

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA, and the)
STATES of CALIFORNIA, FLORIDA,)
MINNESOTA, NEW YORK,)
TENNESSEE, and VERMONT, ex rel.)
JENNIFER DAPOLITO,)

Plaintiffs,)

v.)

APPLIED MEMETICS, LLC, AM TRACE,)
LLC, and AM, LLC,)

Defendants.)

BY

Case No. 5:21-cv-270

OPINION AND ORDER ON MOTION TO DISMISS
(Docs. 33, 72)

Plaintiff-Relator Jennifer DaPolito brings this action under the False Claims Act (“FCA”), 31 U.S.C. § 3729 *et seq.*, and the false claims acts of Vermont, California, Florida, Minnesota, New York, and Tennessee (“Plaintiff States”). (*See* Doc. 53-2.) In *qui tam* claims on behalf of the United States and the Plaintiff States, DaPolito alleges that Defendant Applied Memetics, LLC, Defendant AM Trace, LLC, and Defendant AM, LLC, made false statements and submitted false claims to the government in order to secure contracts for the provision of COVID-19 response services and receive payments under those contracts. In an individual claim, DaPolito alleges that Defendants retaliated against her for challenging these unlawful practices, thereby violating the FCA’s anti-retaliation provision and the analogous provisions of the Plaintiff States’ false claims acts. Finally, DaPolito brings an individual claim for wrongful termination in violation of public policy under Vermont common law.

Defendants moved to dismiss DaPolito’s first amended complaint under Fed. R. Civ. P. 8, 9(b) and 12(b)(6), arguing that she has failed to plead fraud with the specificity required under

Rule 9(b) and that she has failed to state a claim on each of her counts. (Doc. 33). Concurrent with her opposition to that motion, DaPolito moved for leave to amend her complaint. (Doc. 53.) After a hearing on the motions, the court granted DaPolito's motion for leave to amend. (Doc. 70.) Defendants subsequently filed a motion to dismiss DaPolito's second amended complaint, once again arguing that she had failed to meet Rule 9(b)'s pleading standard and that she had failed to state a claim on each of her counts. (Doc. 72.) The parties completed their briefing on the motion to dismiss on May 17, 2024. In this order, the court addresses the merits of both motions to dismiss.

Statutory Framework

The federal False Claims Act imposes liability on any person who, in relevant part, “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 “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.” 31 U.S.C. § 3729(a)(1)(A), (B), (G). The FCA also imposes liability on anyone who “conspires to commit a violation” of one or more of the above provisions. *Id.* § 3729(a)(1)(C). Under the FCA, plaintiffs can proceed on a “fraudulent inducement” theory. *U.S. v. Strock*, 982 F.3d 51, 60 (2d Cir. 2020). In fraudulent-inducement cases, “FCA liability attaches not because a defendant has submitted any claim for payment that is literally false, but instead because the contract under which payment is made is procured by fraud.” *Id.* (cleaned up). Plaintiffs can also proceed on an “implied false certification” theory. *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 579 U.S. 176, 181 (2016). Under this theory, “liability can attach when the defendant submits a claim for payment that makes specific

representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with statutory, regulatory, or contractual requirements," and "the omission renders those representations misleading." *Id.*

The FCA allows any person having information about an FCA violation—referred to as a *qui tam* plaintiff or "relator"—to bring an action on behalf of the government and to share in any recovery. 31 U.S.C. § 3730(b), (d). The complaint must remain under seal for at least 60 days to provide the government an opportunity to conduct an independent investigation and determine whether to intervene in the suit. *Id.* § 3730(b)(2).

Background

The following facts are based on DaPolito's second amended complaint ("SAC"). As required on a motion to dismiss, the court accepts these facts as true for the purposes of this opinion. *Trs. of Upstate N.Y. Eng'rs. Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016).

Plaintiff-Relator DaPolito is a Vermont resident and a public health professional. (Doc. 53-2 ¶ 12.)

Defendants are privately held Delaware corporations that provided COVID-19 response services during the pandemic, including vaccine distribution, testing coordination, contact tracing, health IT, school COVID-19 case management, and vaccine verification and monoclonal antibody treatment services. (*Id.* ¶¶ 13–15.)

Plaintiff's Employment History

After graduating from Hamilton College, DaPolito completed a two-year term with the Peace Corps. (Doc. 53-2 ¶ 12.) She then attended the Johns Hopkins Bloomberg School of Public Health, where she received a master's degree in public health. (*Id.*) In summer 2020 she

started work as a Health Surveillance Epidemiologist with the Vermont Department of Health (“Vermont DOH”). (*Id.* ¶¶ 12, 47.) Her responsibilities included the development of contact tracing efforts and protocols in response to the COVID pandemic. (*Id.* ¶¶ 12, 47.) In August 2021 she left her position in state government and took a position with defendant AM, LLC as Manager, Epidemiology Programs to perform similar work as a contractor. (*Id.* ¶¶ 12, 59, 60.) In late August, she was transferred to serve as “Public Health Standards Manager.” (*Id.* ¶ 172.) In that role, her responsibilities included implementing public health guidance into the work of AM. (*Id.*) She resigned from AM in late October 2021 after AM proposed to increase her job responsibilities without any increase in compensation. (*Id.* ¶ 180, 181).

Federal Response to the COVID-19 Pandemic

In response to the COVID-19 pandemic, the federal government authorized trillions of dollars of aid to states, local governments, school systems, private entities, and individuals so they could effectively respond to the pandemic. (Doc. 53-2 ¶¶ 27–28.) Much of this funding was authorized through the Coronavirus Aid, Relief, and Economic Security Act (“CARES”) and the American Rescue Plan (“ARP”), which in many cases allowed recipients to use those funds to hire private contractors to provide COVID-19 response services. (*Id.* ¶¶ 28–29, 36, 38.) CARES Act funding and ARP funding were allocated into several sub-funds, including the Elementary and Secondary School Emergency Relief Fund (“ESSER”), the Governor’s Emergency Education Relief Fund (“GEER”), and COVID-19 response grants administered by the Department of Homeland Security’s Federal Emergency Management Agency (“FEMA”). (*Id.* ¶¶ 29, 36.) As a contractor for COVID-19 response services, Defendants applied for and received grants through the Department of Education, the Department of Homeland Security, the

Department of Health and Human Services, and other federal agencies. (*Id.* ¶ 38.) These federal agencies directly administered some of the grants, and subgrantees administered others. (*Id.*)

Recipients of ESSER, GEER, and FEMA funding were required to comply with certain provisions of the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Uniform Guidance). (Doc. 53-2 ¶¶ 31–35, 37.) Under ESSER, recipients were specifically required to comply with Subparts D and E of the Uniform Guidance, codified at 2 C.F.R. Part 200.300–345 and 2 C.F.R. Part 200.400–475, respectively. (*Id.* ¶ 32.) State educational agencies and “other entities” receiving funds under ESSER were further required to comply with all applicable acts, regulations, and insurances, including the Uniform Guidance. (*Id.* ¶ 33.) ESSER recipients were required to acknowledge that failure to comply with those requirements “may result in liability under the False Claims Act.” (*Id.* ¶ 31.)

Likewise, recipients of FEMA grants were required to comply with the cost principles in Subpart E, and state educational agencies and entities were required to certify that the uses of these funds would comply with the Uniform Guidance on federal grants cost principles and accounting principles. Relevant here, under the Uniform Guidance, costs for fixed amount contracts must be based on honest cost assessments. Additionally, “[t]he non-Federal entity must certify in writing to the Federal awarding agency or passthrough entity at the end of the Federal award that the project or activity was completed or the level of effort was expended. If the required level of activity or effort was not carried out, the amount of the Federal award must be adjusted.” (*Id.* ¶ 35); *see* 2 C.F.R. Part 200.201(b)(3).

The Vermont Bid

From summer 2020 until August 2021, Plaintiff-Relator Jennifer DaPolito was a Health Surveillance Epidemiologist for the Vermont DOH and oversaw Vermont’s response to the

COVID-19 pandemic. (Doc. 53-2 ¶¶ 12, 47, 59.) During this time, Vermont developed a highly successful COVID-19 response system, “successfully contacting approximately 80–90 percent of people who tested positive for COVID in the first 24 hours of receiving the lab result.” (*Id.* ¶ 56.) However, to achieve that result, Vermont had to divert many state employees from their normal duties. (*Id.* ¶ 48). Thus, in early 2021, Vermont sought private contractors to take over contact tracing, case investigation, and Outbreak Prevention Response. (*Id.*)

In her capacity as a Health Surveillance Epidemiologist, DaPolito helped evaluate contractor bids for contact tracing and related functions. (Doc. 53-2 ¶ 50.) By the time DaPolito became involved in the process, Vermont had narrowed the bids to three potential contractors, including one from Defendants. (*Id.* at ¶ 49.) Although Defendants’ bid was the most expensive, it “stood out” to DaPolito because, “in contrast to the others [bids], [Defendants] represented that it was a public health firm with specialized expertise and knowledge in public health and would provide COVID services guided by state-of-the-art public health expertise and knowledge.” (*Id.* ¶ 50.) This aspect of Defendants’ bid was important to DaPolito and the State of Vermont because Vermont was seeking a contractor who could expand on its current COVID-19 programs “without significant support by the State.” (*Id.* ¶ 53.)

DaPolito subsequently met with two of Defendants’ top executives, Sarah David and Erin Thames, to discuss Defendants’ capabilities. (Doc. 53-2 ¶ 51.) David and Thames represented that Defendants’ programs and services were “designed, guided, implemented and operated by personnel qualified by having significant training and experience in public health, infectious diseases and epidemiology” and that, “based on this expertise, [Defendants] operated consistent with public health infectious disease and epidemiological practices and principles.” (*Id.*) During the bid process, Defendants also stated that they could have their response teams “up and running

and handling cases in a matter of weeks” and would be able “to process a high volume of contact tracing cases per day.” (*Id.* ¶ 49.) Both DaPolito and other Vermont DOH officials were “impressed” by Defendants’ statements about their expertise and the speed with which they could begin processing cases. (*Id.* ¶ 54). Based on the claims Defendants made in their bid and meeting with DaPolito, Vermont accepted Defendants’ bid. (*Id.* ¶¶ 54–55.)

When Defendants began work under the contract, their performance fell short of what they had promised. (Doc. 53-2 ¶¶ 55–58, 63–64). Vermont’s contact tracing metrics “worsened considerably” after Defendants took over under the contract, and Defendants “struggled” to handle Outbreak Prevention Response. (*Id.* ¶¶ 56, 58). Specifically, response times to positive tests at schools and businesses “slowed dramatically.” (*Id.* ¶ 58.) And, although Defendants had stated they would be handling cases in “a matter of weeks” and would process a “high volume of contact tracing cases per day,” “all but two of [Defendants’] projects in Vermont schools were still not operational by the time school resumed in the fall, and these projects remained dysfunctional well into October of 2021.” (*Id.* ¶¶ 51, 63.) And, despite their stated expertise and knowledge in public health, Defendants were “unfamiliar with Vermont-specific guidance and standards employed by the [Vermont DOH].” (*Id.* ¶ 57.)

