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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
27
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1 C.F.R. § 252.204-7012 (2013).¹ 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-

19
20 ¹ 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.²

27 ² Relator filed his first complaint on October 29, 2015.
28 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

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.³

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

26 ³ 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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