conversations—such as the statements Logmet made to the Government in response to the investigation into the Albuquerque contract—before the trial court.

The only facts more specific would be the specific words used or the specific dates the invoices were sent, but, like defendants' false bids, this information is in defendants' sole possession and is unobtainable at the pleading stage. *See* 3-ER-359 (explaining that "[t]he invoices themselves are in the exclusive possession of the billing Defendants"); *United States ex rel. Vatan v. QTC Med. Servs., Inc.*, 721 F. App'x 662, 663 (9th Cir. 2018) (where "the relevant information is within the defendant's

exclusive possession and control," pleading the contents of a document pursuant to information and belief and adducing the factual basis for that belief is "sufficient to satisfy Rule 9(b)'s particularity requirement").[5] In any event, nothing in the FCA or Rule 9(b) requires allegations to reach such a level of hyper-particularity or for a relator to somehow gain access to these materials prior to discovery. *See, e.g.*, *Lusby*, 570 F.3d at 854 (observing that requiring a relator to plead the exact contents of a false invoice would "take[] a big bite out of *qui tam* litigation" because a relator would not have access to those invoices "unless he works in the defendant's accounting department").

D. The Complaint Does Not Concede That Defendants Disclosed Cardinal's Involvement to the Government

As an additional ground for finding that the FAC did not sufficiently plead falsity, the district court stated that defendants' theory

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[5] *See also Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989) (affirming that Rule 9(b)'s particularity requirements "may be relaxed as to matters within the opposing party's knowledge"); *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995) ("Rule 9(b) ... requires that plaintiffs specifically plead those facts surrounding alleged acts of fraud to which they can reasonably be expected to have access"); *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558–59 (9th Cir. 2010) (requiring particularity only where "it is not unreasonable to expect ... personal knowledge of the relevant facts").

that the Government knew about and acceded to Cardinal's involvement in the contracts was an "obvious alternative explanation" that "renders Relator's theory of liability implausible." 1-ER-21–22. To reach this conclusion, the district court overlooked or misinterpreted the allegations in the FAC, misunderstood the contracts' requirements, and drew all inferences in *defendants'* favor. This was improper: At the pleading stage, the court must "accept *all* facts alleged as true and draw *all* inferences in [UPPI]'s favor." *Winter*, 953 F.3d at 1119 (emphasis added).

The only allegation in the FAC concerning the Government's possible knowledge of Cardinal's involvement is that Caring Hands and Logmet "sometimes mentioned Cardinal in their bids"—for example, they "may have included Cardinal's NRC license, or identified Cardinal as a supplier." 3-ER-355. When considered in the context of all the other allegations and the contracts themselves, this acknowledgment cannot bear the weight the district court placed on it.

First, in the *very same paragraph the district court cited*, the FAC explains that "even in these cases"—*i.e.*, the cases in which the SDVOSB defendants "mentioned Cardinal"—"the SDVOSB Defendants were not honest to the Government because they never disclosed the extremely

limited role they intended to play." *Id.* The paragraph goes on to explain that the SDVOSB defendants represented "that they would be acting as authorized distributors, or something similar, implying that they would be taking possession of and delivering radiopharmaceutical products to the Government," and thus "obscured the true nature of their role." *Id.* It strains credulity that the district court could read the first half of this paragraph as a dispositive concession, while ignoring the second half altogether. Read fairly, the paragraph is not a concession that the SDVOSB defendants were truthful; it is an allegation that the SDVOSBs used "half-truths," which the Supreme Court has held are "actionable misrepresentations" under the FCA. *Escobar*, 579 U.S. at 188.

Second, the remaining allegations in the FAC make it clear that UPPI has not conceded that the SDVOSB defendants disclosed that Cardinal would be doing the lion's share of the work under the contracts. The FAC alleges that the contracts mandated at least nine specialized requirements relating to the compounding, transportation, handling, quality control, and disposal of these highly regulated, radioactive products. 3-ER-349–51. The FAC also alleges that the contracts restricted Caring Hands and Logmet from outsourcing this work to a

large business without first obtaining a waiver from the SBA. 3-ER-351. Moreover, the plain language of the contracts in the record is replete with references to a diverse range of work the "*Contractor*" was required to perform and qualifications the "*Contractor*" was required to hold.[6] These references are not just standardized language; they collectively demonstrate that the Government expected the contractor to play the primary role in performing the required work and to back the work with *its own* qualifications, not those of a subcontractor.

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[6] *See, e.g.*, 2-ER-63 ("The Contractor shall provide Radiopharmaceuticals for Nuclear Medicine Imaging."); *id.* ("The Contractor shall have the delivery capabilities to provide doses when needed. … The Contractor shall deliver the radiopharmaceuticals provided in the Schedule/Price Sheet to the Nuclear Medicine Department no more than one hour after the order has been placed."); 2-ER-70 ("Contractor is required to obtain the Contracting Officer's approval prior to engaging in any contractual relationship (sub-contractor) in support of this contract requiring the disclosure of information, documentary material and/or records generated under, or relating to, this contract."); 2-ER-131 ("The Contractor shall be responsible for employing technically qualified personnel to perform the work specified in this PWS. The Contractor shall maintain the personnel, organization and administrative control necessary to ensure that the work delivered meets the contract specifications and requirements."); 2-ER-132 ("The Contractor shall maintain the personnel, organization, and administrative control necessary to ensure that the work delivered meets the contract specifications and requirements.").

Drawing inferences in UPPI's favor, these stray mentions of Cardinal in the bidding process indicated at most that Cardinal might play *some* role that was not prohibited by the contracts—for example by supplying some precursor ingredient or providing consulting advice to help Caring Hands and Logmet set up the proper storage and handling procedures. *See, e.g.*, 3-ER-352 (Caring Hands claimed on its System for Award Management page to have eight "plants" in three different states).

But the district court did not draw inferences in UPPI's favor. Instead, the district court concluded that the disclosure of Cardinal's license and other limited references to Cardinal during the bidding process somehow gave the Government actual knowledge that Caring Hands and Logmet were wholly unqualified to perform the contracts, that Cardinal would do *all* the work under the contracts, that Caring Hands and Logmet would serve as mere pass-throughs for Cardinal so that Cardinal could perform these set-aside contracts—*and* further concluded that the Government nevertheless chose to award these contracts without any further questioning (which it had no legal authority to do). 1-ER-22.