As a result of these deficiencies, the Vermont DOH had to re-mobilize state employees who had returned to their normal duties when Defendants were hired. (Doc. 53-2 ¶ 63.) The Department of Health also “requested multiple corrective action plans from [Defendants] through at least September of 2021.” (*Id.* ¶ 64.) Nevertheless, because Vermont “lacked capacity to evaluate and safely transition a new COVID-response vendor in the middle of the school year amidst rising outbreaks,” Vermont continued working with Defendants. (*Id.*)

DaPolito's Employment with Defendants

In August 2021, before the extent of Defendants' performance deficiencies became clear, DaPolito accepted a job with Defendants as Manager of Epidemiology Programs. (Doc. 53-2 ¶¶ 59–60.) DaPolito's responsibilities "included overseeing data analysts who were building out a program evaluation framework." (*Id.* ¶ 60.) However, by the end of August 2021, DaPolito was reassigned the role of Public Health Standards Manager and was tasked with assisting Defendants' clinical team with implementation of public health guidance. (*Id.* ¶ 172.) DaPolito worked remotely and participated in all meetings remotely. (*Id.* ¶ 59.) By the end of October 2021, DaPolito had resigned from Defendants' employment. (*Id.* ¶ 181.)

During DaPolito's brief employment with Defendants, she came to believe that Defendants routinely misrepresented their qualifications, capabilities, and operating standards in their bids for contracts and, once awarded those contracts, concealed their non-compliance with various federal and state statutory and regulatory requirements. (Doc. 53-2 ¶¶ 62, 79–88.) With respect to Defendants' bids, DaPolito did not have direct access to bid proposals or contracts (*id.* ¶ 78); however, she learned from Sarvani Kuruganti—an employee responsible for drafting bids—that Ms. Kuruganti "made stuff up" in her bids, viewed the drafting process as "creative writing," and included false statements in her bids with the specific goal of gaining extra "points" under the point system that federal, state, and local governments use to evaluate bids. (*Id.* ¶ 66.) When Ms. Kuruganti could not "make stuff up," the "drafting process was difficult." (*Id.* ¶ 67.) For example, when the Adelanto, California School District was unsatisfied with Defendants' performance under their current contract and issued two new requests for proposals (RFPs) for contract tracing and testing, Ms. Kuruganti struggled to draft the bid because, having already engaged with this particular customer, she could not employ her normal tactics. (*Id.*)

DaPolito also learned that Defendants' CEO, Daniel Gabriel, had hired public relations firms to ensure that their bids appeared higher on lists for state and local government bids and that senior leadership "directed and encouraged" Ms. Kuruganti's "creative writing" approach to bids. (*Id.* ¶ 68.) As Ms. Kuruganti explained to DaPolito, she had never drafted a bid before working for Defendants, so Donna Grimm, Defendants' Director of Bid and Capture, and another bid drafter, Rachel Saldivar, mentored her. (*Id.*) The first bid Ms. Kuruganti ever drafted was the Vermont bid that DaPolito reviewed. (*Id.*) In addition to this training, "a member of senior leadership responsible for supervising the drafting and submission of government bids directly instructed Ms. Kuruganti to make knowing false . . . statements in at least one [of Defendants'] bid[s]." (*Id.* ¶ 72.) Specifically, one government RFP "asked whether the proposed Project Lead was experienced with Smartsheets software, a collaboration and work management software often used in large projects." (*Id.*) While drafting the bid, Ms. Kuruganti stated that the proposed Project Lead and other employees had experience with Smartsheets. (*Id.* ¶ 73.) When Ms. Kuruganti learned that the Project Lead in fact had no such experience and alerted Ms. Grimm to that fact, "Ms. Grimm instructed Ms. Kuruganti not to change this language." (*Id.* ¶ 74.)

Defendants referred to one of their bid practices as a "bait and switch" tactic, whereby Defendants would list the same qualified employees on all of its bid proposals, only to staff those projects with different, less qualified employees. (Doc. 53-2 ¶¶ 69, 71, 75–76, 89.) This issue came up when DaPolito met with Erin Thames, Defendants' Chief Operating Officer, and other employees to discuss a draft bid for a project in Maricopa County, Arizona. (*Id.* ¶ 69.) During the meeting, Ms. Saldivar—one of the bid drafters who trained Ms. Kuruganti—stated that Maricopa County would not accept "bait and switch" tactics in the bid, so the employees listed

on the bid would need to actually work on the project. (*Id.*) In response, Thames stated, “[I]f we can’t do what we normally do, I want to think about [the staffing question].” (*Id.*) (second alteration in original.)

DaPolito later learned that “her own name and credentials had been falsely included in multiple bids for projects, despite the fact that she was not involved, or even aware of, these bids and projects.” (*Id.* ¶ 71.) On September 13, 2021, DaPolito told her supervisor and Donna Grimm that her name and credentials should not be included in bids in which she was not involved, but “[Defendants] continued to include her name and credentials on bids in which she was not involved in order to falsely promote [Defendants’] qualifications and expertise.” (*Id.*) “For example, [DaPolito] was listed as an ‘[Defendants] Project Manager’ in an RFP Response dated October 27, 2021,” despite the fact that DaPolito had never served in or been offered that position. (*Id.*) DaPolito also learned that, on at least one occasion, Defendants falsely stated on a bid that one of its employees had a Masters of Social Work and that Defendants had included a former employee in a bid as a “senior epidemiologist” after that employee had already left the company. (*Id.* ¶ 70.)

Defendants employed these various tactics to misrepresent their “qualifications, experience, and expertise in bids and contracts with local governments throughout California.” (*Id.* ¶¶ 75–76.) For example, contrary to Defendants’ representations about their expertise, the employees responsible for implementing Defendants’ programs in the San Bernardino, California school system “had very little experience in or relevant knowledge of the public health issues related to the COVID pandemic, had no background in disease surveillance and testing for infectious diseases, and no background in contact tracing or case outbreak investigations.” (*Id.* ¶ 76.) As a result, Defendants could not provide programs of the quality it promised in its bids,

including that they “used inadequate or inappropriate technologies, methods, or standards,” and that they could not, as promised, operate “consistent with public health infectious disease and epidemiological practices and principles.” (*Id.* ¶¶ 51, 80–86, 89.) DaPolito raised concerns about these misrepresentations to her supervisor, Ms. David, who in turn raised them with CEO Gabriel. (*Id.* ¶ 77.) Ms. David reported back that that CEO Gabriel “was disinterested in such concerns.” (*Id.*)

In addition to the misrepresentations they made in their bids, Defendants concealed statutory and regulatory violations that stemmed from their lack of expertise. In connection with their work under the San Bernadino Unified School District contract, Defendants “began testing students without parental consent” on at least one occasion, violated HIPAA by “sen[ding] confidential information on a student to incorrect parents/guardians” on more than one occasion, failed to get required background checks needed to be alone with students, and “incorrectly contact-traced forty (40) children.” (Doc. 53-2 ¶¶ 80–81, 88.) When DaPolito told her supervisor that this last incident was “a lawsuit waiting to happen,” Ms. David replied, “I agree and I’ve told [Defendants] that before. I just don’t know what to do anymore.” (*Id.* ¶ 81.) In a different California school district, Defendants violated California Health Department guidance by agreeing to allow staff to isolate for nine rather than ten days, “thereby creat[ing] the false impression that school district staff members had isolated for the full ten days as required.” (*Id.* ¶ 86.)

Defendants’ testing protocols also qualified them as a “laboratory” under 42 C.F.R. § 493.2, thus requiring them to have Clinical Laboratory Improvement Amendment (“CLIA”) certification. (Doc. 53-2 ¶ 84.) Yet Defendants could not obtain CLIA certification because they did not have a medical director with a medical license. (*Id.* ¶¶ 83–84.) Instead, they relied on

the CLIA certification of school districts. (*Id.* ¶ 83.) Ms. David, who oversaw employees performing COVID-19 testing on the ground, and another employee, Chelsea Schwertfeger, “both expressed concerns to [DaPolito] about the danger of losing their nursing licenses because they believed that some of [Defendants’] testing protocols required CLIA certification and/or supervision by a Medical Doctor.” (*Id.*) In September 2021, Ms. Schwertfeger increased her professional liability insurance because of these concerns. (*Id.*)

During her time working for Defendants, DaPolito “repeatedly raised concerns to her supervisor regarding the inadequate quality of services provided under [Defendants’] contracts, [Defendants’] guidance to school systems that was inconsistent with guidance provided by state agencies, and [Defendants’] misleading representations to prospective clients.” (Doc. 53-2 ¶ 173.) She protested the misleading inclusion of her own name in bids (*id.* ¶ 71), she raised concerns about Defendants’ bid practices (*id.* ¶ 77), she challenged Defendants’ decision to reduce the isolation period from ten to nine days in one school district (*id.* ¶ 87), and she warned that Defendants’ erroneous contract tracing was “a lawsuit waiting to happen.” (*Id.* ¶ 81.)

Although raising such concerns “was directly within the purview of [DaPolito’s] position,” Defendants responded to these complaints by removing DaPolito from meetings with school district officials (Doc. 53-2 ¶ 87), removing her from meetings with the California Department of Health (*id.* ¶ 175), changing the nature of her role to involve less contact with public health administrators (*id.* ¶ 178), and limiting her access to documents she needed to carry out her job. (*Id.* ¶ 179.) On one occasion, when a colleague gave DaPolito brief access to a file folder containing draft bids in order to collaborate on a project, DaPolito’s supervisor, “became upset, promptly removed [DaPolito’s] access to the bids and chastised [DaPolito’s] colleague.” (*Id.* ¶ 78.) Defendants also responded by trying to shift the focus of DaPolito’s work.

Specifically, on September 27, 2021, Ms. David asked DaPolito about whether Defendants could use a COVID-19 guidance document published by Sacramento County Public Health as Defendants' own document in a project outside that county. (*Id.* ¶ 177.) DaPolito expressed concerns and suggested that Defendants instead make their own document. (*Id.*) Later that day, Ms. David told DaPolito to “pivot” from her current responsibilities to work on a “conceptual” program evaluation for Defendants' school COVID-19 response programs. (*Id.* ¶ 178.) “Ms. David specifically asked [DaPolito] not to take into account anything that was happening on the ground with [Defendants'] actual [school] COVID response projects,” thereby “effectively remov[ing] [DaPolito] from direct dealings with [Defendants'] on-the-ground clinical teams, clients, and public health partners.” (*Id.* ¶ 178.)

