UNITED STATES DISTRICT COURT
IN THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA, Plaintiff, ex rel. MARIO HUMBERTO FIGUEROA and ELMER ARNULFO FIGUEROA, Plaintiffs-Relators, v. COVAN WORLD-WIDE MOVING, INC and COLEMAN AMERICAN MOVING SERVICES, INC. Defendants.	)	C.A. No. 3:12-cv-01144-JFA

Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment

Defendants Covan World-Wide Moving, Inc. and Coleman American Moving Services, Inc. (collectively, "Defendants") moved for summary judgment to all claims brought by Plaintiff, the United States of America, and Plaintiff-Relators, Mario Humberto Figueroa and Elmer Arnulfo Figueroa (collectively, "Plaintiffs") other than those military household goods shipments handled by Defendants Augusta, Georgia warehouse. See Dkt. No. 209. For the reasons set forth below, the motion should be denied.

INTRODUCTION

This action was filed under seal by Plaintiffs-Relators Mario Humberto Figueroa and Elmer Arnulfo Figueroa (the Figueroas), two warehouse employees working at Defendants' Augusta, Georgia warehouse facility. As Elmer Figueroa explained in late 2009, he became

aware of weight bumping—the industry term for adding weight to household good (HHG) shipments in excess of the actual weight in order to increase the billable fee chargeable to the federal government. See E. Figueroa Dep. 141:18-142:15, Nov. 21, 2014.[1] Like his father before him, Elmer Figueroa testified he personally witnessed three different Augusta managers falsifying weight tickets and that he saw one of them falsify over a hundred weight tickets during a two-year period. Id. at 105:3-10, 113:17-114:19.

The Figueroas also discovered facts that strongly suggested Defendants' fraud reached far beyond the Augusta warehouse. For example, Ken Driggers, the regional manager responsible for seven warehouses, including Augusta, testified that he asked company CEO Lacy Brakefield to send Mickey Pope to Augusta to conduct training on company procedures such as weighing shipments and filling out weight certificates. Driggers Dep. 43:6-47:6, Aug. 29, 2014 (explaining he had made similar requests for other locations).[2] Pope, a retired former manager of 42 years, now works "off and on now as a contractor" reporting to corporate as a "troubleshooter." Id. at 19:15-23, 43:6-23; see also M. Pope Dep. 8:24-9:5, March 19, 2014.[3]

When asked about Pope's training mission in Augusta, Elmer Figueroa testified he witnessed Pope, destroying weight tickets. E. Figueroa Dep. 112:2-5. Pope also told Elmer that "he would prefer to weigh the shipments in-house, this way he [Pope] can manipulate the weights." Id. at 113:17-114. At his deposition, Pope repeatedly invoked his constitutional right not to incriminate himself and refused to answer questions about whether he or anyone else at the company falsified documents. Pope Dep. 9:6-18:25.

* * *

[1] Excerpts attached as **Exhibit A**.
[2] Excerpts attached as **Exhibit B.**
[3] Excerpts attached as **Exhibit C**.

Here, Defendants argue there is no evidence from which a jury might conclude these corporations acted knowingly when they repeatedly billed the United States government for the cost of HHG shipments that exceeded the actual weight. Defendants chide that:

> The small army of government investigators, federal prosecutors, and Relator counsel, on whom are bestowed authority to go anywhere and compel anyone to produce documents and talk to them, have been unable to find one witness or one e-mail suggesting the existence of a "company-wide scheme" by these Defendants.

Defs' Mem., 3, Dkt. No. 209-1. Defendants are mistaken and the relief they seek here relies on a misconstruction of what constitutes a culpable mental state under the federal False Claims Act (FCA), 31 U.S.C. §§ 3729, et seq.