This Olympian inferential leap in defendants' favor was unreasonable—but even if it were reasonable, the district court was *required* to reject it in favor of UPPI's alternative explanation that these references to Cardinal were not enough to disclose "the extremely limited role" that Caring Hands and Logmet intended to play." 3-ER-355. As this Court explained in *Starr v. Baca*, "[i]f there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." 652 F.3d 1202, 1216 (9th Cir. 2011).

II. Defendants' False Statements and Fraudulent Course of Conduct Were Material to the Government's Set-Aside, Contracting, and Payment Decisions

A. The Complaint Adequately Pleads Materiality Under Controlling Law

Materiality is an element of both promissory fraud and implied certification claims. The FCA defines "material" as "having 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). In *Escobar*, the Supreme Court stressed that this definition was also employed in "other federal fraud statutes," and "descends from common-law antecedents." 579 U.S.

at 192–93 (quotation marks omitted). Under this definition, materiality focuses on "the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Id.* at 193 (quotation marks omitted).

Under both the FCA's definition and the common law, materiality "focuses on the potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered"—often many years later. *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 916–17 (4th Cir. 2003). In fraudulent inducement cases, materiality can be shown *either* by showing a potential effect on the Government's contracting decisions, or on its payment decisions. *See United States v. Strock*, 982 F.3d 51, 62 (2d Cir. 2020). The Government's actions once it learns the truth may also have probative value, but the inquiry should nevertheless focus on how the Government would have responded at the time of the relevant transaction.

To assess the likely effect of the defendant's fraud on the Government's decision-making, courts undertake a holistic inquiry: A variety of factors are relevant, and no factor is automatically dispositive. *See Escobar*, 579 U.S. at 191 (citing *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39 (2011)). Some considerations include

whether the government has identified the requirement as a condition of payment, whether the violation goes to the "essence of the bargain," and whether the violation is "minor or insubstantial." *Id.* at 194 & n.5 (internal quotation marks omitted).

Another factor is how the Government has reacted to the violation or to similar violations. This includes "evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." *Escobar*, 579 U.S. at 195. "Conversely, 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.* (emphasis added).

Because materiality is holistic, it is likely to be a determination for a jury. *See, e.g.*, *United States v. Gaudin*, 515 U.S. 506, 512 (1995). After *Escobar*, several circuits—including this one—have recognized that materiality typically should not be resolved as a matter of law when factors point in different directions. *See United States ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012, 1020 n.5 (9th Cir. 2018); *United States ex*

rel. Lemon v. Nurses To Go, Inc., 924 F.3d 155, 162 (5th Cir. 2019); *United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc.*, 892 F.3d 822, 831–37 (6th Cir. 2018); *Campie*, 862 F.3d at 905–07; *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 110–12 (1st Cir. 2016). The United States has likewise argued that "[b]ecause none of the various factors *Escobar* identified is automatically dispositive, materiality cannot be decided at the pleadings stage unless, construing the complaint in the light most favorable to the relator, she has failed to plausibly allege that the violation had a natural tendency to influence or was capable of influencing the government's payment decision." Brief for the United States as Amicus Curiae at 12, *Prather*, 892 F.3d 822 (6th Cir. 2018) (quotation marks omitted).

Here, the FAC's allegations and the contracts themselves plausibly support the allegation that defendants' misrepresentations were material to the Government's decisions to award contracts to the SDVOSB defendants, and to pay them.

First, the FAC alleges that Caring Hands and Logmet's misrepresentations during market research and bidding actually caused the Government to set aside the contracts and then award them to the

SDVOSB defendants, s*ee* 3-ER-362–63, 371–73. A showing of actual causation establishes materiality *a fortiori*, because materiality is essentially potential causation.

Second, the FAC includes four examples in which SDVOSBs were denied contracts after it came to light that those businesses were not capable of performing the contracts. 3-ER-363–69. This allegation shows that when the Government truly knows that SDVOSBs are incapable of performing, it does not award contracts to them. And importantly, one of the four cases was about Logmet's Albuquerque contract. After the Government learned that Logmet was essentially playing no role in the delivery of the radiopharmaceuticals, it stopped contracting with Logmet in Albuquerque. That example shows how material defendants' misrepresentations were.

Third, defendants' representations that they could and would perform the contracts themselves, and that they would comply with the nonmanufacturer rule, were material because the Government naturally would not have willfully subverted its own set-aside program by authorizing a rent-a-vet scheme under which it would pay an artificially inflated price just to deliver a windfall to the scheme's pass-through

entities. 3-ER-363. Indeed, no reasonable person would want to pay money to an entity that was not adding any value to the performance of a contract.

In another FCA case based on violations of SDVOSB contracting requirements, the Government alleged "that performance [of the contract] by an SDVOSB is at the very heart of the SDVOSB statutory and regulatory regime." *Strock*, 982 F.3d at 65. When non-SDVOSBs perform the work, they "divert[] contracts and benefits . . . intended for service-disabled veterans towards an ineligible company," and "deprive[] the government of the intended benefits of a SDVOSB receiving and performing federal contracts." *Id.* (quotation marks omitted). The court found that this factor "weighs strongly in favor of materiality." *Id.*

In a similar vein, many of the contracts expressly required the contractor to "meet the requirements in [the nonmanufacturer rule] to receive a benefit under this [set-aside] program." *E.g.*, 2-ER-82. These requirements make compliance with the nonmanufacturer rule an express condition of payment for most of the contracts at issue, which is relevant to the materiality inquiry. *Escobar*, 579 U.S. at 190; *see also*

Strock, 982 F.3d at 62 (finding this factor weighed in favor materiality in SDVOSB case).

The Government recently reaffirmed its long-held commitment to preserving the integrity of set-aside programs—and how seriously it takes the misconduct alleged in this case—by enacting the Protecting Business Opportunities for Veterans Act, Pub. L. No. 116-183, 134 Stat. 895 (2020). The statute provides that the limitations on subcontracting in 15 U.S.C. § 657s apply to all contracts awarded to SDVOSBs and veteran owned small businesses under the VA's set-aside program, and requires contractors to certify, under penalty of perjury, that they will comply with the limitations. *See* 38 U.S.C. § 8127(k)(1), (2). It also enhances enforcement authority, procedures, and penalties. *Id.* § 8127(k)(3). Legislators who spoke in favor of the statute explained that it was designed to stop "improper passthroughs," which "occur when a small business obtains a contract under set-aside award conditions, but gives all, or substantially all, of the work to a large company while collecting profit for doing absolutely nothing." 166 Cong. Rec. H1180-01, H1181 (Feb. 25, 2020) (Rep. Bergman). The legislators emphasized that "[t]his practice has long been prohibited by law and wastes taxpayer

dollars, but, unfortunately, in reality, agencies up until this point have had little ability to stop it." *Id.*; *see also id.* (Rep. Roe) (explaining that the statute was necessary because "there have long been some fly-by-night small businesses that obtain set-aside contracts only to pass on all of the work to large businesses while collecting the profits. This is illegal, but the law is difficult to enforce").