In late October 2021, Ms. David presented DaPolito with a new job description “that dramatically . . . expanded her responsibilities without any increase in compensation.” (Doc. 53-2 ¶ 180.) The new job description included, among other items, “[l]ead[ing] distribution of updates related to public health best practices, changes to guidelines, and all public health innovations across projects and for the corporate teams.” (*Id.*) (alterations in original.) “This job description encompassed the functions of the entire epidemiology team at the [Vermont DOH].” (*Id.*) When DaPolito expressed concerns about any one person being able to carry out those functions, Ms. David told her, “[T]hat’s the job.” (*Id.*) Because of Defendants' prior responses to her concerns and the significant increase in job duties that this new position would entail, DaPolito chose to resign from her job on October 28, 2021. (*Id.* ¶ 181.)

Rule 12(b)(6) Standard

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff “must plead enough facts to state a claim to relief that is plausible on its face.” *United States ex rel. Chorches v. Am. Med. Response, Inc.*, 865 F.3d 71, 78 (2d Cir. 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotation marks omitted). In evaluating a Rule 12(b)(6) motion, the court must “accept[] all factual allegations as true and draw[] all reasonable inferences in favor of the plaintiff.” *Id.* (quoting *Trs. of Upstate N.Y. Eng’rs.*, 848 F.3d at 566) (internal quotation marks omitted). “Dismissal is appropriate when ‘it is clear from the face of the complaint . . . that the plaintiff’s claims are barred as a matter of law.’” *Biocad JSC v. F. Hoffman-La Roche*, 942 F.3d 88, 93 (2d Cir. 2019) (alteration in original) (quoting *Parkcentral Glob. Hub Ltd. v. Porsche Auto Holdings SE*, 763 F.3d 198, 208–09 (2d Cir. 2014)).

Rule 9(b) Standard

Plaintiffs who assert claims under the FCA must meet the heightened pleading standard of Rule 9(b), which provides that, “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constitute fraud or mistake.” Fed. R. Civ. P. 9(b). However, “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” *Id.* As with a 12(b)(6) motion, the court “assume[s] the truth of a plaintiff’s allegations” in deciding a motion to dismiss a complaint on Rule 9(b) grounds. *Chorches*, 865 F.3d at 81 (quoting *O’Brien v. Nat’l Prop. Analysts Partners*, 936 F.2d 674, 676-77 (2d Cir. 1991) (cleaned up). Additionally, while “[t]he rule demands specificity . . . it does not elevate the standard of certainty that a pleading must attain beyond the ordinary level of plausibility.” *Id.* at 88.

The purpose of Rule 9(b) “is to ensure that there is sufficient substance to the [plaintiff’s] allegations to both afford the defendant the opportunity to prepare a response and to warrant

further judicial process.” *Chorches*, 865 F.3d at 87 (citation omitted). To that end, a plaintiff proceeding under Rule 9(b) must ordinarily “(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.” *U.S. ex. rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 25 (2d Cir. 2016). However, “the adequacy of particularized allegations under Rule 9(b) is . . . case- and context-specific.” *Chorches*, 865 F.3d at 81 (quoting *Espinoza ex rel. JPMorgan Chase & Co. v. Dimon*, 797 F.3d 229, 236 (2d Cir. 2015)) (alteration in original) (internal quotation marks omitted).

“Despite the generally rigid requirement [of Rule 9(b)], allegations may be based on information and belief when facts are peculiarly within the opposing party’s knowledge.” *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990). A plaintiff pleading on information and belief must “set[] forth facts establishing specific reasons why such information . . . is peculiarly within [the opposing party’s] knowledge.” *Id.* (internal quotations omitted). That is, plaintiffs who *can* plead with particularity based on personal knowledge “*must* do so at the pleading stage.” *Chorches*, 865 F.3d at 86 (emphasis in original). Additionally, when pleading on information and belief, the complaint must “adduce specific facts supporting a strong inference of fraud.” *Wexner*, 902 F.2d at 172.

In the context of FCA *qui tam* suits, the Second Circuit has specifically cautioned that, in applying Rule 9(b)’s pleading standard, a court must be “mindful of the purposes of both Rule 9(b) and the False Claims Act.” *Chorches*, 865 F.3d at 86. As the court noted in *Chorches*, *qui tam* plaintiffs are often former employees who may have significant knowledge of corporate fraud yet lack access to information about the submission of specific fraudulent claims. *Id.* The court held that, in such cases, a plaintiff may allege the submission of fraudulent claims on

information and belief, so long as the complaint “provides ample details as to the nature of the alleged scheme, as well as to particular instances in which the scheme was, to the personal knowledge of the . . . relator, allegedly carried out.” *Id.* at 86–87. Such a standard ensures that Rule 9(b)’s purpose is fulfilled without “discourag[ing] the filing of meritorious *qui tam* suits” or “render[ing] the FCA toothless as to particularly clever fraudulent schemes.” *Id.* at 86. At the same time, “[t]hat standard must not be mistaken for license to base claims of fraud on speculation and conclusory allegations,” *id.* at 86 (quoting *Wexner*, 902 F.2d at 172) (internal quotation marks omitted), as “it is the pleading of the circumstances of the alleged fraud with a certain amount of precision that [guarantees] Rule 9(b)’s purpose” is met. *Id.* (citations omitted) (cleaned up).

Analysis

DaPolito asserts nine claims against Defendants. Seven of these counts allege that Defendants violated—and conspired to violate—the FCA and the false claims acts of the six Plaintiff States, respectively. (*See* Doc. 53-2.) DaPolito’s eighth count alleges that Defendants violated the antiretaliation provision of the FCA, 31 U.S.C. § 3730(h) and the analogous provisions of the Plaintiff States’ false claims acts.¹ (Doc. 53-2 ¶¶ 168–184.) DaPolito’s ninth count alleges wrongful discharge in contravention of Vermont common law, proceeding on a theory of constructive discharge. (*Id.* ¶¶ 185–196.) The court applies the Rule 9(b) and 12(b)(6) standards to Counts I through VII and the 12(b)(6) standard to Counts VIII and IX.

¹ The Plaintiff States’ antiretaliation provisions are codified at 32 V.S.A. § 638, Cal. Gov’t Code § 12653, Fla. Stat. Ann. § 68.088, Minn. Stat. Ann. § 15C.145, N.Y. State Fin. § 191, and Tenn. Code Ann. § 4-18-105(b).

I. Counts I, II, and VII: The FCA, California FCA, and Vermont FCA

Counts I, II, and VII of the SAC allege violations of and conspiracy to violate the federal FCA, California FCA, and Vermont FCA, respectively. On these Counts, DaPolito alleges two theories of fraud. First, she asserts that Defendants committed fraudulent inducement by knowingly and materially overstating the qualifications of their staff, the quality of their programs, their compliance with best public health practices, and the speed with which they could begin operations in order to secure contracts with state and local governmental entities. (*See* Doc. 52 at 12–15.) She submits that Defendants understood the “point systems” that governments use to evaluate grants and included misstatements in their bids targeted at earning extra points under that system. (Doc. 53-2 ¶ 66.) She further submits that Defendants won contracts in part by hiring a handful of qualified public health professions—including herself—and serially listing those individuals on bid proposals with no intention of actually assigning them to the associated projects. (Doc. 52 at 12–14.)

Second, DaPolito asserts an implied false certification theory. DaPolito notes that, to receive ESSER grants, Defendants would have been required to certify that they would comply with the provisions of all applicable acts and regulations. (Doc. 53-2 ¶ 33.) DaPolito therefore submits that, by failing to disclose their violations of HIPAA and FERPA and the fact that they were operating without CLIA certification, Defendants committed fraud actionable under the FCA when they submitted claims for payment.

Defendants seek dismissal of these claims on the basis that DaPolito has failed to plead fraud with the specificity required by Rule 9(b) and that she has failed to state a claim under Rule 12(b)(6). (*See* Doc. 33; *see* Doc. 72.) To survive the motion to dismiss, DaPolito need

only demonstrate that she has adequately pled one of her two theories of fraud. The court begins its analysis with DaPolito's fraudulent-inducement theory.

A. The SAC Adequately Pleads Counts I, II, and VII Under Rule 9(b)

Defendants contend that DaPolito has failed to meet Rule 9(b)'s particularity requirements because: (1) she has not sufficiently demonstrated that the facts she pled on information and belief were "peculiarly within [Defendants'] knowledge" such that she was entitled to plead on information and belief; (2) even if she has demonstrated that those facts were peculiarly within Defendants' knowledge, not all elements of fraud can be pled on information and belief; and (3) even if all elements of fraud can be pled on information and belief, DaPolito has not "adduce[d] specific facts supporting a strong inference of fraud." (*See generally* Doc. 72); *Wexner*, 902 F.2d at 172.

1. Facts Pled on Information and Belief were Peculiarly Within Defendants' Knowledge

In the context of Rule 9(b), a plaintiff pleading on information and belief must "set[] forth facts establishing specific reasons why such information . . . is peculiarly within [the opposing party's] knowledge." *Chorches*, 865 F.3d at 82 (internal quotations omitted). In this case, DaPolito has alleged that she lacked access to Defendants' bids, contracts, COVID-19 testing protocols and testing liaisons, and claims for payment. (Doc. 53-2 ¶¶ 78, 84–85, 104.) On that basis, she has pleaded the following on information and belief:

- Defendants' work was substantially funded by federal COVID-19 relief funds, often passed through by state and local public authorities (Doc. 53-2 ¶ 3);
- "[Defendants] also contracted directly with the federal government and federal agencies to provide COVID related services, including the

Department of Health and Human Services through the Indian Health Service” (*Id.*);

- “[Defendants’] COVID services contracts required [them] to comply with all state, local, and Federal guidelines, including [HIPAA] and [FERPA]” (*Id.* ¶ 79), and Defendants acknowledged in their contracts that they could face liability under the FCA for making fraudulent statements or related acts (*Id.* ¶ 3);
- Defendants did not report the HIPAA and FERPA violations that occurred under their contract with the San Bernadino Unified School District (*Id.* ¶ 80);
- Defendants’ contracts required them to process COVID-19 samples in a laboratory with CLIA certification “and to provide testing, testing kits and materials including swabs, transport media, specimen collection bags, and all materials necessary to store and transport samples in accordance with all laws and regulations” (*Id.* ¶ 82);
- Defendants relied on the CLIA certification of school districts rather than applying for its own certification, and Defendants were unable to obtain their own certification because they did not have a medical director with a medical license (*Id.* ¶ 83);
- “[Defendants’] testing practices in some circumstances qualified them as a ‘laboratory’ under 42 CFR § 493.2 requiring CLIA certification” (*Id.* ¶ 84);
- “[Defendants’] COVID testing liaisons were asked to make clinical evaluations beyond the scope of their qualifications” (*Id.* ¶ 85); and

- The bids that Defendants submitted included false and material representations about the qualifications of their employees and the quality of their COVID-19 services (*Id.* ¶¶ 75, 91–93, 104).