Defendants also overlook testimony from witnesses from across the nation who told the truth and refused to be intimidated by visits from Defendants' private investigators and grueling cross-examination by their one-time employer now seeking to discredit the very people on which they once relied. Defendants also ignore devastating evidence that when their shipments are reweighed they consistently weigh less than the services for which federal taxpayers foot the bill. Based on the weight measurements taken in this case, forensic accountant and fraud examiner Roy Strickland opined that he believed *all* of Defendants non-temporary storage (NTS) shipments should be reweighed. Strickland Dep. 127:11-129:8; 167:13-16, Jan. 12, 2015.[4]

Before considering these points in detail below, it is telling that the gravamen of Defendants' theory here is that Plaintiffs' investigation has failed to uncover a smoking-gun email or a *mea culpa* by a corporate insider. This argument has no merit as it asks the Court to ascribe significance to a closely-held family company's ability to enforce a conspiracy of silence among a closely knit group of well-compensated executives and managers. As one former

[4] Excerpts attached as **Exhibit D.**

manager who witnessed fraud explained, "Weight bumping was not something we talked about." S. Dannen Dep.: 51:10-51:11, Dec. 19, 2014.[5]

When Defendants finally produced internal communications—documents first requested almost three years ago—three issues of considerable weight on this action became clear. First, since *at least* 2009, high-ranking company executives had actual knowledge weight bumping was occurring. For example, on September 16, 2009, Defendants former general manager in Miami, Florida, Jack Irby, emailed vice president Paul Hansen to demand that Hansen stop contacting an office employee Mr. Irby claimed Hansen had asked for sex. An irate Mr. Irby threatened:

> If you talk or contact her ever again I will call your wife in Nashville and tell her of the prostitutes you payed for that I saw and I will call the military bases in Huntsville and Montgomery and give the [sic] all the names of the milatry [sic] members that I saw you make false weight tickets for around the time of 06-06-07 which is around 40 members that will testify to in court too.

Email from J. Irby to P. Hansen, Sept. 16, 2009.[6] CEO Lacy Brakefield is copied on this email.

Second, even though weight bumping was already occurring, corporate executives designed and implemented a strategy that institutionalize the practice by tying employee compensation at all levels of the company to shipment weight and adopting a system of rewards and punishment that used the stated goal of achieving greater shipment density as a proxy for increasing weight. The density program placed intense top-down pressure on managers to in turn pressure packers and drivers to increase shipment densities even though, in many instances, the only way for employees to meet these goals was to engage in fraud. The combination of the per-hundred-weight pay program and the density program gave individuals tasked with weighing

[5] Excerpts attached as **Exhibit E.**
[6] Attached as **Exhibit F**. Defendants' produced this email on November 25, 2014.

shipments and creating billing records as simple choice: bump weights and reap financial rewards or bill shipments accurately and suffer punishment.

Third, Defendants and their corporate employees have repeatedly abused the discovery process, told half-truths, and suffered from serious lapses in memory in order to conceal this fraud. Another internal communication from May 2010 alerted corporate executives of fraud in Petersburg, Virginia and illustrates precisely how Defendants well-documented discovery abuse[7] has prejudiced Plaintiffs ability to confront recalcitrant witnesses with internal writings to refresh purportedly unreliable memories.

In May 2010, Brakefield received an email from an assistant manager named Charles Burch attempting to alert him to fraud by an employee identified as "DJ":

> Today i was falsely accused of being racist by another employ And Jon Came down and put me in suspension without pay . And I think this is going on because I caught DJ stealing money from the company last year. at least 5 to 7 thousand dollars. And i feel like nothing was done about it He is also bumping weights again adding long carry that do not exists and stairs carry to on all military shipment that he can do it to. I have no issues with Covan itself But I feel like it is wrong what they are doing to me because i know to much on DJ. You can contact me back threw email @ [email address redacted] I think I have done a good job as the asst manager and i have not received a raise the entire time i have been employed at covan. I thought i was doing a good job looking out for the company when i found all of this out an went to Jon about this matter. But if you want to you can contact me at [phone number redacted]

Email from C. Burch to L. Brakefield, May 3, 2010 (all errors original).[8] Brakefield forwarded this email to former human resources executive Kristen Baker.

[7] Plaintiffs have sought the Court's assistance in obtaining disclosure on three separate occasions (Dkt. Nos. 65, 124 & 156) and urged the Court to hold an evidentiary hearing on whether Defendants have deliberately abused the attorney-client and work product privileges to hide evidence and improperly instruct fact witnesses. Dkt. No. 143 (filed Sept. 22, 2014).

[8] Attached as **Exhibit G**. Defendants' produced this email on November 25, 2014.