In sum, the FAC plausibly alleges that the Government actually regards the misrepresentations in this case as important to its contracting and payment decisions, and that a reasonable person would do so as well. Accordingly, the complaint pleads materiality.

B. The District Court's Materiality Analysis Was Erroneous

The district court effectively ignored the foregoing and found the violations in this case immaterial as a matter of law based the Supreme Court's statement 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." *Escobar*, 579 U.S. at 195. The district court believed that this statement was triggered for two reasons: (1) FAC paragraph 95 acknowledges that Caring Hands and Logmet may have sometimes

mentioned Cardinal in their bids—which the district court read as an admission that the Government awarded the contracts and paid the claims with knowledge of Cardinal's actual role; and (2) the Government declined to intervene in this action and continued to pay claims under the contracts. Neither contention is persuasive.

First, even if this Court takes the district court's observations at face value, they do not justify dismissal at the pleading stage. As explained above, when different materiality factors cut in different directions, no one factor can justify judgment as a matter of law.

Second, the district court read far too much into Paragraph 95. That paragraph acknowledges only that the SDVOSB defendants "sometimes mentioned Cardinal"—but it also alleges that "even in these cases, the SDVOSB Defendants were not honest to the Government because they never disclosed the extremely limited role they intended to play," and in fact misled the Government by stating "that they would be acting as authorized distributors, or something similar," thereby "obscur[ing] the true nature of their role." 3-ER-355. To leap from that statement to the conclusion that the Government had "actual knowledge of violations" and willingly paid the claims is a bridge too far at the pleading stage—

especially when other paragraphs of the complaint make it clear that "the Government's contracting officers were deceived by Defendants," 3-ER-378, and that the Government's contracting officers took defendants "at their word" when they claimed they would perform the contracts, 3-ER-356. Indeed, the most probative fact on this point is that after the Government learned of Logmet's actual role in the Albuquerque contract, it stopped contracting with Logmet to provide radiopharmaceuticals in Albuquerque. 3-ER-358. This strongly suggests that the Government did not have actual knowledge vis-à-vis the other contracts, and it proves that the Government does not knowingly pay claims with such knowledge.

This Court has repeatedly made clear that it is inappropriate to rely on continued payments as evidence of immateriality when the extent of the Government's knowledge is disputed. *See, e.g.*, *Rose*, 909 F.3d at 1021 (materiality could not be resolved as a matter of law based on the Government's continued payment of claims when the record did not indisputably establish that, "during the relevant time period, the Department had actual knowledge" of the defendant's noncompliance). In *Campie*, for example, this Court held that dismissal was inappropriate

when the parties disputed "exactly what the government knew and when, calling into question its actual knowledge." 862 F.3d at 906–07 (quotation marks omitted). Instead, this defense raised "matters of proof, not legal grounds to dismiss relators' complaint." *Id.* at 907. Other circuits agree. *See, e.g.*, *Prather*, 892 F.3d at 834 (district court improperly drew negative materiality inference at the pleading from lack of past government action where the Government's knowledge of past violations was disputed).

For similar reasons, the Court should reject the district court's holding that "the ongoing payment of claims by the VA after the Government declined to intervene in this case further supports a finding that Defendants' alleged wrongdoing was immaterial to the Government's performance of the contracts." 1-ER-23. Even if this observation were correct (it is not), it is improper to make any such factual "finding" at the pleading stage when the FAC's allegations concerning materiality point in the other direction. *See Rose*, 909 F.3d at 1020; *Campie*, 862 F.3d at 906–07; *Lemon*, 924 F.3d at 162; *Prather*, 892 F.3d at 834.

It is also wrong to conclude that the Government's payment of claims after the filing of the FAC indicates that Defendant's misrepresentations were immaterial. The statements in the complaint are only allegations, and as the First Circuit explained in the *Escobar* remand, "mere awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance." *Escobar*, 842 F.3d at 112.

Other courts agree that continued payment despite knowledge of allegations does not defeat materiality. Instead, "continued payment is only 'strong evidence' of immateriality if [the Government] actually knew that false claims were being submitted" because "[t]here are simply too many possible explanations for an agency's action or inaction" to read this conduct as a "decision on the merits of an allegation of fraud." *United States ex rel. Montcrieff v. Peripheral Vascular Assocs., P.A.*, 507 F. Supp. 3d 734, 766 (W.D. Tex. 2020). This argument is especially strong here because the Government is unlikely to stop paying for important drugs merely because it becomes aware of certain allegations. Because "[h]ealthcare administration is complicated," *id.* at 767, "[t]he Government does not enjoy the luxury of refusing to reimburse health

care claims the moment it suspects there may be wrongdoing," *United States v. Berkeley HeartLab, Inc.*, No. 14-cv-230, 2017 WL 4803911, at *7 (D.S.C. Oct. 23, 2017).

Similarly, the Government's non-intervention decisions are not a comment on the merits of an FCA case. Multiple courts have held that it is improper to draw inferences about materiality, or indeed any element, from the Government's declination. *See, e.g.*, *Prather*, 892 F.3d at 836; *United States ex rel. United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006); *United States v. Aerojet Rocketdyne Holdings, Inc.*, 381 F. Supp. 3d 1240, 1248 (E.D. Cal. 2019). Indeed, some courts have precluded defendants from even mentioning non-intervention to a jury, deeming this fact irrelevant. *See, e.g.*, *United States ex rel. Ubl v. IIF Data Sols.*, 650 F.3d 445, 457 (4th Cir. 2011); *United States ex rel. Kiro v. Jiaherb, Inc.*, 2019 WL 2869186, at *2 (C.D. Cal. July 3, 2019); *United States ex rel. Emanuele v. Medicor Assocs.*, 2017 WL 4867614, at *1 n.1 (W.D. Pa. Oct. 26, 2017); *Graves v. Plaza Med. Centers, Corp.*, 2017 WL 3895438, at *2 (S.D. Fla. Sept. 6, 2017); *United States ex rel. Feldman v. van Gorp*, 2010 WL 2911606, at *2 (S.D.N.Y. July 8, 2010); *Landau v. Lucasti*, 2010 WL 502972, at *6 (D.N.J. Feb. 8,

2010). The district court's decision to place heavy weight on it at the pleading stage was erroneous—and certainly not enough to overcome UPPI's countervailing allegations, let alone the fact that the Government itself filed a statement of interest urging the district court to deny defendants' motions to dismiss.