Defendants argue that DaPolito has failed to demonstrate lack of access to this information as required to permit her to plead these facts on information and belief. (Doc. 72 at 9–10.) Specifically, they challenge DaPolito’s submission that she lacked “direct access to bid proposals or contracts” and that she lacked “access to [Defendants’] testing protocols or liaisons.” (*Id.* (quoting Doc. 53-2 ¶¶ 78, 84–85).) DaPolito maintains that she did not have access to such information because it was outside the purview of her position (Doc. 53-2 ¶¶ 84–85), she did not have computer access to such information (*id.* ¶¶ 78), she worked remotely and therefore lacked physical access to files (*id.* at 59), and Defendants increasingly limited her access to both documents and people in response to her complaints about their practices. (*Id.* ¶¶ 175, 178–79.)

With respect to DaPolito’s lack of access to draft bids and contracts, Defendants argue that other allegations in the SAC belie that conclusion. Specifically, they note that she has admitted to having “brief access to a file folder containing draft bids.” (*Id.* at 9 (quoting Doc. 53-2 ¶ 77).) Defendants further point out that, despite her alleged lack of access to bids, DaPolito alleges in the SAC that “[D]efendants included similar false and material representations of its qualifications, experience, and expertise in bids and contracts with local governments throughout California,” suggesting that she must have had access to those bids. (*Id.* at 9–10 (quoting Doc. 53-2 ¶ 75).)

To support their position, Defendants cite *Pilat v. Amedisys, Inc.*, No. 23-566, 2024 WL 177990 (2d Cir. 2024) (summary order). In that case, the Second Circuit held that, as written,

the plaintiffs' complaint suggested that they "had enough access to billing information to render implausible their claim that the billing was 'peculiarly within' Amedisys's knowledge." *Id.* at *4. The plaintiffs in that case alleged neither of them was "privy to the submission of the bills or invoices to Government Funded Healthcare Programs," yet their complaint also stated the following:

Amedisys operated an independent billing department that gathered the forms submitted by therapists outlining services performed. That billing department then converted those forms to billings to the Government. While in most cases, Relator Maniscalco never saw these forms again after submitting them to the billing department, in some cases he was able to later review the forms and noticed changes that were made by the billing department that specifically increased revenue to Amedisys.

Id. The Second Circuit reasoned that, "[w]ithout further explanation," the plaintiffs' two allegations seemed to be in tension so as to undermine their claim that the billing information at issue was peculiarly within the defendant's knowledge. *Id.*

This case is distinguishable from *Pilat*. In *Pilat*, both the district court and the Second Circuit emphasized the fact that the plaintiff was able to review the forms "enough to notice certain alleged changes made by [the billing] department." 2024 WL 177990, at *4 (internal citations and quotation marks omitted). By contrast, while DaPolito admits to having brief access to draft bids, she has not alleged that she had the opportunity to review those bids. Indeed, she alleges that, after she gained access, her supervisor became angry and "promptly removed [her] access to the bids." (Doc. 53-2 ¶ 78.) Moreover, DaPolito had access only to *draft* bids, not final bids. (*Id.*) And, because DaPolito worked remotely, she could not have had physical access to the bids. (*Id.* ¶ 59.) Nothing in the SAC suggests that she ever had access to finalized bids, contracts, or information regarding Defendants' submission of claims.

Nor does DaPolito's allegation that "[Defendants] included similar false and material representations . . . in bids and contracts with local governments throughout California," compel an inference that she had access to Defendants bids and contracts. (Doc. 53-2 ¶ 75.) It is true that, out of context, this allegation appears to be based on DaPolito's personal knowledge that Defendants' final bids and contracts contained such misrepresentations. However, the section of the complaint in which this allegation appears repeatedly emphasizes that DaPolito learned about these misrepresentations through conversations with Ms. Kuruganti and other colleagues, not by directly reviewing bids. Moreover, in giving an example of one of these misrepresentations, DaPolito does not describe a particular bid or contract; rather, she explains that the staff members assigned to Defendants' project with the San Bernardino, California school system lacked public health knowledge and experience. (*Id.* ¶ 76.) Her allegation is therefore best read as an assertion that, at the same time that other employees were making DaPolito privy to Defendants' deceptive bid practices, DaPolito was personally observing that the staff placed on Defendants' California projects lacked public health qualifications or experience. DaPolito's assertion that she lacked access to Defendants' bids and contracts is therefore perfectly plausible.

Defendants also challenge DaPolito's claim that she lacked "access to [Defendants'] testing protocols or liaisons because testing was outside the ambit of her position" (Doc. 53-2 ¶¶ 84–85.) The basis for this challenge is DaPolito's allegation that, "[o]n at least one occasion, [Defendants'] COVID testing liaisons began testing students without parental consent." (Doc. 72 at 10 (quoting Doc. 53-2 ¶ 80).) Again, these two assertions are not inherently contradictory. DaPolito could have easily learned about this incident from her supervisor, from a colleague, or from her meetings with California school district officials. Given that testing was not part of DaPolito's role, that she worked remotely, and that Defendant limited her access to

documents in response to her various complaints, it is plausible that she lacked access to Defendants' testing protocols and liaisons.

As DaPolito has sufficiently alleged that Defendants' bids, contracts, and testing protocols were peculiarly within Defendants' knowledge, the court turns to Defendants' second argument.

2. Facts that Can be Pled on Information and Belief

Defendants argue that, notwithstanding the finding that Defendants' bids, contracts, and testing protocols were peculiarly within Defendants' knowledge, FCA plaintiffs may plead on information and belief only the *actual submission* of false records or claims. (Doc. 72 at 5.) They submit that plaintiffs must plead all other facts based on personal knowledge. (*Id.*) This argument is unavailing.

To state a claim under the FCA, a plaintiff must plead with particularity both the underlying fraudulent scheme and the actual submission of false claims. *Chorches*, 865 F.3d at 83 (“Fraud under the FCA has two components: the defendant must submit or cause the submission of a claim for payment to the government, and the claim for payment must itself be false or fraudulent” (cleaned up)); *see also*, *United States v. Empire Educ. Corp.*, 959 F.Supp.2d 248, 254 (N.D.N.Y. 2013) (“[Plaintiff] must not only allege with particularity the underlying schemes and other wrongful activities but also the resulting submission of fraudulent claims” (cleaned up)). The crux of Defendants' argument is that, under Second Circuit case law, a plaintiff may plead the submission of fraudulent claims, and *only* the submission of fraudulent claims, on information and belief. (Doc. 72 at 5.) Alternatively, they argue that permitting a plaintiff to plead facts on information and belief that pertain to “both the knowing creation of false records and the submission of those records undermines the gatekeeping function of Rule

9(b) and runs contrary to established precedent.” (*Id.*) That is, under Defendants’ rule, a plaintiff could plead either the creation of false records or the submission of false records on information and belief, but not both.

Defendants’ argument relies on a narrow reading of the Second Circuit’s opinion in *Chorches*, 865 F.3d 71. In that case, an Emergency Medical Technician (“EMT”) named Paul Fabula alleged that his employer, American Medical Response, Inc. (“Defendants”), routinely required that its EMTs—including Fabula—to falsify their Patient Care Reports so that certain ambulance runs would qualify for Medicare reimbursement. *Id.* at 76. Although Fabula had personal knowledge that many of Defendants’ Patient Care Reports contained false information, he did not have personal knowledge that Defendants had actually used those Patient Care Reports to submit false claims for payment to the government. *Id.* at 82. The Second Circuit held that, because Fabula had both established that such information was peculiarly within Defendants’ knowledge and made “plausible allegations creating a strong inference that specific false claims were submitted to the government,” he could plead the actual submission of fraudulent claims on information and belief in order to meet Rule 9(b)’s pleading standard. *Id.* at 86.

Nowhere does *Chorches* indicate, as Defendants suggest, that FCA plaintiffs cannot plead certain types of facts on information and belief. That question was not before the court. Moreover, the Second Circuit’s reasoning indicates that the purpose of Rule 9(b) can be protected without imposing either of the rigid rules that Defendants propose. As a preliminary matter, the *Chorches* court emphasized that, although Rule 9(b) demands specificity, “it does not elevate the standard of certainty that a pleading must attain beyond the ordinary level of plausibility.” 865 F.3d at 88. Nor, the court stated, “does it forbid pleading upon information

and belief where, as here, the circumstances justify pleading on that basis.” *Id.* This latter statement was in reference to the Second Circuit’s 1990 decision in *Wexner*, which, although it was not an FCA case, notably did *not* qualify which types of facts a plaintiff may plead in information and belief. 902 F.2d at 172.

More directly to the point, the *Chorches* opinion underscored that “[the] point of Rule 9(b) is to ensure that there is sufficient substance to the allegations to both afford the defendant the opportunity to prepare a response and to warrant further judicial process,” and that “it is the pleading of the circumstances of the alleged fraud with a certain amount of precision that serves [Rule 9(b)’s] purpose.” 865 F.3d at 87 (internal quotation marks and citations omitted) (alteration in original). This reasoning emphasizes that the fundamental inquiry is whether the plaintiff has pled enough facts on personal knowledge to create a strong inference of fraud and, therefore, fulfill the underlying purpose of Rule 9(b). That is, the plaintiff must detail, on personal knowledge, the “nature of the alleged scheme.” *Id.* Whether a plaintiff has met that standard is . . . case- and context-specific.” *Chorches*, 865 F.3d at 81 (quoting *Espinoza ex rel. JPMorgan Chase & Co. v. Dimon*, 797 F.3d 229, 236 (2d Cir. 2015)) (internal quotation marks omitted).

Where, as here, a plaintiff did not herself participate in falsifying documents, she might plead too many facts on information and belief for her claims to meet Rule 9(b)’s requirements. But the court finds no basis for holding that DaPolito cannot plead any given fact on information and belief so long as she has presented sufficient facts, in the aggregate, to create a strong inference of fraud. In this case, that will require her, like the plaintiff in *Chorches*, to make “plausible allegations creating a strong inference that specific false claims were submitted to the government.” 865 F.3d at 86. The only difference in this case is that, to create that inference,

DaPolito must go through the intermediary step of making plausible allegations that support a strong inference that other employees made false statements in their bids before Defendants submitted them. The court therefore turns to the question of whether DaPolito has alleged specific facts to create a strong inference of fraud.

3. The SAC Alleges Specific Facts that Support a Strong Inference of Fraud

As noted above, DaPolito must plead with particularity both the underlying fraudulent scheme and the actual submission of false claims. *Chorches*, 865 F.3d at 83; *see also, Empire Educ. Corp.*, 959 F.Supp.2d at 254. Although she has pled certain facts on information and belief, she has met this standard.