Ten days later, Baker emailed Brakefield a preview of her recommendation concerning DJ which corroborates Mr. Burch's allegations by suggesting remedial action in a draft email to "Jon" (presumably regional vice president Jon Coon):

> DJ and I met this morning to recap some ideas that need to be tightened up. My recommendations are as follows and DJ has agreed to start today:
>
> **Weights/Weight Tickets-**
>
> - DJ will keep a spreadsheet log of all shipments that do not have weight tickets.
> - DJ will record the shipper's name, amount of weight, and reason weight ticket has to be recreated.
>
> […]
>
> - In the event that a density/weight has to be increased, DJ will record in log. Otherwise, no changes will be made to density/weights.
>
> […]
>
> **Long Carries/Extras**
>
> - Shippers will sign any and all extras performed.
> - DJ will contact base if shipper does not sign to get approval.
> - DJ will not approve for payment without signatures or base approval.
>
> **Weight Masters**
>
> **Need to be current by Tuesday.**

Email K. Baker to L. Brakefield, May 13, 2010.[9] In other words, Baker urged the company to stand by its employee notwithstanding that she found evidence DJ was engaged in fraud. Particularly curious is Baker's admission that weight bumping had occurred and would occur again in the future: "In the event that a density/weight has to be increased, DJ will record in log. Otherwise, no changes will be made to density/weights."

[9] Attached as **Exhibit H**. Defendants' produced this email on November 25, 2014.

When Plaintiffs deposed Baker she was evasive and short on specifics. See generally, K. Baker Dep., Dec. 10, 2014.[10] For example, when pressed as to whether she had ever participated in any audits concerning shipment weights, Baker contradicted herself:

Mr. Harpootlian:	Have you ever conducted or been part of any audits of weights at any facilities?
Ms. Baker:	No audits.
Mr. Harpootlian:	When you say no audits, as if there was something other than an audit.
Ms. Baker:	*I have not participated in any audits of weight tickets.*
Mr. Harpootlian:	By distinguishing -- by using the word not participated in any audits, have you participated in any sort of evaluation, examination, discussion, anything other than an audit of weights?
Ms. Baker:	Yes.
Mr. Harpootlian:	Can you explain to me what you did?
Ms. Baker:	*I looked at weight tickets in one of the facilities*.

Id. at 33:1-21 (emphasis added). Pressed further to explain, Baker suffered from memory loss but was able to recall being sent to Petersburg, Virginia in 2010 or 2011 to investigate allegations by an assistant manager that the manager "was asking him to increase the weights of the shipments." Id. 33:22-34:36:10 (but failing to recall names of any participants). Baker reported her findings to the manager, the regional vice president, and Brakefield. Id. at 36:11-37:6. While she could not recall whether she generated a report of her findings, Baker testified it was her practice to documents her finding. Id. at 37:7-10. To date, Defendants have failed to produce any such document.

[10] Attached as **Exhibit I**.

Also troubling is Baker's apparent willingness to perjure herself in response to questions designed to ascertain whether this former corporate manager's spotty memory might be a ploy to protect the company's CEO. See, e.g., id. at 45:4-18 (claiming she spoke with Brakefield about this action but he said there was no merit to it). Baker resigned her position with the company six months ago to "pursue other opportunities." Id. at 46:14-20. These opportunities have not been forthcoming, as the recently divorced mother has not worked since leaving her position as a high-ranking company executive. See id. at 46:21-47:22, 71:22-72:4. On three different occasions counsel sought to highlight Baker's likely bias on account of a romantic relationship with Brakefield.[11] Each time Baker vehemently denied the allegations. Id. at 45:19-46:7 ("Absolutely not."), 70:13-71:7 ("Absolutely not.") & 71:20-21 ("Absolutely not.").

Internal company communications suggest otherwise as Baker and Brakefield's emails about the Petersburg investigation soon took a personal turn during what appears to be Baker's flight back to Defendants' Alabama headquarters. Baker offered the non sequitur (presumably responding to a different email), "Well I have managed to run one off.. I am going to end up alone[.]" Ex. H. "No you will not[,]" Brakefield responded, prompting Baker to explain she "fell asleep hard" and "yelled" when the plane's wheels dropped (from Ex. H):

Baker:	People looked.
Brakefield:	What did you yell
Baker:	Oh ..I love u lacy
Brakefield:	That makes me happy
Baker:	That is what I yelled.. I was having a really good dream

[11] Brakefield is the son-in-law of company patriarch James Coleman. Brakefield's brothers-in-law Jeff and John Coleman are also top company executives. John Coleman was present for Baker's deposition. Brakefield was not.