III. The District Court Improperly Dismissed UPPI's Conspiracy Claim

The district court dismissed UPPI's civil conspiracy claim on the ground that no "viable underlying presentment or false statement claim" existed. 1-ER-24. But because the court's dismissal of the presentment and false-statement claims was in error, so too was its dismissal of the conspiracy claim.

To state a claim for civil conspiracy under Section 3729(a)(1)(C) of the False Claims Act, a relator must plausibly allege (1) the existence of an unlawful agreement between defendants to get a false or fraudulent claim allowed or paid by the Government and (2) at least one act performed in furtherance of that agreement. *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 343 (5th Cir. 2008).

The FAC alleges that Cardinal, Caring Hands, and Logmet formed and collectively orchestrated an unlawful rent-a-vet scheme, under which

the SDVOSB defendants misrepresented their and Cardinal's respective roles in supplying the radiopharmaceuticals required under the contracts and submitted false invoices that stated or implied that they, not Cardinal, were performing the core work under the contracts. *E.g.*, 3-ER-325–26, 341–42, 359–60, 361–62, 375–76. Further, the FAC alleges that each Defendant engaged in a bevy of affirmative acts to further the fraudulent scheme, including making false statements during the market-research phase, jointly preparing and submitting false bids, making false promises at the moment of contracting, and making false statements during performance of the contracts. *E.g.*, 3-ER-344–60.

These facts plead a plausible FCA conspiracy claim.

CONCLUSION

For the foregoing reasons, the district court's dismissal of the FAC should be reversed.

Respectfully submitted,

s/ Tejinder Singh

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel is unaware of any related cases currently pending in this Court.

Dated: January 28, 2022

/s/ Tejinder Singh

ADDENDUM

ADDENDUM TABLE OF CONTENTS

31 U.S.C. § 3729, False Claims

(a) Liability for Certain Acts.—

(1) In general.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note;

Public Law 104–410), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.—

A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption From Disclosure.—

Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion.—

This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

15 U.S.C. § 644. Awards or contracts

* * *

(g) Goals for participation of small business concerns in procurement contracts

(1) Governmentwide goals

(A) Establishment

The President shall annually establish Governmentwide goals for procurement contracts awarded to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women in accordance with the following:

(i) The Governmentwide goal for participation by small business concerns shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year. In meeting this goal, the Government shall ensure the participation of small business concerns from a wide variety of industries and from a broad spectrum of small business concerns within each industry.

(ii) The Governmentwide goal for participation by small business concerns owned and controlled by service-disabled veterans shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(iii) The Governmentwide goal for participation by qualified HUBZone small business concerns shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(iv) The Governmentwide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(v) The Governmentwide goal for participation by small business concerns owned and controlled by women shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(B) Achievement of Governmentwide goals

Each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts let by such agency. The Small Business Administration and the Administrator for Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Governmentwide prime contract goal established by the President pursuant to this paragraph.

(2)

(A) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, by small business concerns owned and controlled by service-disabled veterans, by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically

disadvantaged individuals, and by small business concerns owned and controlled by women in procurement contracts of such agency. Such goals shall separately address prime contract awards and subcontract awards for each category of small business covered.

(B) Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to perform such contracts and to perform subcontracts under such contracts. Contracts excluded from review by procurement center representatives pursuant to subsection (l)(9)(B) shall not be considered when establishing these goals.

(C) Whenever the Administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator for Federal Procurement Policy for final determination.

(D) After establishing goals under this paragraph for a fiscal year, the head of each Federal agency shall develop a plan for achieving such goals at both the prime contract and the subcontract level, which shall apportion responsibilities among the agency's acquisition executives and officials. In establishing goals under this paragraph, the head of each Federal agency shall make a consistent effort to annually expand participation by small business concerns from each industry category in procurement contracts and subcontracts of such agency, including participation by small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically

disadvantaged individuals, and small business concerns owned and controlled by women.

(E) The head of each Federal agency, in attempting to attain expanded participation under subparagraph (D), shall consider--

(i) contracts awarded as the result of unrestricted competition; and

(ii) contracts awarded after competition restricted to eligible small business concerns under this section and under the program established under section 637(a) of this title.

(F)

(i) Each procurement employee or program manager described in clause (ii) shall communicate to the subordinates of the procurement employee or program manager the importance of achieving goals established under subparagraph (A).

(ii) A procurement employee or program manager described in this clause is a senior procurement executive, senior program manager, or Director of Small and Disadvantaged Business Utilization of a Federal agency having contracting authority.

(3) First tier subcontracts that are awarded by Management and Operating contractors sponsored by the Department of Energy to small business concerns, small businesses[1] concerns owned and controlled by service disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, shall be considered toward the annually established agency and Government-wide goals for procurement contracts awarded.

15 U.S.C. 657f. Procurement program for small business concerns owned and controlled by service-disabled veterans

(a) Contracting officer defined

For purposes of this section, the term "contracting officer" has the meaning given such term in section 2101 of Title 41.

(b) Certification of small business concerns owned and controlled by service-disabled veterans

With respect to a procurement program or preference established under this chapter that applies to prime contractors, the Administrator shall--

(1) certify the status of a concern as a small business concern owned and controlled by service-disabled veterans; and

(2) require the periodic recertification of such status.

(c) Sole source contracts

In accordance with this section, a contracting officer may award a sole source contract to any small business concern owned and controlled by service-disabled veterans if--

(1) such concern is determined to be a responsible contractor with respect to performance of such contract opportunity and the contracting officer does not have a reasonable expectation that 2 or more small business concerns owned and controlled by service-disabled veterans will submit offers for the contracting opportunity;

(2) the anticipated award price of the contract (including options) will not exceed--

(A) $7,000,000, in the case of a contract opportunity assigned a standard industrial classification code for manufacturing; or

(B) $3,000,000, in the case of any other contract opportunity; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price.

(d) Restricted competition

In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans certified under subsection (b) if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price.

(e) Relationship to other contracting preferences

A procurement may not be made from a source on the basis of a preference provided under subsection (a) or (b) if the procurement would otherwise be made from a different source under section 4124 or 4125 of Title 18 or chapter 85 of Title 41.

(g) Certification requirement

Notwithstanding subsection (c), a contracting officer may only award a sole source contract to a small business concern owned and controlled by service-disabled veterans or a contract on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if such a concern is certified by the Administrator as a small business concern owned and controlled by service-disabled veterans.