With respect to her fraudulent-inducement theory, DaPolito has provided detailed information about how Defendants carried out their allegedly fraudulent scheme. She has explained that Defendants hired a public relations firm to ensure that their bids appeared higher on lists for state and local government bids, that the leadership team taught and directed Defendants' bid writers to lie about employees' qualifications and the quality of Defendants' product, and that bid writers were familiar with the government's "point system" for bids and tailored their false statements to that point system. She has also explained that Defendants hired a small number of employees with public health expertise so it could serially list those employees on bids—sometimes even after they left the company—only to staff their projects with less qualified employees. And DaPolito has presented evidence that Defendants' employees admitted to routinely employing these tactics in their bid process, not just in a handful of bids.

To demonstrate the falsity of Defendants' statements, DaPolito has given several specific examples of instances in which Defendants stated that employees had qualifications that they did

not have. She has similarly provided specific examples of Defendants’ “bait-and-switch” approach to project staffing. And, with respect to the Vermont bid, DaPolito has alleged on personal knowledge that Defendants’ bid and oral presentation emphasized that its projects were “designed, guided, implemented and operated” by staff with significant experience in public health, infectious diseases, and epidemiology, that their expertise would allow them to process a high volume of cases without state support, and that they could launch their projects within weeks. (Doc. 52-3 ¶ 51-52.) To counter the veracity of that claim, DaPolito has noted that, other than a director who had experience as a nurse, none of Defendants’ directors had any health care or public health background. (*Id.* ¶ 65.) She avers that, at the very least, that fact undermines Defendants’ claim that staff with public health, infectious disease, and epidemiology experience “designed” or “guided” their projects. More notably, DaPolito has alleged notable mistakes and deficiencies in Defendants’ work on several projects, including the Vermont project, that support the inference that, more broadly, Defendants’ employees lacked meaningful public health experience, which had a tangible effect on the quality of their work.

As an example, DaPolito has alleged that Defendants failed to start processing cases under their Vermont contract within the promised few weeks’ time, that they failed to launch most of their Vermont school projects by the time school started, and that Vermont had to divert Department of Health employees to COVID-19 response to address the deficiencies in Defendants’ projects once they did become operational. (Doc. 52-3 ¶¶ 52, 56–58, 63.) DaPolito has further alleged that Defendants performed so poorly under the contract that the Vermont DOH had to request multiple corrective action plans. (*Id.* ¶ 64.) Similarly, she has alleged that the Adelanto School District in California issued new Requests for Proposals from contractors because it was dissatisfied with Defendants’ performance. Other examples of employees’ lack of

public health qualifications include that they incorrectly contact-traced 40 students, sent students' personal health information to the wrong parents on more than one occasion, administered COVID-19 tests without parental consent, and allowed staff at one California school to return to work after nine days of work in contravention of California Health Department guidance, which required ten days of isolation. (*Id.* ¶¶ 80–81, 86.)

Though DaPolito only had the opportunity to review the Vermont bid, these plausible allegations provide strong support for the inference that Defendants' bid writers in fact wrote bids that misrepresented the qualifications of Defendants' employees, the quality of Defendants' product, and which employees would work on given projects. The allegations further support the inference that Defendants actually submitted those bids. As in *Chorches*—where the Second Circuit reasoned that “it is difficult to conceive of a reason why Defendants would go through the trouble of qualifying runs as medically necessary if not to claim reimbursement for them”—it is difficult to imagine in this case why employees would admit to falsifying information in their bids or to using “bait-and-switch” staffing tactics *with the specific intention of winning contracts* if they did not actually include those falsehoods in their bids or if Defendants did not intend to submit them. 865 F.3d at 85. Moreover, DaPolito has personal knowledge that Defendants made such representations in their Vermont bid, which was written by one of the employees who admitted to lying in her bids. (Doc. 53-2 ¶ 66.) And, as a public health expert herself, DaPolito was well-positioned to assess whether Defendants' claims about the quality of their work and the qualifications of their staff were false.

The case law in the Second Circuit supports the court's conclusion. Undoubtedly, the complaint in *Chorches* included more detail and more specific examples than DaPolito's complaint. But, like the relators in *Pilat*, 2024 WL 177990, at *3, DaPolito has “identified

multiple specific instances” in which Defendants carried out their fraudulent scheme, spanning both California and Vermont. And she has done so despite the fact that she worked for Defendants for less than three months. This case is therefore distinguishable from *Doe I v. EviCore Healthcare MSI, LLC*, No. 22-530, 2023 WL 2249577, at *2 (2d Cir. 2023) (summary order), where the relators “failed to identify even a single instance” when the allegedly fraudulent scheme was carried out.

The SAC also alleges facts that create a much stronger inference of fraud than in *United States ex rel. Duhaine v. Apple Health Care Inc.*, No. 19-CV-00963, 2022 WL 3226631 (D. Conn. Aug. 10, 2022), which Defendants cite in their briefing. In that case, the plaintiff alleged that her employer was prescribing excessive physical therapy to Medicare patients so it could submit higher bills. But notably, the plaintiff in *Apple Health Care* “[did] not allege that any individual acknowledged or even hinted at a connection between the therapy prescribed and the ability to maximize Medicare billing.” *Id.* at *9. By contrast, DaPolito has alleged that specific employees admitted to lying in their bids, that these employees were familiar with the government’s “point systems” for bids, and that they lied in their bids specifically to increase their chances of winning contracts. (Doc. 53-2 ¶¶ 66–68.)

Quite simply, DaPolito has met the requirements of the *Ladas* test, which requires her to plead with particularity: (1) the statements she contends were fraudulent, (2) who made the fraudulent statements, (3) where and when the statements were made, and (4) why the statements were fraudulent. First, she contends that Defendants falsely stated that its employees had public health, infectious disease, and epidemiology expertise and falsely stated that certain employees would work on given projects. Second, she identifies the speaker generally as Defendants’ bid writers and specifically names Ms. Kuruganti, Rachel Saldivar, Donna Grimm, Sarah David, and

Erin Thames as people who made these statements. Third, she alleges, on information and belief, that these statements were made in bids that Defendants submitted between early 2021 and October 2021. And fourth, she explains that the statements were fraudulent because they falsely asserted that Defendants would staff their projects with highly qualified employees and did so with the intent and result that their bids would be accepted. *Ladas*, 824 F.3d at 25. The court is satisfied that these allegations “are . . . sufficiently robust to allay any fear of undermining Rule 9(b)’s purpose” with respect to DaPolito’s claims under the federal FCA, California FCA, and Vermont FCA. *Chorches*, 865 F.3d 87.

4. The SAC Sufficiently Pleads Materiality

To be actionable under the FCA, “a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government’s payment decision.” *Escobar*, 579 U.S. at 192. “Material” means “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). “The FCA’s materiality requirement is demanding,” *Escobar*, 579 U.S. at 178, and a plaintiff must plead materiality with particularity pursuant to Rule 9(b). *Id.* at 195 n.6. Because the court has found that DaPolito alleged facts supporting a strong inference of fraud specifically for her fraudulent-inducement theory, the court’s analysis of materiality is likewise limited to that theory.

In *Escobar*, the Supreme Court held that, for a violation to be material, a defendant need not have violated “a contractual, statutory, or regulatory provision that the Government expressly designated as a condition of payment.” 579 U.S. at 190. At the same time, “the Government’s decision to expressly identify a provision as a condition of payment is relevant, but not

automatically dispositive.” *Id.* at 194. Instead, a court must consider at least the following factors:

[P]roof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with particular statutory, regulatory, or contractual requirement. 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. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

Id. at 194–95. Additionally, the court must consider whether or not the “noncompliance is minor or insubstantial.” *Id.* at 194. In fraudulent-inducement cases, the court considers “both [the government’s] decision to award a contract and its ultimate decision to pay under that contract.” *Strock*, 982 F.3d at 62.

With respect to the Vermont contract, the first factor that *Escobar* identifies—whether the government “expressly identif[ied] a provision as a condition of payment”—weighs in favor of a finding of materiality. 579 U.S. at 194. Because DaPolito alleges fraudulent inducement, the court must consider whether Vermont expressly indicated that certain qualifications and capabilities were a condition of the contract award. *Strock*, 982 F.3d at 62. In this case, DaPolito has unique insight into materiality at the time the contract was awarded, as she participated in evaluating Defendants’ bid. As DaPolito explains, the Vermont DOH solicited contracts not because it had struggled to respond effectively to COVID-19 on its own—to the contrary, the state had been meeting this challenge quite well. (Doc. 53-2 ¶ 56.) Rather, the State solicited contracts because, to achieve its current success, it had diverted Department of Health staff, the Vermont National Guard, and other State employees from their regular duties.

(*Id.* ¶ 48.) The Vermont DOH therefore sought a contractor that could maintain and even expand on this success “without significant support” from the State. (*Id.* ¶ 53.)

When DaPolito started her review of the final three bids under consideration, she assessed them with those goals in mind. And Defendants’ bid “stood out” to her because, “in contrast to the others, [Defendants] represented that [they were] a public health firm with specialized expertise and knowledge in public health and would provide COVID services guided by state-of-the-art public health expertise and knowledge.” (*Id.* ¶ 50.) DaPolito was similarly impressed after a meeting with Sarah David and Erin Thames, both on Defendants’ leadership team, in which they represented that they could begin processing a high volume of cases on a short timeline. (*Id.* ¶ 51-52.) So, although Defendants’ bid was the most expensive, the Vermont DOH awarded the contract to Defendants, believing that it would best meet Vermont’s needs. (*Id.* ¶¶ 54–55.)

DaPolito admittedly stops short of explicitly alleging that she or other Vermont DOH officials stated that public health expertise, the ability to operate without state support, and a fast transition period were conditions of awarding the contract. Yet the SAC plainly supports such an inference. As DaPolito explains, the contract specifically contemplated that Defendants would take over duties currently carried out by state employees, not that Defendants would supplement the existing response team. (Doc. 53-2 ¶¶ 48, 55, 63–64.) Indeed, Vermont allowed many State employees to return to their pre-pandemic duties after awarding Defendants’ contract. (*Id.* ¶ 63.) Moreover, DaPolito met with members of Defendants’ leadership team to specifically discuss its public health qualifications, the speed with which it could begin processing cases, and its case capacity. (*Id.* ¶¶ 51–53.) And, when Defendants failed to successfully launch their Vermont school projects by the beginning of the school year, the Vermont DOH issued multiple requests

for corrective action plans and redeployed State employees to address the deficiencies in Defendants' work. (*Id.* ¶¶ 63–64.)

Together, these allegations support the inference that Vermont expressed that it was seeking a firm with public health expertise that could operate without state support and launch its projects before the start of the school year. The first *Escobar* factor therefore weighs in favor of a finding of materiality.