Defendants' general refusal to disclose has paid considerable dividends in this action by denying Plaintiffs an opportunity to interview and depose individuals like Mr. Irby and Mr. Burch—individuals with direct personal knowledge of fraud. Defendants' belated production of internal records has also precluded counsel from confronting corporate executives with their own internal writings.[12] Defendants now push this strategy further by seeking summary judgment as to a company-wide scheme. Respectfully, this see no evil, hear no evil, speak no evil defense has run its course. This motion should be denied and a jury should have an opportunity to evaluate the credibility of Defendants' claims.

I. The record evidences a nationwide weight-bumping scheme with knowing participants at all levels of the Defendant corporations.

The record here paints a damning picture of a closely-held family corporation knowingly engaged in fraud from coast-to-coast and actively working to adopt new programs to pressure low-level employees to maximize profits by any means necessary. The result of this overt pressure was a widely known but little discussed practice of weight bumping used to increase billings to the United States Government. Notable, there is *no dispute* that weight bumping (sometimes called "weight inflation") increases company revenue.[13]

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[12] During the October 20, 2014 hearing, the Court learned (as Plaintiffs had just days earlier), that Defendants had failed to produce some 125,000 email communications responsive to a 2012 civil investigative demand and numerous discovery requests. The two-page Baker/Brakefield email discussed above was one of 12,039 documents consisting of more than 50,000 pages of produced on November 25, 2014. Even though Plaintiffs immediately acted to load these documents into a review platform, that process alone took almost a week, meaning Plaintiffs first opportunity to review 50,000 documents was December 1, thus leaving just over one week to attempt to locate critical document in advance of Baker's December 10 deposition.

[13] K. Driggers Dep. 66:19-66:20 ("The more weight would increase, yeah, would increase the revenue."); Paula West Dep. 25:9-13, May 30, 2014, ("It is the weight of the shipment. That's how you bill off.") (excerpts attached as **Exhibit J**); A. Coleman Dep. 35:9-14 ("Q. So that weight determines how much you're going to get paid? A. Correct."), Aug. 27, 2014 (excerpts attached as **Exhibit K**).

Witnesses from across the country have come forward to corroborate the Figueroas testimony and offer their own first-hand accounts of the various tricks and ploys Defendants used to bump weights. This section briefly explains the nature of Defendants' business (§ I(A)) before considering evidence of corporate programs designed to incentivize weight bumping (§ I(B)), evidence that low-level employees succumb to this pressure and bumped weights (§ I(C)), evidence that Defendants managers also participated in this fraud (§ I(D)), and that corporate executives and regional managers had actual notice of this fraud (§ I(E)). Finally, Plaintiffs' explain why reweigh data collected in this action evidences knowledge (§ I(F)).

A. Military move services and Defendants' business practices.

Defendants here are HHG moving companies and subsidiaries of Coleman World Group, a single corporate enterprise based in Midland City, Alabama and dominated by *one* family—the Coleman family—which owns, operates, and profits from the scheme alleged here. Defendants and their sibling corporate entities, use the same corporate infrastructure and take direction from the same executive leadership, James (Jim) Coleman, his son Jeff, and his son-in-law Lacy Brakefield. See A. Coleman Dep. 9:7-12, 51:22-54:8. For example, Fayetteville manager Paula West testified that she reports to regional vice president Gary Adams who oversees warehouse locations in Fayetteville, New Bern, and Jacksonville, North Carolina and Hopkinsville, Kentucky. West Dep. 12:20-25, May 30, 2014. Adams reports to senior vice president Jimbo Loftin at Defendants' corporate office. Id. at 13:1-7.

Generally, the named Defendants here are transportation service providers (TSPs) and third-party origin agents that provide shipping and storage services for military HHG shipments using a network of 30 warehouses in 11 states to provide domestic shipments, international shipments, and non-temporary storage (NTS). See Defs.' Mem., 3-4. A TSP is responsible for all

aspects of a HHG shipment, including billing the Government, while an agent is responsible for packing and unpacking goods at origin and destination. Defendants' corporate headquarters used a highly centralized dispatch system to book Defendants as TSPs for HHG shipments and coordinate local agent services, and schedule transportation via truck, ship or some combination.