(h) Enforcement; penalties

(1) Verification of eligibility

In carrying out this section, the Administrator shall establish procedures relating to--

(A) the filing, investigation, and disposition by the Administration of any challenge to the eligibility of a small business concern to receive assistance under this section (including a challenge, filed by an interested party, relating to the veracity of a certification made or information provided to the Administration by a small business concern under subsection (b)); and

(B) verification by the Administrator of the accuracy of any certification made or information provided to the Administration by a small business concern under subsection (b).

(2) Examinations

The procedures established under paragraph (1) shall provide for a program of examinations by the Administrator of any small business concern making a certification or providing information to the Administrator under subsection (b), to determine the veracity of any statements or information provided as part of such certification or otherwise provided under subsection (b).

(3) Enforcement; penalties

Rules similar to the rules of paragraphs (5) and (6) of section 637(m) of this title shall apply for purposes of this section and section 657f-1 of this title.

(i) Provision of data

Upon the request of the Administrator, the head of any Federal department or agency shall promptly provide to the Administrator such information as the Administrator determines to be necessary to carry out subsection (b) or to be able to certify the status of the concern as a small business concern owned and controlled by veterans under section 657f-1 of this title.

15 U.S.C. § 657s. Limitations on subcontracting

(a) In general

If awarded a contract under section 637(a), 637(m), 644(a), 657a, or 657f of this title, a covered small business concern--

(1) in the case of a contract for services, may not expend on subcontractors more than 50 percent of the amount paid to the concern under the contract;

(2) in the case of a contract for supplies (other than from a regular dealer in such supplies), may not expend on subcontractors more than 50 percent of the amount, less the cost of materials, paid to the concern under the contract;

(3) in the case of a contract described in paragraphs (1) and (2)--

(A) shall determine for which category, services (as described in paragraph (1)) or supplies (as described in paragraph (2)), the greatest percentage of the contract is awarded;

(B) shall determine the amount awarded under the contract for that category of services or supplies; and

(C) may not expend on subcontractors, with respect to the amount determined under subparagraph (B), more than 50 percent of that amount; and

(4) in the case of a contract which is principally for supplies from a regular dealer in such supplies, and which is not a contract principally for services or construction, shall supply the product of a domestic small business manufacturer or processor, unless a waiver of such requirement is granted--

(A) by the Administrator, after reviewing a determination by the applicable contracting officer that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications (including period for performance) required by the contract; or

(B) by the Administrator for a product (or class of products), after determining that no small business manufacturer or processor is available to participate in the Federal procurement market.

(b) Similarly situated entities

Contract amounts expended by a covered small business concern on a subcontractor that is a similarly situated entity shall not be considered subcontracted for purposes of determining whether the covered small business concern has violated a requirement established under subsection (a) or (d).

(c) Modifications of percentages

The Administrator may change, by rule (after providing notice and an opportunity for public comment), a percentage specified in paragraphs (1) through (4) of subsection (a) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for businesses in that industry category.

(d) Other contracts

(1) In general

With respect to a category of contracts to which a requirement under subsection (a) does not apply, the Administrator is authorized to establish, by rule (after providing notice and an opportunity for public comment), a requirement that a covered small business concern may not expend on subcontractors more than a specified percentage of the amount paid to the concern under a contract in that category.

(2) Uniformity

A requirement established under paragraph (1) shall apply to all covered small business concerns.

(3) Construction projects

The Administrator shall establish, through public rulemaking, requirements similar to those specified in paragraph (1) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such paragraph. The percentage applicable to any such requirement shall be determined in accordance with paragraph (1).

(e) Definitions

In this section, the following definitions apply:

(1) Covered small business concern

The term "covered small business concern" means a business concern that--

(A) with respect to a contract awarded under section 637(a) of this title, is a small business concern eligible to receive contracts under that section;

(B) with respect to a contract awarded under section 637(m) of this title--

(i) is a small business concern owned and controlled by women (as defined in that section); or

(ii) is a small business concern owned and controlled by women (as defined in that section) that is not less than 51 percent owned by 1 or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law);

(C) with respect to a contract awarded under section 644(a) of this title, is a small business concern;

(D) with respect to a contract awarded under section 657a of this title, is a qualified HUBZone small business concern; or

(E) with respect to a contract awarded under section 657f of this title, is a small business concern owned and controlled by service-disabled veterans.

(2) Similarly situated entity

The term "similarly situated entity" means a subcontractor that--

(A) if a subcontractor for a small business concern, is a small business concern;

(B) if a subcontractor for a small business concern eligible to receive contracts under section 637(a) of this title, is such a concern;

(C) if a subcontractor for a small business concern owned and controlled by women (as defined in section 637(m) of this title), is such a concern;

(D) if a subcontractor for a small business concern owned and controlled by women (as defined in section 637(m) of this title) that is not less than 51 percent owned by 1 or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law), is such a concern;

(E) if a subcontractor for a qualified HUBZone small business concern, is such a concern; or

(F) if a subcontractor for a small business concern owned and controlled by service-disabled veterans, is such a concern.

38 U.S.C. § 8127. Small business concerns owned and controlled by veterans: contracting goals and preferences

(a) Contracting goals.—

(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall--

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) Use of noncompetitive procedures for certain small contracts.--Except as provided in subsection (d)(2), for purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans or a small business concern owned and controlled by veterans with service-connected disabilities for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

(c) Sole source contracts for contracts above simplified acquisition threshold.--Except as provided in subsection (d)(2), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans or a small business concern owned and controlled by veterans with service-connected disabilities using procedures other than competitive procedures if--

> (1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;
>
> (2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed $5,000,000; and
>
> (3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

(d) Use of restricted competition.--(1) Except as provided in paragraph (2) and in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans or small business concerns owned and controlled by

veterans with service-connected disabilities if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans or small business concerns owned and controlled by veterans with service-connected disabilities will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

(2)

(A) Notwithstanding paragraph (1) and except as provided by subparagraph (B) of this paragraph, with respect to the procurement of a covered product or service, a contracting officer of the Department shall procure such product or service from a source designated under chapter 85 of title 41, and in accordance with the regulations prescribed under such chapter.

(B)

(i) Subject to clause (ii), subparagraph (A) shall not apply in the case of a covered product or service for which a contract was--

(I) awarded under paragraph (1) after December 22, 2006; and

(II) in effect on the day before the date of the enactment of the Department of Veterans Affairs Contracting Preference Consistency Act of 2020.