The second *Escobar* factor requires the court to consider the government's response to noncompliance both "in the mine run of cases," as well as in the "particular" case at issue. *Id.* at 195. DaPolito has not presented any evidence of how the government generally responds to the kind of noncompliance at issue here. However, as noted above, DaPolito has alleged that, in this particular case, the Vermont DOH had to redeploy its staff to address deficiencies in Defendants' performance and that it requested multiple corrective action plans from Defendants because of its poor performance. (Doc. 53-2 ¶¶ 63–64.) As for Vermont's payment decisions, DaPolito does not have personal knowledge on this matter because she started working for Defendants in August 2021 and did not work on the Vermont contract while in their employ. (*Id.*) However, DaPolito has plausibly alleged on information and belief that "Vermont continued working with [Defendants] because the State lacked capacity to evaluate and safely transition to a new COVID-response vendor in the middle of the school year amidst rising outbreaks." (*Id.* ¶ 64.) In light of that allegation, Vermont's decision not to terminate the contract is not particularly probative of lack of materiality. *United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 115 (2d Cir. 2021) ("There may be circumstances where the government's payment of a claim or failure to terminate a contract despite knowledge of certain alleged contractual violations will not be particularly probative of lack of materiality. . . . But the

plaintiff must plausibly plead facts to support . . . possible alternative explanations in the complaint”). This *Escobar* factor is therefore neutral in this case.

When assessing the final *Escobar* factor, the court must consider “whether the relator has demonstrated sufficiently widespread deficiencies in the contractor’s performance or identified misrepresentations that go the heart of the bargain, such that any regulatory, statutory, or contractual violations would likely affect the Government’s payment decision.” *Foreman*, 19 F.4th at 116 (cleaned up). In this case, accepting DaPolito’s allegations as true, Defendants’ misrepresentations and noncompliance cannot be considered “minor” or insubstantial.” To the contrary, they went to the heart of the contract’s purpose. And, as already noted, Defendants’ shortcomings were so substantial that the Vermont DOH had to redeploy its own staff to COVID-19 response and issued requests for corrective action plans. (Doc. 53-2 ¶¶ 63–64.) Thus, this final factor weighs heavily in favor of materiality. Accordingly, DaPolito has sufficiently pled materiality for her Vermont FCA claim.

Turning to DaPolito’s California FCA claim, the first *Escobar* factor weighs in favor of a finding of materiality. DaPolito has plausibly alleged on information and belief that Defendants’ contracts required them to comply with HIPAA, FERPA, and CLIA. (Doc. 53-2 ¶¶ 79, 82–84.) As DaPolito notes, state educational agencies and “other entities” receiving funds under ESSER were required to comply with all applicable acts, regulations, and insurances. (*Id.* ¶ 33.) In the context of COVID-19 response, the applicable statutes and regulations would necessarily include HIPAA, FERPA, and CLIA. While it is true that DaPolito’s fraudulent inducement theory alleges that Defendants misrepresented the qualifications of its staff, not its intention to comply with HIPAA, FERPA, and CLIA, DaPolito *has* alleged that Defendants were unable to comply

with those statutes and regulations specifically because its staff did not have the qualifications that Defendants claimed. (*Id.* ¶¶ 80–85.)

DaPolito has also made allegations regarding the California government’s response to Defendants’ noncompliance that weigh in favor of a finding of materiality. Specifically, she has alleged that the Adelanto School District ended its contract with Defendants and issued two new Requests for Proposals because it was dissatisfied with Defendants’ performance. Because DaPolito has not alleged any other facts regarding California’s response to Defendants’ noncompliance, this factor weighs only slightly in her favor.

The final *Escobar* factor also weighs in favor of a finding of materiality. As with the Vermont contract, the qualifications of Defendants’ staff and their ability to comply with relevant public health guidelines directly implicated their capacity to perform as promised under their contracts. DaPolito has alleged that, because the employees Defendants staffed on their projects lacked the experience that they claimed, Defendants incorrectly contact-traced students, reported students’ personal health information to the wrong parents, tested children without parental consent, and allowed one school district to reduce its staff isolation period from ten to nine days in direct contravention of California Health Department guidance. (Doc. 53-2 ¶¶ 80–81, 86.) She has also alleged that, due to their lack of medically qualified staff, Defendants’ testing staff had to operate without supervision by a medical doctor, as required by CLIA. (*Id.* ¶ 83.)

Finally, though it is not one of the factors outlined in *Escobar*, the Defendants’ own belief that its misrepresentations would be material to their ability to win contracts weighs in

favor of a finding of materiality.² DaPolito has alleged that Defendants strategically misrepresented the qualifications of its employees, as well as which employees would staff its projects, to increase their chances of securing contracts. She alleges that, when one contract specifically asked “whether the proposed Project Lead was experienced with Smartsheets software, a collaboration and work management software often used in large projects,” Defendants intentionally and falsely stated that the Project Lead did have that experience. (Doc. 53-2 ¶ 72.) And she alleges that Ms. Kuruganti was instructed on the government’s “point systems” so she could better tailor her falsehoods. (*Id.* ¶ 66.) Further, she alleges that Ms. Kuruganti struggled to draft a bid for a client with whom Defendants had already worked because Ms. Kuruganti could not lie in the bid. (*Id.*) That is, Ms. Kuruganti was unsure if she would be able to write a successful bid without making her usual misrepresentations. Lastly, Defendants refused to address DaPolito’s concerns about their “bait-and-switch” staffing tactics, including DaPolito’s request that they cease listing her on bids, which suggests that Defendants’ believed such tactics meaningfully increased their bid success rate. In sum, DaPolito has successfully alleged materiality for her California FCA claim.

On DaPolito’s federal FCA claim, the first *Escobar* factor weighs in her favor for the same reason that it weighs in her favor for her California FCA claim: the federal government required its grantees to comply with applicable acts, regulations, and insurances, including HIPAA, FERPA, and CLIA, and, in misrepresenting their staff’s qualifications, Defendants misrepresented their ability to comply with those acts and regulations. (Doc. 53-2 ¶¶ 33, 79, 82–84.) Further, with respect to the federal government’s post-contract payment decisions, she has

² As noted above, *Escobar* did not limit courts’ discretion to consider factors other than those outlined in that case. 579 U.S. at 194–95 (stating that “proof of materiality can include, but is not necessarily limited to” the factors articulated by the Court in that case).

alleged that the federal government required its grantees to comply with its Uniform Guidance on federal awards. (*Id.* ¶¶ 31-35, 37). Relevant here, the Uniform Guidance requires that fixed amount contracts be based on honest cost assessments and that:

“[t]he non-Federal entity . . . certify in writing to the Federal awarding agency or passthrough entity at the end of the Federal award that the project or activity was completed or the level of effort was expended. If the required level of activity or effort was not carried out, the amount of the Federal award must be adjusted.”

(*Id.* ¶ 35); *see* 2 CFR Part 200.201(b)(3). That is, the federal government explicitly conditioned payment on Defendants’ ability to carry out the required level of activity or effort. And DaPolito has alleged that Defendants could not and did not carry out their projects as promised because they lacked the requisite expertise.

By contrast, DaPolito has failed to allege any facts that speak to the federal government’s typical response to the type of misrepresentations or noncompliance at issue in this case. Nor has she alleged any facts regarding its specific response to Defendants’ misrepresentations and noncompliance. However, DaPolito has alleged that the federal government was unaware of Defendants’ misrepresentations and noncompliance until she instigated this lawsuit. (Doc. 53-2 ¶ 105.) Nevertheless, the second *Escobar* factor weighs against materiality because DaPolito has failed to provide evidence of the government’s typical response in this type of case.

For the same reasons that the third *Escobar* factor weighs in favor of a finding of materiality for DaPolito’s California FCA claim, it weighs in favor of a finding of materiality on her federal FCA claim. The federal government made COVID-19 relief funds available with the expectation that grantees would implement meaningful COVID-19 response measures. As Defendants’ qualifications and expertise were central to its ability to implement such measures, its misrepresentations cannot be regarded as “minor” or “insignificant.”

While DaPolito's inability to make any plausible allegations with respect to the second *Escobar* factor weakens the strength of her assertion of materiality, she has nevertheless satisfied the *Escobar* standard. As in *Strock*, where the Second Circuit found that the government had plausibly alleged materiality where the first and third *Escobar* factors weighed "heavily" in favor of materiality, so too has DaPolito made a strong showing on the first and third factors. 982 F.3d at 65. In this case, that is sufficient to make her allegations of materiality plausible.

In summary, DaPolito has pled fraud with particularity as required by Rule 9(b).

B. The Complaint States a Claim on Counts I, II, and VII

In addition to their Rule 9(b) challenge, Defendants argue that DaPolito has failed to state a claim on Counts I, II, and VII. The court's analysis under Rule 9(b) has already demonstrated that DaPolito has plausibly alleged that Defendants submitted materially false claims to the government. However, "[t]o find FCA liability, it is not enough for the Defendants to have presented a materially false claim; they must have done so 'knowingly'" *Strock*, 982 F.3d at 66. Additionally, the court has yet to address DaPolito's allegation that Defendants conspired to violate the federal, California, and Vermont FCAs.

1. Knowingly

Under the FCA, "knowingly" means that a person "has actual knowledge of the information," "acts in deliberate ignorance of the truth or falsity of the information," or "acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(1)(A)(i)–(iii). "In other words, the [plaintiff] must allege that the Defendants 'knowingly violated a requirement that the defendant[s] know[] is material to the Government's payment decision.'" *Strock*, 982 F.3d at 66 (quoting *Escobar*, 579 U.S. at 178 (alterations in original)). Proving knowledge "require[s] no proof of specific intent to defraud," 31 U.S.C. § 3729(b)(1)(B), and it

need not be pled with particularity. *Strock*, 982 F.3d at 66 (“Rule 9(b) permits knowledge to be averred generally” (citations and internal quotation marks omitted)). However, a plaintiff “must plead the factual basis which gives rise to a strong inference of fraudulent intent.” *Id.* “The requisite strong inference of fraud may be established either (a) by alleging facts that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.” *Id.* (quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290-91 (2d Cir. 2006)) (internal quotation marks omitted).

Here, DaPolito has alleged facts that constitute strong evidence of conscious misbehavior. As discussed throughout this opinion, DaPolito has alleged that Defendants lied and misrepresented their qualifications repeatedly and with the specific intention of securing contracts. She has alleged that Ms. Kuruganti admitted that she was familiar with the government’s “point systems” for bids, that she regularly lied in bids to gain extra points under that system, and that the Director of Bid and Capture taught Ms. Kuruganti how to write bids. (Doc. 53-2 ¶¶ 66–68.) DaPolito has alleged that some of Defendants’ misrepresentations were blatantly false, such as the instance when they listed an employee as the “senior epidemiologist” for a project after she had resigned her post. (*Id.* ¶ 70.) She has alleged that, when she reported her concerns about the “bait-and-switch” tactic to her supervisor, who in turn reported it to the CEO, the CEO refused to cease the practice. (*Id.* ¶ 77.)

