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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA ex rel.  
BRIAN MARKUS,

Relator,

v.

AEROJET ROCKETDYNE HOLDINGS,  
INC., a corporation and AEROJET  
ROCKETDYNE, INC., a corporation,

Defendants.

No. 2:15-cv-02245 WBS AC

MEMORANDUM AND ORDER RE:  
CROSS-MOTIONS FOR SUMMARY  
JUDGMENT

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

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

11 I. Background

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

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

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

7 See id.

8 In August 2015, the DoD issued an interim rule,  
9 modifying the government's cybersecurity requirements for  
10 contractor and subcontractor information systems. 48 C.F.R. §  
11 252.204-7012 (Aug. 2015). The interim rule incorporated more  
12 cybersecurity controls and required that any alternative measures  
13 be "approved in writing prior by an authorized representative of  
14 the DoD [Chief Information Officer] prior to contract  
15 award." Id. at 252.204-7012(b)(1)(ii)(B). The DoD amended the  
16 interim rule in December 2015 to allow contractors until December  
17 31, 2017 to have compliant or equally effective alternative  
18 controls in place. See 48 C.F.R. § 252.204-

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19  
20 <sup>1</sup> Defendants submitted a request for judicial notice of,  
21 among several other items, certain regulations. (Docket No. 119).  
22 The court need not take judicial notice of regulations. Accord  
23 Fed R. Evid. 201. Because relator does not object, the court  
24 takes judicial notice of Exhibit 37 and 121 of the Declaration of  
25 Tammy A. Tsoumas (Docket No. 117), which is data published on  
26 USASpending.gov, which is maintained by the United States  
27 Department of Treasury and other federal agencies. (See Daniels-  
28 Hall v. Nat'l Educ. Ass'n, 629 F. 3d 992 998-99 (9th Cir. 2010)  
("It is appropriate to take judicial notice of [information on a  
government website], as it was made publicly available by  
government entities . . . and neither party disputes the  
authenticity of the web sites or the accuracy of the information  
displayed therein.") The court does not rely on the remaining  
items at issue in the request, and therefore the request is  
denied as moot as to those items.

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

2 Each version of this regulation defines adequate  
3 security as "protective measures that are commensurate with the  
4 consequences and probability of loss, misuse, or unauthorized  
5 access to, or modification of information." 48 C.F.R. § 252.204-  
6 7012(a).

7 Contractors awarded contracts from NASA must comply  
8 with relevant NASA acquisition regulations. 48 C.F.R. §  
9 1852.204-76 lists the relevant security requirements where a  
10 contractor stores sensitive but unclassified information  
11 belonging to the federal government. Unlike the relevant DoD  
12 regulation, this NASA regulation makes no allowance for the  
13 contractor to use alternative controls or protective measures. A  
14 NASA contractor is required to "protect the confidentiality,  
15 integrity, and availability of NASA Electronic Information and IT  
16 resources and protect NASA Electronic Information from  
17 unauthorized disclosure." 48 C.F.R. § 1852.204-76(a).

18 Relator claims defendants fraudulently induced the  
19 government to contract with AR knowing that AR was not complying  
20 with Defense Federal Acquisition Regulation 48 C.F.R. § 252.204-  
21 7012 ("DFARS") and NASA Federal Acquisition Regulation 48 C.F.R.  
22 § 1852.204-76 ("NASA FARS"), which is required to be awarded a  
23 government contract. (SAC ¶ 30.)

24 II. Summary Judgment Standard

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

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

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

13 Summary judgment is appropriate when, viewing the  
14 evidence in the light most favorable to the nonmoving party,  
15 there is no genuine dispute as to any material fact. Acosta v.  
16 City Nat'l Corp., 922 F.3d 880, 885 (9th Cir.  
17 2019) (citing Zetwick v. Cty. of Yolo, 850 F.3d 436, 440 (9th  
18 Cir. 2017)).

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

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

4 III. Scope of the Claims

5 As an initial matter, the parties dispute the scope of  
6 relator's claims. In his SAC, relator specified eighteen  
7 contracts that AR had with the DoD and NASA between February 23,  
8 2014 and April 1, 2016. (SAC ¶¶ 84-93, 105-14.) Relator also  
9 alleges in his SAC that defendants obtained subcontracts,  
10 separate from those listed in the SAC, subject to the DFARS and  
11 NASA FARS regulations, by falsely representing that they were  
12 compliant with those regulations. However, relator does not  
13 produce any evidence as to those subcontracts, and the court will  
14 not consider them in deciding the cross motions for summary  
15 judgment. (SAC ¶ 126.)