(ii) Clause (i) shall cease to apply to a covered product or service described in such clause upon a determination of the Secretary that when the current contract for the covered product or service is terminated or expires there is no reasonable expectation that--

(I) two or more small business concerns owned and controlled by veterans will submit offers as described in paragraph (1); and

(II) the award can be made at a fair and reasonable price that offers best value to the United States.

(C) In this paragraph, the term "covered product or service" means--

(i) a product or service that--

(I) is included on the procurement list under section 8503(a) of title 41; and

(II) was included on such procurement list on or before December 22, 2006; or

(ii) a product or service that--

(I) is a replacement for a product or service described under clause (i);

(II) is essentially the same and meeting the same requirement as the product or service being replaced; and

(III) a contracting officer determines meets the quality standards and delivery schedule of the Department.

(e) Eligibility of small business concerns.--A small business concern may be awarded a contract under this section only if the small business concern and the veteran owner of the small business concern are listed in the database of veteran-owned businesses maintained by the Secretary under subsection (f).

(f) Database of veteran-owned businesses.—

(1) Subject to paragraphs (2) through (6), the Secretary shall maintain a database of small business concerns owned and controlled by veterans, small business concerns owned and controlled by veterans with service-connected disabilities, and the veteran owners of such business concerns.

(2)

(A) To be eligible for inclusion in the database, such a veteran shall submit to the Secretary such information as the Secretary may require with respect to the small business concern or the veteran. Application for inclusion in the database shall constitute permission under section 552a of title 5 (commonly referred to as the Privacy Act) for the Secretary to access such personal information maintained by the Secretary as may be necessary to verify the information contained in the application.

(B) If the Secretary receives an application for inclusion in the database from an individual whose status as a veteran cannot be verified because the Secretary does not maintain information with respect to the veteran status of the individual, the Secretary may not include the small business concern owned and controlled by the individual in the database maintained by the Secretary until the Secretary receives such information as may be necessary to verify that the individual is a veteran.

(3) Information maintained in the database shall be submitted on a voluntary basis by such veterans.

(4) No small business concern may be listed in the database until the Secretary has verified, using regulations issued by the Administrator of the Small Business Administration with respect to the status of the concern as a small business concern and the ownership and control of such concern, that--

(A) the small business concern is owned and controlled by veterans; and

(B) in the case of a small business concern for which the person who owns and controls the concern indicates that the person is a veteran with a service-connected disability, that the person is a veteran with a service-connected disability.

(5) The Secretary shall make the database available to all Federal departments and agencies and shall notify each such department and agency of the availability of the database.

(6) If the Secretary determines that the public dissemination of certain types of information maintained in the database is inappropriate, the Secretary shall take such steps as are necessary to maintain such types of information in a secure and confidential manner.

(7) The Secretary may not issue regulations related to the status of a concern as a small business concern and the ownership and control of such small business concern.

(8)

(A) If a small business concern is not included in the database because the Secretary does not verify the status of the concern as a small business concern or the ownership or control of the concern, the concern may appeal the denial of verification to the Office of Hearings and Appeals of the Small Business Administration (as established under section 5(i) of the Small Business Act). The decision of the Office of Hearings and Appeals shall be considered a final agency action.

(B)

(i) If an interested party challenges the inclusion in the database of a small business concern owned and controlled by veterans or a small business concern owned and controlled by veterans with service-connected disabilities based on the status of the concern as a small business concern or the ownership or control of the concern, the challenge shall be heard by the Office of Hearings and Appeals of the Small Business Administration as described in subparagraph (A). The decision of the Office of Hearings and Appeals shall be considered final agency action.

(ii) In this subparagraph, the term "interested party" means--

(I) the Secretary; or

(II) in the case of a small business concern that is awarded a contract, the contracting officer of the Department or another small business concern that submitted an offer for the contract that was awarded to the small business concern that is the subject of a challenge made under clause (i).

(C) For each fiscal year, the Secretary shall reimburse the Administrator of the Small Business Administration in an amount necessary to cover any cost incurred by the Office of Hearings and Appeals of the Small Business Administration for actions taken by the Office under this paragraph. The Administrator is authorized to accept such reimbursement. The amount of any such reimbursement shall be determined jointly by the Secretary and the Administrator and shall be provided from fees collected by the Secretary under multiple-award schedule contracts. Any disagreement about the

amount shall be resolved by the Director of the Office of Management and Budget.

(g) Enforcement penalties for misrepresentation.—

(1) Any business concern that is determined by the Secretary to have willfully and intentionally misrepresented the status of that concern as a small business concern owned and controlled by veterans or as a small business concern owned and controlled by service-disabled veterans for purposes of this subsection shall be debarred from contracting with the Department for a period of not less than five years.

(2) In the case of a debarment under paragraph (1), the Secretary shall commence debarment action against the business concern by not later than 30 days after determining that the concern willfully and intentionally misrepresented the status of the concern as described in paragraph (1) and shall complete debarment actions against such concern by not later than 90 days after such determination.

(3) The debarment of a business concern under paragraph (1) includes the debarment of all principals in the business concern for a period of not less than five years.

(h) Priority for contracting preferences.--Preferences for awarding contracts to small business concerns shall be applied in the following order of priority:

(1) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans with service-connected disabilities.

(2) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans that are not covered by paragraph (1).

(3) Contracts awarded pursuant to--

(A) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(B) section 31 of such Act (15 U.S.C. 657a).

(4) Contracts awarded pursuant to any other small business contracting preference.

(i) Applicability of requirements to contracts.—

(1) If after December 31, 2008, the Secretary enters into a contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods or services, the Secretary shall include in such contract, memorandum, agreement, or other arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of this section in acquiring such goods or services.

(2) Nothing in this subsection shall be construed to supersede or otherwise affect the authorities provided under the Small Business Act (15 U.S.C. 631 et seq.).

(j) Annual reports.--Not later than December 31 each year, the Secretary shall submit to Congress a report on small business contracting during the fiscal year ending in such year. Each report shall include, for the fiscal year covered by such report, the following:

(1) The percentage of the total amount of all contracts awarded by the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(2) The percentage of the total amount of all such contracts awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(3) The percentage of the total amount of all contracts awarded by each Administration of the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(4) The percentage of the total amount of all contracts awarded by each such Administration during that fiscal year that were awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(k) Limitations on subcontracting.—

(1)

(A) The requirements applicable to a covered small business concern under section 46 of the Small Business Act (15 U.S.C. 657s) shall apply with respect to a small business concern owned and controlled by veterans that is awarded a contract under this section.