At the warehouse level, managers like West dispatch pack teams that pack and weigh shipments or deliver shipments to their final destination. See West Dep. 14:4-15:14, 16:8-16 & 24:4-26:7. Typically, when a shipment's destination is the continental United States (CONUS), commonly referred to as a "Code 1" shipment, Defendants load the shipment "loose" into a line-haul tractor trailer. Id. at 20:23-21:5. Before the shipment is loaded, the empty truck must be weighed using a truck scale to obtain a weight ticket with a "light weight." See id. at 18:18-19:15. Once the shipment is loaded, the driver returns to the truck scale to obtain a "heavy weight" and the company calculates the actual shipment weight as the difference between the two weight tickets.

Some HHG shipments are crated, meaning the servicemember's belongings are placed into large wooden crates for shipping. With some exceptions, crated shipments are sent to destinations outside the continental United States (OCONUS). See West Dep. 21:6-13, 34:5-14. Unlike shipments traveling "loose" in a truck, crated shipments are packed into crates at residence and sealed using protective government mandated seals. Id. at 36:4-16. The packed and sealed crates are returned to Defendants' warehouses and weighed by warehouse employees using a platform scale. Id. at 37:15-21. To obtain the actual shipment weight, Defendants are supposed to weigh the empty crates prior to packing and subtract this "tare" weight from the gross weight. See id. at 35:10-36:1. The shipment is supposed to be weighed by a licensed weigh master and the weight recorded on a weight certificate. Id. at. 37:25-38:5-10.

Shipments less than 500 miles are typically handled by company drivers that work out of a warehouse service center, while shipments in excess of 500 miles are shipped by line-haul drivers dispatched out of the corporate office or by the carrier. Id. at 28:3-29:1. The corporate office's dispatch function is automated such that Defendants' warehouses need not affirmatively contact corporate. See id. at 29:2-13. When a shipment is destined for overseas, the corporate office similarly arranges a freight shipment. Id. at 40:3-43:9. International cargo shipments are also rated using a government-approved tariff regime that considers a shipments weight base calculated using the shipment's per-hundred-weight and the destination. Id. Defendants contract with affiliated and third-party freight companies to truck shipments to a port, load them onto cargo ships, and transport them overseas. See id. at 41:19-42:15. As with long-haul drivers, freight contracting and dispatch is centralized at Defendants' corporate headquarters. Id. at 42:23-43:25.

Once a shipment is weighed, the weigh tickets, whether they be truck-scale or warehouse tickets, are given to billing clerks who "rate" and bill the shipment using a software program that calculates the billable fee chargeable to the government for a particular shipment. See id. at 22:10-24:11 & 38:11-14. The billable amount is calculated using government-approved tariffs that, generally speaking, are a function of two variables: weight and distance from origin to destination. See id. at 26:1-23. In all instances, Defendants' billing clerks generate invoices and government bills of lading (GBLs) that follow the shipment along with the inventories and weight tickets. Id. at 39:18-24. When the shipment is delivered at residence, the shipper signs a delivery receipt and the documents are scanned and mailed back to Defendants' corporate headquarters for billing. Id. at 32:1-33:11.

Sometimes a shipment arrives at destination prior to the servicemember establishing a new residence. See id. at 30:1-6. Typically, when this occurs, the servicemember's belongings are placed in storage-in-transit (SIT) at one of Defendants' warehouse—another service billable by shipment weight. However, when servicemembers need long term storage, like during a deployment, their HHG are placed in NTS. Both SIT and NTS are billed using a per-hundred-weight rate-filing system. West Dep. 49:20-22. As an example, in 2013 Defendants' Fayetteville NTS warehouse stored between 85,000 and 90,000 pounds of HHG. Id. at 49:1-7.

B. Defendants' executive leadership used density and production pay programs to pressure employees and incentivize fraud.

Beginning in 2009, corporate leaders implemented a series of programs designed to pressure managers and employees to increase shipment weights under the auspices of improving efficiency and reducing insurance claims caused by breakage. These policies took two forms, a per-hundred-weight pay regime and strict shipment density goals that rewarded employees for increasing density and punished their failure to meet these goals.