16 A. Contracts Awarded After Litigation Commenced

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

27 \_\_\_\_\_  
28 <sup>2</sup> Relator filed his first complaint on October 29, 2015.  
Therefore, the court will not consider the following six

1           B.    Contracts Explicitly Containing FARS Clauses

2           Defendants argue that the scope of relator's claim must  
3 be limited to only those contracts that contain the DFARS or NASA  
4 FARS clauses. (Defs.' Mot. for Summ. J. ("Defs.' MSJ") at 22  
5 (Docket No. 116); Defs.' Reply to Relator's Resp. to Defs.'  
6 Statement of Undisputed Facts ("Defs.' SUF") ¶ 32, 35, 38, 40-43,  
7 46, 49, 51, 53 (Docket No. 138).) However, the parties agree  
8 that six of the remaining 12 contracts do include the  
9 cybersecurity clauses.

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

21           C.    Contracts Not Containing FARS Clauses

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

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

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

12 Relator claims defendants' evidence of which contracts  
13 contained the pertinent clause is flawed because (1) the  
14 defendants' supporting evidence consists of only order forms,  
15 rather than complete contracts; (2) the parent award (which is  
16 not produced) does contain the clause; or (3) the orders produced  
17 state that they do not list all applicable clauses. (Defs.' SUF  
18 ¶ 32, 35, 38, 40-43, 46, 49, 51, 53.) However, relator merely  
19 argues that these other documents incorporated the clauses but  
20 does not produce any evidence to that effect. Therefore, the  
21 court cannot assume that the other documents relator describes  
22 actually contain the clauses.

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

1 either explicitly listed or are incorporated, as shown through  
2 the parties' evidence.<sup>3</sup>

3 IV. Relator's Claims under the False Claims Act

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

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

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

24 A. Promissory Fraud

25 Both sides move for summary judgment on the promissory

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26 <sup>3</sup> Specifically, the court will consider contract nos.  
27 #W31P4Q-14-C-0075, #NNC10BA13B (parent award for #NNC13TA66T),  
28 #N00014-14-C-0035, #FA8650-14-C-7424, #N68936-14-C-0035,  
#NNC15CA07C, and #HR001115C0132.

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

9 1. False Statement or Fraudulent Course of Conduct

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

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

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

1 assessment matrix via email or letter, though its accuracy is in  
2 question as discussed below. (Tsoumas Decl., Ex. 60-61, 65, 78,  
3 83, 89, 110, 111 (Docket No. 117).) AR also disclosed its  
4 noncompliance to agencies via documented meetings and  
5 teleconferences. (Tsoumas Decl., Ex. 55, 56, 58, 61, 65, 66;  
6 Defs.' SUF ¶ 74, 75, 113, 114.) However, there is no record of  
7 what was stated during those meetings or conferences.

8 Defendants correctly point out numerous instances where  
9 the government acknowledged AR's noncompliance and was even  
10 working with AR to implement a waiver. (See Tsoumas Decl., Ex.  
11 253, Dep. of Laurie Hewitt 60:6-61:5, 63:15-16 ("With this letter  
12 it was my understanding that Aerojet was not in compliance with  
13 the DFARS clause")); (Tsoumas Decl., Ex. 85, 86, 91, 92, 115.)  
14 Defendants' evidence produced on summary judgment shows that AR  
15 disclosed information to NASA about noncompliance and NASA  
16 acknowledged it. (Tsoumas Decl., Ex. 162, 168, 169, 180.) Though  
17 defendant has produced evidence demonstrating disclosures of  
18 noncompliance, these disclosures hold less weight when they are  
19 incomplete.

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

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

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

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

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

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

18 Further, the outside audits found that AR had several  
19 high, moderate, and low risk deficiencies and a low security  
20 monitoring score from 2013 to 2015. (Relator's SUF ¶ 31-33, 35.)  
21 An auditing firm was able to penetrate AR's network within four  
22 hours, requiring the firm to recommend immediate action.

23 (Relator's SUF ¶ 34.) Defendants point out that these audits do  
24 not necessarily translate to AR being non-compliant with DFARS or  
25 NASA FARS as the audit reports do not specify as such.