(B) For purposes of applying the requirements of section 46 of the Small Business Act (15 U.S.C. 657s) pursuant to subparagraph (A), the term "similarly situated entity" used in such section 46 includes a subcontractor for a small business concern owned and controlled by veterans described in such subparagraph (A).

(2) The Secretary may award a contract under this section only after the Secretary obtains from the offeror a certification that the offeror will comply with the requirements described in paragraph (1)(A) if awarded the contract. Such certification shall--

(A) specify the exact performance requirements applicable under such paragraph; and

(B) explicitly acknowledge that the certification is subject to section 1001 of title 18.

(3)

(A) The Director of Small and Disadvantaged Business Utilization for the Department, established pursuant to section 15(k) of the Small Business Act (15 U.S.C. 644(k)), and the Chief Acquisition Officer of the Department, established pursuant to section 1702 of title 41, shall jointly implement a process using the systems described in section 16(g)(2) of the Small Business Act (15 U.S.C. 645(g)(2)), or any other relevant systems available, to monitor compliance with this subsection.

(B) The Director of Small and Disadvantaged Business Utilization and the Chief Acquisition Officer shall jointly refer any violations or suspected violations of this subsection to the Inspector General of the Department.

(C) If the Secretary determines, in consultation with the Inspector General of the Department, that a small business concern that is awarded a contract under this section did not act in good faith with respect to the requirements described in paragraph (1)(A), the small business concern shall be subject to any or all of the following consequences--

(i) referral to the Debarment and Suspension Committee of the Department;

(ii) a fine under section 16(g)(1) of the Small Business Act (15 U.S.C. 645(g)(1)); and

(iii) prosecution for violating section 1001 of title 18.

(D) Not later than November 30 for each of fiscal years 2021 through 2025, the Inspector General shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report for the fiscal year preceding the

fiscal year during which the report is submitted that includes, for the fiscal year covered by the report--

(i) the number of referred violations and suspected violations received under subparagraph (B); and

(ii) the disposition of such referred violations, including the number of small business concerns suspended or debarred from Federal contracting or referred to the Attorney General for prosecution.

(l) Definitions.--In this section:

(1) The term "small business concern" has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(2) The term "small business concern owned and controlled by veterans" has the meaning given that term under section 3(q)(3) of the Small Business Act (15 U.S.C. 632(q)(3)).

(3) The term "small business concern owned and controlled by veterans with service-connected disabilities" has the meaning given the term "small business concern owned and controlled by service-disabled veterans" under section 3(q)(2) of the Small Business Act (15 U.S.C. 632(q)(2)).

38 U.S.C. § 8128. Small business concerns owned and controlled by veterans: contracting priority

(a) Contracting priority.--In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary shall give priority to a small business concern owned and controlled by veterans, if such business concern also meets the requirements of that contracting preference.

(b) Definition.--For purposes of this section, the term "small business concern owned and controlled by veterans" means a small business concern that is included in the small business database maintained by the Secretary under section 8127(f) of this title.

13 C.F.R. § 125.6 What are the prime contractor's limitations on subcontracting?

(a) General. In order to be awarded a full or partial small business set-aside contract with a value greater than the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101), an 8(a) contract, an SDVO SBC contract, a HUBZone contract, or a WOSB or EDWOSB contract pursuant to part 127 of this chapter, a small business concern must agree that:

(1) In the case of a contract for services (except construction), it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded. Other direct costs may be excluded to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service, such as airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code (562910), cloud computing services, or mass media purchases. In addition, work performed overseas on awards made pursuant to the Foreign Assistance Act of 1961 or work required to be performed by a local contractor, is excluded.

(2)

(i) In the case of a contract for supplies or products (other than from a nonmanufacturer of such supplies), it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(ii) In the case of a contract for supplies from a nonmanufacturer, it will supply the product of a domestic

small business manufacturer or processor, unless a waiver as described in § 121.406(b)(5) of this chapter is granted.

(A) For a multiple item procurement where a waiver as described in § 121.406(b)(5) of this chapter has not been granted for one or more items, more than 50% of the value of the products to be supplied by the nonmanufacturer must be the products of one or more domestic small business manufacturers or processors.

(B) For a multiple item procurement where a waiver as described in § 121.406(b)(5) of this chapter is granted for one or more items, compliance with the limitation on subcontracting requirement will be determined by combining the value of the items supplied by domestic small business manufacturers or processors with the value of the items subject to a waiver. As such, as long as the value of the items to be supplied by domestic small business manufacturers or processors plus the value of the items to be supplied that are subject to a waiver account for at least 50% of the value of the contract, the limitations on subcontracting requirement is met.

(C) For a multiple item procurement, the same small business concern may act as both a manufacturer and a nonmanufacturer.

* * * *

48 C.F.R. § 19.102 (2012) Small business size standards and North American Industry Classification System codes.

* * *

(f)

(f) Any concern submitting a bid or offer in its own name, other than on a construction or service contract, that proposes to furnish an end product it did not manufacture (a "nonmanufacturer"), is a small business if it has no more than 500 employees, and—

(1) Except as provided in paragraphs (f)(4) through (f)(7) of this section, in the case of Government acquisitions set-aside for small businesses, furnishes in the performance of the contract, the product of a small business manufacturer or producer. The end product furnished must be manufactured or produced in the United States or its outlying areas. The term "nonmanufacturer" includes a concern that can, but elects not to, manufacture or produce the end product for the specific acquisition. For size determination purposes, there can be only one manufacturer of the end product being acquired. The manufacturer of the end product being acquired is the concern that, with its own forces, transforms inorganic or organic substances including raw materials and/or miscellaneous parts or components into the end product. However, see the limitations on subcontracting at 52.219–14 that apply to any small business offeror other than a nonmanufacturer for purposes of set-asides and 8(a) awards.

(2) A concern which purchases items and packages them into a kit is considered to be a nonmanufacturer small business and can qualify as such for a given acquisition if it meets the size qualifications of a small nonmanufacturer for the acquisition, and if more than 50 percent of the total value of the kit and its contents is accounted for by items manufactured by small business.

(3) For the purpose of receiving a Certificate of Competency on an unrestricted acquisition, a small business nonmanufacturer may furnish any domestically produced or manufactured product.

(4) In the case of acquisitions set aside for small business or awarded under section 8(a) of the Small Business Act, when the acquisition is for a specific product (or a product in a class of products) for which the SBA has determined that there are no small business manufacturers or processors in the Federal market, then the SBA may grant a class waiver so that a nonmanufacturer does not have to furnish the product of a small business. For the most current listing of classes for which SBA has granted a waiver, contact an SBA Office of Government Contracting. A listing is also available on SBA's Internet Homepage at http://www.sba/content/class-waivers. Contracting officers may request that the SBA waive the nonmanufacturer rule for a particular class of products.