The origin of this push appears to be February 2009, when company consultant Jack Thompson emailed Jim Coleman (and copied Brakefield and Jeff Coleman) to urge Coleman to adopt an intense density training program as a vehicle to reduce the cost of ocean freight and make the company a preferred origin agent to freight forwarders looking for efficient packers. See Email thread from M. Tatum, Feb. 5, 2009.[14] Thompson explained that his plan called for *daily* written reminders to pack crews of the need to increase density. See id. Brakefield forwarded Thompson's recommendation to the company's vice presidents and regional managers and on February 5, 2009, one of those executives, Mike Tatum, replied to the company's top leadership and explained how he was using density data on weekly conference calls with

warehouse managers: "Peer pressure can help tremendously also." Id. Tatum echoed Thompson, explaining it was necessary for "Managers to promote and keep the crews 'painfully' aware of subpar [density] performance." Id. Tatum also urged the company to adopt "a reasonable 'density bonus' or *alternatively a tiered performance based compensation* to the crews[.]" Id. (emphasis added).

Later that month, Thompson notified the company vice presidents that Brakefield authorized the density program and certain reporting functions would be programed into the company's service center software to allow managers to "drill down to the individual density of an employee." Email from J. Thompson, Feb. 20, 2009.[15] Thomspon explained how the density report would work:

> The shippers name, date, weight, cube, density pieces and O/F (overflows used)) will be automatically entered when the shipment is registered. The density is given to each crew member on a job as their density for that job. The crew names are taken from the payroll program for the Pay for Pack program. Then the incentive loss or gain column is filled in based on the contract for pay for pack. Those contracts as you know has [sic] the break point between loss or gain at 5.5 lbs for cube which will become the minimum acceptable density at any terminal once the overall program has been in operation for a reasonable time.

Id. One month later, the density program was in effect companywide and Thompson emailed warehouse managers instructions to run density reports on individual employees explaining the results [redacted] J. Thompson email, March 16, 2009.[16] Thompson explains, [redacted]

[14] Attached as **Exhibit L**. Defendants produced this email on November 7, 2014.
[15] Attached as **Exhibit M**. Defendants produced this email on November 18, 2014.
[16] Attached as **Exhibit N**. Defendants produced this email on November 7, 2014. This exhibit has been designated confidential and is being submitted for *in camera* review.

[redacted] He warned, [redacted] Id. Thompson explains further, [redacted] Id.

Notably, while the company extols the virtues of improving density to reduce breakage and insurance claims, internal communications about the program are focused on increasing profits. Defendants' corporate managers were forced to concede as much during their depositions when pressed as to their claim that employees were trained to increase density. For example, Ken Driggers was unable to point to any specific training materials and conceded pack teams were, in fact, paid based on weight, not density:

Mr. Kenney:	I understand. I'm just -- so the company pays crews incentive pay based on weight; isn't that right?
Mr. Driggers:	Correct.
Mr. Kenney:	So, that creates a built in incentive to the people packing the shipment to get as much weight as possible?
Mr. Driggers:	To get better density.
Mr. Kenney:	Well, you told me that the incentive was based on weight?
Mr. Driggers:	But they are not trained that way.
Mr. Kenney:	Well, I understand that. But that's the company's incentive. The money that you put in your workers' pocket is based on how heavy the shipment is?
Mr. Driggers:	Correct.

Driggers Dep. 69:19-70:9; see also id. at 70:10-72:3 (same).

This testimony is consistent with internal company records and manager testimony explaining employees throughout the company whose compensation is directly tied to shipment weights. For example, Paula West explained that pack teams are paid for discrete tasks like packing, loading, carrying, etc. by multiplying a set rate for these tasks by the per-hundred-weight of the shipment. West Dep. 69:4-73:15. Were this incentive to cheat not already strong, West explained that sometimes employees tasked with this back-breaking labor are "barely making minimum wage[,]" but that more weight equaled more pay. Id. at 73:16-74:3. Moreover, as the shipment weight exceeds certain set thresholds, so does the multiplier rate. Id. at 79:13-81:15. According to internal company records, Defendants completed their transition to incentive pay sometime in 2010.