DaPolito has further alleged that members of Defendant’s leadership team expressed concern when they could not use the “bait-and-switch” tactic on one bid, and the Director of Bid and Capture explicitly instructed Ms. Kuruganti to lie about an employee having experience with Smartsheets in response to an inquiry in a contract about Defendants’ Smartsheets capabilities. (*Id.* ¶¶ 69–72.) And she has alleged on personal knowledge that, during the Vermont bid

process, she met with Sarah David and Erin Thames, two members of Defendants' leadership team, to specifically discuss their expertise in public health, infectious diseases, and epidemiology. (*Id.* ¶ 51.) Finally, she has alleged that Defendant responded to DaPolito's numerous complaints about its practices by changing the nature of her position, limiting her access to documents, and preventing her from attending meetings. (*Id.* ¶¶ 87, 175, 179.) Together, these allegations are sufficient to support an inference that Defendants knew they were lying about material facts concerning the conditions under which Defendants obtained and fulfilled their state contracts.

2. Conspiracy

The FCA imposes liability on anyone who “conspires to commit a violation” of one or more of the above provisions. 31 U.S.C. § 3729(a)(1)(C). The California FCA and Vermont FCA likewise impose liability for conspiracy. Cal. Gov't Code § 12651(a)(3); 32 V.S.A. § 631(a)(12). Defendants argue that DaPolito has failed to state a claim for conspiracy under each statute because she runs afoul of the “intra-corporate conspiracy” doctrine, which provides that a corporation cannot conspire with its own employees or agents, as all are considered a single entity. (Doc. 33 at 16.) The intra-corporate conspiracy doctrine also provides, at least in the context of the Sherman Act, that “the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise,” as they “have a complete unity of interest.” *Copperweld Corp. v. Indep. Tub Corp.*, 467 U.S. 752, 771 (1984). Defendants reason that the complaint fails to state a claim for conspiracy because it treats the three defendants as a single entity, refers to Defendants collectively as “AM,” and “does not distinguish between actions of any of its claimed defendants, instead ascribing all actions to ‘AM.’” *Id.* DaPolito contends that, although she refers to Defendants collectively as “AM,” the

intra-corporate conspiracy doctrine does not bar her claim because there is “[no] allegation in the Complaint from which the Court could conclude that Defendants have ‘a complete unity of interest’ or can be viewed as that of a single enterprise.” (Doc. 52 at 24–25) (quoting *Copperweld Corp*, 467 U.S. at 753).

The court agrees with DaPolito that dismissal of her conspiracy claims would be premature at this stage in the litigation. Without discovery, the corporate relationship among the three Defendants remains unclear, as DaPolito is not privy to their corporate structure. Thus, as in *Turkmen v. Hasty*, 789 F.3d 218, 264 (2d Cir. 2015), “factual questions about how disparate or distinct Defendants’ functions were . . . preclude[s] [the court] from deciding as a matter of law that Defendants resemble the single policymaking body of a corporation.”

In sum, DaPolito has met each of the pleading requirements for Counts I, II, and VII. Accordingly, the court denies Defendant’s motion to dismiss with respect to these claims.³

II. Counts III through VI: The Florida FCA, Minnesota FCA, New York FCA, and Tennessee FCA

Counts III through VI of the complaint allege violations of the Florida FCA, Minnesota FCA, New York FCA, Tennessee FCAs, respectively. (*See* Doc. 53-2.) As with her claims under the federal, California, and Vermont FCAs, she proceeds under theories of fraudulent inducement and implied false certification. Defendants argue that DaPolito has failed to state a claim under Rule 12(b)(6).

The court agrees with Defendants that DaPolito’s complaint falls short on Counts III through VI. DaPolito has not alleged any facts regarding Defendants’ bids or contracts in the relevant states. Rather, she asks the court to infer that Defendants violated those states’ FCAs

³ As noted above, the court need not address DaPolito’s second theory of fraud because she has adequately pled fraud on her first theory.

based on her allegations that some of Defendants’ employees admitted to or implied that they regularly lied in their bids. But DaPolito has offered no evidence that those employees worked on bids for Florida, Minnesota, New York, or Tennessee. Nor has she even alleged that Defendants had contracts in those states. She does not allege who, when, or where any fraudulent statements were made, nor does she identify the fraudulent statements. Such “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements” are inadequate. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The court will therefore dismiss Counts III through VI.

III. Count VIII: Illegal Retaliation

Count VIII of DaPolito’s complaint alleges that Defendants violated the FCA’s anti-retaliation provision, 31 U.S.C. § 3730(h), and the anti-retaliation provisions of the FCAs of each of the Plaintiff States. The federal FCA’s anti-retaliation provision provides in relevant part:

Any employee . . . shall be entitled to all relief necessary to make that employee . . . whole, if that employee . . . is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee . . . in furtherance of an action under this section or other efforts to stop 1 or more violations of [the FCA].

31 U.S.C. § 3730(h)(1). Thus, to succeed on a claim of illegal retaliation, a plaintiff must show that: “(1) [s]he engaged in activity protected under the statute, (2) the employer was aware of such activity, and (3) the employer took adverse action against [her] because [s]he engaged in the protected activity.” *Chorches*, 865 F.3d at 95. “The particularity requirement of Rule 9(b) does not apply to retaliation claims under the FCA.” *Id.*

Here, DaPolito argues that she engaged in a protected activity by repeatedly expressing her concerns about Defendants’ bid practices and the qualifications of their staff. (Doc. 53-2 ¶¶ 170–180.) She alleges that Defendant was aware of that activity because she directly voiced

her concerns to her supervisor, who in turn relayed at least some of those concerns to Defendants' CEO. (*Id.*) And she alleges that Defendant took adverse action against her by repeatedly changing the nature of her role, limiting her access to the people and documents she needed to complete her work, and ultimately presenting her "with a new job description that dramatically and unreasonably expanded her responsibilities without any increase in compensation," leading to DaPolito's constructive discharge. (*Id.* at 172, 175, 177–80.)

Defendant contends that DaPolito has failed to plausibly allege each of these factors and that she therefore fails to state a claim under Rule 12(b)(6).

A. The Complaint Sufficiently Pleads that DaPolito Engaged in a Protected Activity

A plaintiff can demonstrate that she engaged in "efforts to stop 1 or more violations of the FCA" by alleging that she complained internally to supervisors about suspected fraudulent practices or by alleging that she refused to engage in such practices. *See Chorches*, 865 F.3d at 97–98. Here, DaPolito argues that her repeated complaints about Defendants' practices constitute protected activities under the FCA. Defendants contend that these complaints cannot constitute protected actions because they "fail[] to show any recognition by [DaPolito] at the time that such issues were FCA violations," nor do they "show an effort by [DaPolito] to stop any perceived FCA violations." (Doc. 72 at 12.)

To demonstrate that her complaints were protected activities, DaPolito did not, as Defendants suggest, need to expressly allege fraud or a violation of the FCA. Rather, "it is enough to show that a plaintiff's investigation reasonably could have led to an FCA action." *Dhaliwal v. Salix Pharms., Ltd.*, 752 F. App'x 99, 100 (2d Cir. 2019) (summary order) (cleaned up). On this point, *Pilat*, 2024 WL 177990, is instructive. In that case, the Second Circuit held that the plaintiff had plausibly alleged that he engaged in a protected activity where he "voiced

concerns about ‘unethical’ behavior, as opposed to ‘illegal behavior.’” *Id.* at *2. The court reasoned that, by “repeatedly express[ing] his concerns to his supervisor” about scheduling more patients than was safe, the plaintiff was “voicing concerns about this fraud,” even though the plaintiff himself did not frame his complaints in that language. *Id.* And the court explicitly rejected the district court’s determination that the allegations did not constitute protected activities “because they were about the quality of patient care, not fraud.” *Id.* Similarly, district courts in this circuit have held that a plaintiff need not even be aware that her investigation could lead to an FCA claim to show she has engaged in a protected activity. *See United States ex rel. Mooney v. Americare, Inc.*, No. 06-CV-1806, 2013 WL 1346022, at *9 (E.D.N.Y. Apr. 3, 2013).

The same reasoning applies here. DaPolito repeatedly expressed concerns about the falsehoods that Defendants included in their bids, their “bait-and-switch” tactics, and the impacts of staffing projects with underqualified employees. She may not have expressed those concerns as allegations of fraud, but she was raising concerns about fraud nonetheless. The complaint therefore sufficiently alleges that DaPolito engaged in a protected activity.

B. The Complaint Sufficiently Pleads that Defendants were Aware of DaPolito’s Protected Activities

Defendants’ argument that DaPolito has failed to plead they were aware of her protected activities mirrors their argument that she did not engage in a protected activity. Specifically, they contend that DaPolito fails on this point because she “provides no facts to suggest that any of her stated concerns provided [Defendants] with any notice that [DaPolito] was raising FCA issues” and because the complaint does not show that “[Defendants were] aware that [DaPolito’s] actions were meant to prevent FCA violations.” (Doc. 72 at 12.) Both of these arguments are unavailing, though for different reasons.

Beginning with Defendants' second argument, it would defy reason if a plaintiff could engage in a protected activity without framing her concerns as allegations of fraud, as *Pilat* suggests, or without even knowing her investigation could lead to an FCA claim, as district courts in this circuit have held, but was simultaneously required to show that the Defendants knew she was trying to prevent FCA violations. *See Mooney*, 2013 WL 1346022, at *9.

To Defendant's first point, it is true that Defendants must have known DaPolito was "engaged in a protected activity," not just that they knew about her complaints. *See Lawrence v. Int'l Bus. Mach. Corp.*, No. 12-cv-8433, 2017 WL 3278917, at *7 (S.D.N.Y. Aug. 1, 2017). Here, DaPolito has made that showing. Defendants were clearly aware of her complaints, as she repeatedly raised her concerns with her supervisor—a member of Defendant's leadership team—who in turn relayed at least one of those complaints to Defendants' CEO. DaPolito has also alleged that at least some of her complaints fell outside the scope of her normal job duties, such as her complaints about Defendants' bid practices, and courts have long reasoned that raising concerns outside the purview of one's position can support an inference that the defendant knew the plaintiff was engaging in a protected activity. *See United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1261 (D.C. Cir. 2004) (collecting cases); *see also Beckles-Canton v. Lutheran Soc. Serv. of N.Y., Inc.*, No. 20 Civ. 4379, 2021 WL 3077460, at *6–7. Further, DaPolito has alleged that, as federal grant recipients, Defendants had to certify in writing that failure to comply with all aspects of the agreement could result in liability under the FCA. (Doc. 53-2 ¶ 31.) These allegations plausibly support the inference that Defendants knew that DaPolito was challenging illegal conduct and also knew that this conducted violated the FCA. DaPolito has therefore sufficiently pled that Defendants knew she was engaged in a protected activity.