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

1 7012(b). Adequate security is defined as "protective measures  
2 that are commensurate with the consequences of probability of  
3 loss, misuse, or unauthorized access to, or modification of  
4 information." 48 C.F.R. § 252.204-7012(a). A reasonable trier  
5 of fact could find that the government agencies with whom AR was  
6 contracting would not see AR as providing adequate security if  
7 they were aware of the audit findings. There is no evidence  
8 showing that the government agencies were aware of the findings  
9 from these audits, or that the findings were not relevant to  
10 compliance.

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

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

26 2. Scienter

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

1 31 U.S.C. § 3729(a)(1)(A). The term knowingly is defined as  
2 having "actual knowledge," acting with "deliberate ignorance of  
3 the truth or falsity of the information," or acting in "reckless  
4 disregard of the truth or falsity or the information." Id. at §  
5 3729(b)(1)(A)(i-iii).

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

### 17 3. Materiality

18 Under the False Claims Act, materiality means a  
19 defendant's fraud has "a natural tendency to influence" or was  
20 "capable of influencing" the government's payment decision. 31  
21 U.S.C. § 3729(b)(4). "[M]ateriality looks to the effect on the  
22 likely or actual behavior of the recipient of the alleged  
23 misrepresentation." Universal Health Servs., Inc. v. United  
24 States ex rel. Escobar, --- U.S. ----, 136 S. Ct. 1989, 2002  
25 (2016) (alternations omitted) ("Escobar").

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

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

8 Here, compliance with the relevant clauses was an  
9 express term of the contracts. (See Tsoumas Decl., Ex. 129 (“The  
10 Contract shall comply with the following Federal Acquisition  
11 Regulation (FAR) clauses”).) It may be reasonably inferred that  
12 compliance was significant to the government because without  
13 complete knowledge about compliance, or noncompliance, with the  
14 clauses, the government cannot adequately protect its  
15 information. (See Tsoumas Decl., Ex. 34, DoD Presentation Apr.  
16 26, 2018, at 45:5-7.) Therefore, a genuine dispute of fact  
17 exists as to the materiality element.

18 Defendants argue that compliance with DFARS and NASA  
19 FARS was nonmaterial because the government awarded contracts to  
20 other contractors and AR despite knowledge that they were  
21 noncompliant. (Defs.’ SUF at ¶ 160, 179, 178, 193, 199, 162,  
22 171, 174, 180, 183, 186, 189, 195, 201, 204, 207, 210, 213, 216,  
23 219, 222.) However, without some evidence of the circumstances  
24 of those other contracts, the court cannot speculate as to other  
25 contractors’ level of non-compliance when analyzing whether  
26 similar “particular type[s]” of claims were paid. Escobar, 136  
27 S. Ct. at 2003-04. Specifically for AR, as discussed above, a  
28 genuine dispute of material fact exists as to whether the

1 government had "actual knowledge that certain requirements were  
2 violated" due to the sufficiency of AR's disclosures. Escobar,  
3 136 S. Ct. 2003-04 (emphasis added).

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

8 4. Causation

9 The False Claims Act requires "a causal rather than  
10 temporal connection between fraud and payment." Hendow, 461 F.3d  
11 1174 (citations omitted). The relator must show actual, but-for  
12 causation, meaning defendant's fraud caused the government to  
13 contract. See United States ex rel. Cimino v. Int'l Bus. Machs.  
14 Corp., 3 F.4th 412, 420 (D.C. Cir. 2021) (concluding that in a  
15 False Claims Act fraudulent inducement claim the relator "was  
16 required to plead actual causation under a but for standard.")

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

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

28 B. False Certification

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

7 As noted above, contracts awarded after this litigation  
8 commenced will not be considered. Relator's claim for false  
9 certification is based solely on an invoice payment under a NASA  
10 contract that was entered into after relator brought this action  
11 and is therefore not a proper basis for his false certification  
12 claim. (See Relator's Opp'n at 14; Tsoumas Decl., Ex. 121, Row  
13 126 (the contract at issue was awarded on April 28, 2016).)  
14 Because relator provides no other examples of alleged false  
15 certifications, defendants' motion for summary judgment on  
16 relator's second claim of false certification will be granted.

17 V. Damages

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

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

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

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

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

15 Dated: February 1, 2022



16 **WILLIAM B. SHUBB**  
17 **UNITED STATES DISTRICT JUDGE**  
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