Defendants also implemented a manager bonus program that tied bonuses to weight-oriented goals like increasing profits, exceeding budget, and increasing density—thus providing a pecuniary incentive to pressure subordinates to get weights up and, if necessary, take matters into their own hands. See generally, J. Farish Dep. 75:10-76:23, Dec. 19, 2014 (describing a bonus program and explaining, "Density has been, from time to time, has been a part of it.").[17]

Mr. Kenney:	Some of these components have to do with -- strike that. Some of these incentives are directly tied to increasing revenue, correct?
Ms. Farish:	Yes.
Mr. Kenney:	Okay. One of the components that impacts revenue is weight, correct?
Ms. Farish:	Yes.

Id. at 80:13-80:20. The density component to the manager bonus program rewards and punishes by subtracted bonuses earned elsewhere for density scores below and acceptable level. Id. at

86:23-87:17. These bonuses constitute a sizable portion of a manager's potential income. Ms. Farish explained that a general manager's starting salary ranged from $40,000 to $60,000 annually but that the manager bonus program allowed a manager to earn up to $25,000 more each year. See id. at 92:4 to 92:24. As former Augusta general manager Ron Niemi explained, "I was salary from day 1 and made a shitload of money. As GM they pay for the right to murder you and that's not exaggerating." Email thread with J. Powell, May 4, 2012.[18]

C. Low-level employees outside of Augusta were also pressured to engage in fraud to keep their jobs and increase their pay.

The combination of carrots and sticks employed by Defendants' corporate programs has been a highly effective means to pressure low-ranking employees like drivers, packers, and loaders to engage in fraud or, at least, turn the other way. The efficacy of this policy is heightened by Defendants' reliance on a workforce comprised of unsophisticated and economically vulnerable individuals that could be marginalized, intimidated, or discredited when they no longer further Defendants' purpose. As one former manager explained, the industry "attracted a lot of people that wanted to stay what I call under the radar, didn't like -- had some kind of personal problem." Dannen Dep. 21:19-23.

For example, numerous employees were engaged in intentional wrongdoing in Woodbridge, Virginia, one of Defendants' largest warehouse facilities. Sandra Benitez, who drove a truck for Defendants for over a decade, will testify that "[b]umping weights on military shipments was a common practice[.]" S. Benitez Aff. ¶¶ 3-4, Jan. 19, 2015.[19] Ms. Benitez explains that weight bumping could be accomplished in a number of ways, including:

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[17] Excerpts attached as **Exhibit O**.
[18] Attached as **Exhibit P**.
[19] Attached as **Exhibit Q**.

> placing big guys on the scales, leaving employees inside the truck, placing the tire from a forklift on the scale, and simply making up a weight, imputing the false weight on the computer and printing out the weight certificate.

Id. ¶ 3. Ms. Benitez knows weight bumping occurred "because I actually witnessed it being done and have done it myself in order to maintain my job."[20]

The former assistant general manager in Fayetteville, Jose Alverez, will testify that after this lawsuit became public, Fayetteville drivers "start[ed] talking and opening up about how Mrs. West alter the weights by teaching them how to do it 'more weight, more money[.]'" J. Alverez Aff. ¶ 8, Jan. 20, 2015.[21] Mr. Alverez explains that "drivers routinely bumped weights on military shipments in order to get into the next pay bracket." Id. ¶ 4 (explaining the bracket increases). Plaintiffs attempted to depose one of these former Fayetteville truck drivers, Franklin Harris, but Mr. Harris repeatedly invoked his Fifth Amendment rights in lieu of answering questions about fraud in Fayetteville. See F. Harris Dep. 5:17-10:3, June 5, 2014.[22] Mr. Alverez was fired after refusing to sign a statement that claimed Defendants were obtaining accurate weights on military shipments. J. Alverez Aff. ¶¶ 6-7.

This strategy was on display in this litigation where, even though he testified through an interpreter—"I didn't speak English. I don't speak English[,]"—Defendants spent *hours* attempting to attack Mario Figueroa's credibility by suggesting he should have learned English, he lied about whether he actually spoke English, or that he was not a naturalized American citizen. See M. Figueroa Dep. 20:19-23:15, 26:7-33:3, 45:19-46:2 & 55:23-57:5.[23] All this line of inquiry established was that Defendants' knew Mr. Figueroa did not speak English, that he is a

[20] Ms. Benitez was told by another employee that this action was the reason "Covan employees were told to stop getting gas after picking up military shipments." Id. ¶ 6.
[21] Attached as **Exhibit R**.
[22] Excerpts attached as **Exhibit S**.
[23] Excerpts attached as **Exhibit T**.