C. Adverse Employment Action

To succeed on the final prong of the FCA retaliation analysis, DaPolito must demonstrate that she suffered an adverse action “because [s]he engaged in the protected activity.” *Chorches*, 865 F.3d at 95. This final element therefore “requires proof of both adverse action and causation.” *Parris v. N.Y.C. Hous. Auth.*, No. 18 Civ. 8299, 2024 WL 1363582, *10 (S.D.N.Y. Mar. 29, 2024) (internal citations and quotation marks omitted). Here, Defendants appear not to challenge DaPolito’s allegation that she suffered an adverse employment action, arguing only that she cannot establish causation. (Doc. 72 at 12–13.) The court therefore assumes that each of the allegedly adverse actions were in fact adverse.⁴ As for causation, Defendants argue that, because DaPolito alleged that Defendants also changed the roles of other employees over a short period of time and that DaPolito’s job changed “at least once before [she] ever complained about any of [Defendant’s] practices,” she cannot establish causation. (*Id.*)

The Second Circuit has not yet addressed “whether plaintiffs alleging FCA retaliation claims must show but-for causation or only that the protected activity was a motivating factor in the company’s decision to take adverse employment action.” *United States ex rel. Fabula v. Am. Med. Response, Inc.*, No. 12-CV-921, 2019 WL 4414951, *21 (D. Conn. 2019). However, “[o]ther courts have recently adopted a but-for causation requirement in FCA retaliation cases based on the Supreme Court’s interpretation of the phrase ‘because of’ . . . in both Title VII and

⁴ Because the Second Circuit has yet to define “adverse action” in the context of FCA retaliation claims, courts in this Circuit have applied the approach of other Circuits and adopted the material adversity standard used in the Title VII context. *See Parris*, 2024 WL 1363582, at *10 (collecting cases). To the extent that Defendants alleges that it did not engage in any adverse employment actions, the court concludes that DaPolito has plausibly alleged that limiting her access to the people and documents she needed to do her work and substantially expanding her job responsibilities were adverse employment actions, as such actions “well might have dissuaded a reasonable worker” from raising concerns about fraud. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal quotation marks and citations omitted).

the ADEA to require but-for causation.” *Id.* (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 2517, 2529 (2013) (interpreting “because of” in Title VII to require but-for causation)) (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 179 (2009) (interpreting “because of” in the ADEA to require but-for causation)).

Generally, plaintiffs may demonstrate a causal connection between an adverse employment action and a protected activity either “(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant.” *Littlejohn v. City of N.Y.*, 795 F.3d 297, 319 (2d Cir. 2015) (internal quotation marks and citations omitted). “Because discriminatory intent is difficult to prove, and because employers control most of the cards,” “[b]urden-shifting frameworks have long provided a mechanism for getting at intent in employment discrimination cases.” *Murray v. UBS Sec., LLC*, 601 U.S. 23, 35–36 (2024) (cleaned up) (stating that the Sarbanes-Oxley Act uses a burden shifting test akin to that used in the Title VII context). Because demonstrating discriminatory intent is particularly difficult at the pleading stage, the Second Circuit has held that, at the motion-to-dismiss stage in Title VII cases, a plaintiff has “a *minimal* burden of showing facts suggesting an inference of discriminatory motivation.” *Littlejohn*, 795 F.3d at 311 (emphasis in original). This same reasoning applies to retaliation under the FCA, so the court applies the *Littlejohn* standard here.

Though DaPolito has provided no direct evidence of causation, she has sufficiently pleaded circumstantial facts that would establish causation. Like the plaintiff in *Littlejohn*, she has alleged that she repeatedly objected to Defendants’ practices and suffered adverse

employment actions in close temporal proximity to those complaints. For instance, she alleges that, when she raised concerns about Defendants' choice to reduce the isolation period for staff in one school district from ten to nine days, Defendants "removed [her] from meetings with school district officials," which affected her ability to do her work. (Doc. 53-2 ¶ 87.) And, the same day that DaPolito resisted her supervisor's suggestion that Defendants should present a Sacramento County Public Health guidance document as their own, Ms. David instructed her to "pivot" from her current responsibilities to work on a different project that involved no contact with clients or public health partners. (*Id.* ¶ 178.) Finally, DaPolito alleges that, in late October, Ms. David presented DaPolito with a new job description that "encompassed the functions of the entire epidemiology team at the [Vermont DOH]" without offering an increase in compensation. (*Id.* ¶ 180.) Given that DaPolito only worked for Defendants for three months, this last adverse employment action occurred in relatively close temporal proximity to DaPolito's many complaints. Together, these allegations are sufficient to plausibly support an indirect inference of causation.

Because DaPolito has sufficiently pled each element of illegal retaliation, the court denies Defendant's motion for summary judgement on this issue.

IV. Count IX: Wrongful Termination

Count IX of the SAC claims that Defendants wrongfully terminated her position by way of constructive discharge in violation of Vermont law. (Doc. 53-2 ¶¶ 185–196.) To succeed on this claim, DaPolito must demonstrate both that her resignation constituted constructive discharge and that her termination was "wrongful." *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 10, 175 VT 413, 834 A.2d 37. DaPolito argues that Defendants "created intolerable working conditions that would lead a reasonable person to resign by placing her in

the impossible position of performing the functions of an entire team, without a commensurate increase in compensation and without access to the documents and individuals needed to perform the role.” (Doc. 53-2 ¶ 190.) This termination, she contends, was wrongful because it violated Vermont public policy, “which encourages honesty in business dealings, transactions, and representations.” (*Id.* ¶ 193.) Defendants counter that DaPolito has failed to adequately allege that her working conditions were intolerable, that Defendants changed her job duties with the intent to induce her resignation, or that the change in her job was related to her complaints of wrongdoing. (Doc. 72 at 13.)

A. Constructive Discharge

To demonstrate constructive discharge under Vermont law, a plaintiff must demonstrate that her employer imposed “intolerable working conditions with a deliberate purpose to provoke a quit.” *Clayton E. Butler v. Town of Westmore*, No. 24-AP-115, 2024 WL 4751747, at *3 (Vt. 2024) (mem.) (quoting *In re Bushey*, 142 Vt. 290, 297, 455 A.2d 818 (1982)) (internal quotation marks omitted). In the *Butler* decision, the Vermont Supreme Court reiterated the reasoning it originally articulated in *In re Bushey*:

A difficult employment environment can generate voluntary resignation. Involuntariness, in this sense, must be the product of purposeful actions [by the employer] directed at obtaining the resignation. Moreover, the cases which have found involuntary discharge to have occurred consistently reveal sustained discriminatory acts by management or at the least, a serious infringement of a fundamental right

Id. (quoting *in re Bushey*, 142 Vt. at 298) (alteration in original). The plaintiff must demonstrate that a reasonable person in her position would have felt compelled to resign. *Id.* The standard is a “high” one, *Adams v. Festival Fun Parks, LLC*, 560 F. App’x 47, 49 (2d Cir. 2014) (summary order), and a plaintiff cannot meet it by showing that the working conditions were merely “difficult or unpleasant.” *Stetson v. NYNEX Serv. Co.*, 995 F.2d 355, 360 (2d Cir. 1993). Rather,

a plaintiff must show that a reasonable employee would “have felt at the time that [they] had no alternative but to resign.” *Id.* at 361. That is, an employee must demonstrate that she “was denied the opportunity to exercise a free choice.” *Butler v. Town of Westmore*, 2024 WL 2942588, at *8 (Vt. Super. Ct. Mar. 20, 2024). When a constructive discharge claim “stems from an alleged hostile work environment,” the constructive discharge standard is higher than that for hostile work environment claims. *Fincher v. Depository Trust and Clearing Corp.*, 604 F.3d 712, 712 (2d Cir. 2010).

DaPolito’s allegations fall short of this standard. Although DaPolito alleges that her new role “encompassed the functions of the entire epidemiology team at [the Vermont] DOH,” she alleges that Defendants simultaneously “excluded [her] by limiting her access to the documents and individuals needed to carry out her job.” (Doc. 53-2 ¶¶ 180, 187.) In other words, her allegations do not support the inference that Defendants would have expected or required her to work unreasonable hours to complete the responsibilities of her new role, nor does she allege that they made any statements to that effect. Additionally, even assuming that the new role would have substantially increased her workload, DaPolito’s allegations, without more, do not support the inference that a reasonable employee would have felt she had no choice but to resign. *See, e.g., Barbagallo v. General Motors Corp.*, 1996 WL 19004, at *4–5 (S.D.N.Y. Jan. 17, 1996) (allegation that employer increased plaintiff’s workload so substantially that it interfered with his health did not support claim for constructive discharge.) As unpleasant as such conditions might have been, dissatisfaction with one’s assignments or compensation rarely permit an inference that a reasonable employee would have felt compelled to resign. *See Stetson*, 995 F.2d at 361; *see also, Petrosino v. Bell Atlantic*, 385 F.3d 210, 231 (2d Cir. 2004) (“the law is clear that a

constructive discharge claim cannot be proved by demonstrating that an employee is dissatisfied with the work assignments she receives within her job title”).

Similarly, Defendants’ decision to exclude DaPolito from meetings and deny her access to documents does not support a finding that DaPolito’s resignation was involuntary. As noted above, the standard for constructive discharge is higher than that for hostile work environment, yet courts in the Second Circuit have concluded that facts similar to those alleged by DaPolito did not support a hostile work environment claim. *See, e.g. Fleming v. MaxMara USA*, 371 F.App’x 115, 119 (2d Cir. 2010) (concluding that no hostile work environment existed even though “defendants wrongly excluded [the plaintiff] from meetings, excessively criticized her work, refused to answer work-related questions, arbitrarily imposed duties outside of her responsibilities, threw books, and sent rude emails to her”) (summary order); *see also Davis-Molinia v. Port Auth. of N.Y. & N.J.*, No. 08-CV-7584, 2011 WL 4000997, at *11 (S.D.N.Y., Aug. 19, 2011) (concluding that “diminished [job] responsibilities,” “exclu[sion] from staff meetings,” deliberate “avoid[ance],” “yell[ing] and talk[ing] down to,” and an increased workload of menial tasks was not enough to show that defendants’ conduct was sufficiently severe or pervasive), *aff’d*, 488 F.App’x 530 (2d Cir. 2012). Contrast this to the plaintiff in *Serricchio v. Wachovia Secs. LLC*, 658 F.3d 169, 187 (2d Cir. 2011), who successfully demonstrated wrongful discharge where he was offered reinstatement “in an inferior position than he had had before . . . on which he could not have supported his family,” and where his supervisor testified that “he knew that [the plaintiff] would be unable to support himself.” (citations and internal quotations marks omitted).

As DaPolito has failed to show that she was constructively discharged, the court grants the Defendants’ motion to dismiss on this count.

Conclusion

Defendants' Second Motion to Dismiss (Doc. 72) is GRANTED in part with respect to Counts III through VI and Count IX. The motion is otherwise DENIED. Defendant's First Motion to Dismiss (Doc. 33) is MOOT in part with respect to Counts III through VI because of the court's rulings on those same issues in the Second Motion to Dismiss. The motion is otherwise DENIED.

Dated at Burlington, in the District of Vermont, this 3rd day of December, 2024.

/s/ Geoffrey W. Crawford
District Judge
United States District Court