(5) For a specific solicitation, a contracting officer may request a waiver of that part of the nonmanufacturer rule which requires that the actual manufacturer or processor be a small business concern if the contracting officer determines that no known domestic small business manufacturers or processors can reasonably be expected to offer a product meeting the requirements of the solicitation.

(6) Requests for waivers shall be sent to the Associate Administrator for Government Contracting, United States Small Business Administration, Mail Code 6250, 409 Third Street, SW., Washington, DC 20416.

(7) The SBA provides for an exception to the nonmanufacturer rule if—

> (i) The procurement of a manufactured end product processed under the procedures set forth in part 13—

(A) Is set aside for small business; and

(B) Is not anticipated to exceed $25,000; and

(ii) The offeror supplies an end product that is manufactured or produced in the United States or its outlying areas.

(8) For non-manufacturer rules pertaining to HUBZone contracts, see 19.1303(e).

48 C.F.R. § 52.219-27 Notice of Service–Disabled Veteran–Owned Small Business Set–Aside

As prescribed in 19.1408, insert the following clause:

Notice of Service–Disabled Veteran–Owned Small Business Set–Aside (SEP 2021)

(a) Definition. Service-disabled veteran-owned small business concern—

(1) Means a small business concern—

(i) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

(2) Service-disabled veteran means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

(b) Applicability. This clause applies only to—

(1) Contracts that have been set aside for service-disabled veteran-owned small business concerns;

(2) Part or parts of a multiple-award contract that have been set aside for service-disabled veteran-owned small business concerns;

(3) Orders set aside for service-disabled veteran-owned small business concerns under multiple-award contracts as described in 8.405–5 and 16.505(b)(2)(i)(F); and

(4) Orders issued directly to service-disabled veteran-owned small business concerns under multiple-award contracts as described in 19.504(c)(1)(ii).

(c) General.

(1) Offers are solicited only from service-disabled veteran-owned small business concerns. Offers received from concerns that are not service-disabled veteran-owned small business concerns shall not be considered.

(2) Any award resulting from this solicitation will be made to a service-disabled veteran-owned small business concern.

(d) A joint venture may be considered a service-disabled veteran owned small business concern if—

(1) At least one member of the joint venture is a service-disabled veteran-owned small business concern, and makes the following representations:

(i) That it is a service-disabled veteran-owned small business concern, and

(ii) That it is a small business concern under the North American Industry Classification Systems (NAICS) code assigned to the procurement;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of 13 CFR 121.103(h); and

(4) The joint venture meets the requirements of 13 CFR 125.15(b).

48 C.F.R. § 819.7004 Contracting Order of Priority

In determining the acquisition strategy applicable to an acquisition, the contracting officer shall consider, in the following order of priority, contracting preferences that ensure contracts will be awarded:

(a) To SDVOSBs;

(b) To VOSB, including but not limited to SDVOSBs;

(c) Pursuant to—

(1) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(2) The Historically–Underutilized Business Zone (HUBZone) Program (15 U.S.C. 657a); and

(d) Pursuant to any other small business contracting preference.

48 C.F.R. § 819.7005 Service-disabled veteran-owned small business set-aside procedures

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that,

(1) Offers will be received from two or more eligible SDVOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) When conducting SDVOSB set-asides, the contracting officer shall ensure:

(1) Eligibility is extended to businesses owned and operated by surviving spouses; and

(2) Businesses are registered and verified as eligible in the VIP database prior to making an award.

(c) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible SDVOSB concern in response to a SDVOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible SDVOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for VOSB competition, if appropriate.

48 C.F.R. § 852.219-10 VA Notice of Total Service–Disabled Veteran–Owned Small Business Set–Aside

As prescribed in 819.7009, insert the following clause:

VA Notice of Total Service–Disabled Veteran–Owned Small Business Set–Aside (DEC 2009)

(a) Definition. For the Department of Veterans Affairs, "Service-disabled veteran-owned small business concern":

(1) Means a small business concern:

(i) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans (or eligible surviving spouses);

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans (or eligible surviving spouses) or, in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran;

(iii) The business meets Federal small business size standards for the applicable North American Industry Classification System (NAICS) code identified in the solicitation document; and

(iv) The business has been verified for ownership and control and is so listed in the Vendor Information Pages database, (http://www.VetBiz.gov).

(2) "Service-disabled veteran" means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

(b) General.

(1) Offers are solicited only from service-disabled veteran-owned small business concerns. Offers received from concerns that are not service-disabled veteran-owned small business concerns shall not be considered.

(2) Any award resulting from this solicitation shall be made to a service-disabled veteran-owned small business concern.

(c) Agreement. A service-disabled veteran-owned small business concern agrees that in the performance of the contract, in the case of a contract for:

(1) Services (except construction), at least 50 percent of the cost of personnel for contract performance will be spent for employees of the concern or employees of other eligible service-disabled veteran-owned small business concerns;

(2) Supplies (other than acquisition from a nonmanufacturer of the supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern or other eligible service-disabled veteran-owned small business concerns;

(3) General construction, at least 15 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other eligible service-disabled veteran-owned small business concerns; or

(4) Construction by special trade contractors, at least 25 percent of the cost of the contract performance incurred for personnel will be spent on the concern's employees or the employees of other eligible service-disabled veteran-owned small business concerns.

(d) A joint venture may be considered a service-disabled veteran owned small business concern if—

(1) At least one member of the joint venture is a service-disabled veteran-owned small business concern, and makes the following representations: That it is a service-disabled veteran-owned small business concern, and that it is a small business concern under the North American Industry Classification Systems (NAICS) code assigned to the procurement;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement; and

(3) The joint venture meets the requirements of paragraph 7 of the explanation of Affiliates in 19.101 of the Federal Acquisition Regulation.

(4) The joint venture meets the requirements of 13 CFR 125.15(b).

(e) Any service-disabled veteran-owned small business concern (non-manufacturer) must meet the requirements in 19.102(f) of the Federal Acquisition Regulation to receive a benefit under this program.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 21-35905

I am the attorney or self-represented party.

This brief contains 13,992 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Appellant's Principal Brief to be filed using the Court's CM/ECF system on January 28, 2022. All counsel to parties to the case are ECF users.

s/Tejinder Singh

January 28, 2022