Guatemalan immigrant, and that Defendants never had a problem with either fact until he reported their wrongdoing to the federal Government. But more to the point here, Mr. Figueroa's testimony provided a vivid example of how Defendants' managers relied on the vulnerability of low-level employees to maintain their complicity. When asked about his knowledge of a written corporate policy, Mr. Figueroa referred to his earlier testimony about an Augusta manager making a "shh" sign to him:

> Mr. Wyrsch: And you don't know of any company, Coleman American policy, written or otherwise, that told you that you ought to bump up weights, right?
>
> […]
>
> Mr. Figueroa: The only thing I know is that one time I told Preston that that was wrong. And what he said is just the company, the office, and he made those signs because he knew I didn't speak English.

Id. at 106:15-107:2; see also id. at 46:25-47:12 ("And when he saw me he said, shh, and then he smiled.").

When Defendants' employees get caught weight bumping by third-party carriers and a chargeback is issued, they seek to claw back a portion of the ill-gotten gains previously paid through the incentive compensation program. This practice engendered considerable hostility in one employee who asked Defendants' to take into account two other shipments they successfully billed in excess of actual charges as an offset to the chargeback funds. In an email thread including Andy Coleman, Jeff Coleman, and Farish, Scott Buksa pled the case of a driver subjected to a chargeback notice on a reweighed shipment. See Email thread to J. Farish, May, 5, 2009.[24] Referring to Andy Coleman, Buksa argued:

[24] Attached as **Exhibit U**. This exhibit has been marked as confidential and will be submitted *in camera*.

[redacted]

Id. (emphasis added). Buksa then details how he billed two shipments in excess of the actual costs before concluding, [redacted] Id.

D. Managers outside of Augusta actively participated in the weight bumping scheme.

Plaintiffs have also uncovered evidence that Defendants' managers outside Augusta are engaged in fraud. Defendants' Fayetteville facility, located near Fort Bragg, North Carolina, is illustrative. Approximately 75-80 percent of that facilities' business is military HHG moves. See West Dep. 16:22-17:4. After Plaintiffs moved the Court for leave to inspect this facility (see Dkt.No. 57), counsel was contacted by a federal contractor working at the Ft. Bragg personal property office, explaining that in April 2014, Defendants' Fayetteville manager, Paula West, contacted her seeking to repay monies paid by the Government on six (6) NTS shipments billed in excess of their actual weight since as far back as July 2010 at a loss of $8,000 to the federal fisc. See Dkt. Nos. 86-1 & 86-2.

Plaintiffs immediately deposed West about these shipments. Initially West testified that, while she was familiar with the term weight bumping, she was not aware of *any* weight bumping in the company and she had no personal knowledge of any such activity. West Dep. 124:4-125:7.

After confronted with the original and reweigh weight tickets for the six shipments for which she tried to repay the government, West conceded these six shipments might be examples of weight bumping. Id. at 172:1-173:23. West's testimony also alerted Plaintiffs and the Court to the fact that these six shipments were identified as part of a "purge" of the Fayetteville warehouse that may have revealed additional shipments billed in excess of their actual weight. Id. at 170:15-24; 175:12-21. After considerable procedural wrangling, the Court ordered Defendants to disclose the facts underlying these surreptitious reweighs in Fayetteville and elsewhere. See Dkt. No. 169. This disclosure revealed that according to Defendants' own internal Fayetteville reweigh, 10 of the 24 shipments weighed were being billed in excess of their actual weight—some by as much as 1,300; 1,800; 1,900; and even 2,700 pounds. See Strickland Supp. Report, Ex. 6.[25]

As to the individuals responsible for this fraud, Michelle Swenson, a former Fayetteville office manager from 2010 to 2012, will testify that West was one of the individuals personally responsible. See M. Swenson Affidavit, Jan. 29, 2015.[26] For example, West fabricated weight tickets when the Fayetteville facility was overwhelmed. Id. ¶ 4. As to line-haul shipments, that scheme was more involved since, in Fayetteville, Defendants do not own their own truck scale, but instead use a public scale owned by Paterson Mayflower. See West Dep. 19:16-21. In order to bump truck weights, West kept copies of old truck weight tickets from the public scale and "[s]ometimes when either the light truck weight, the heavy truck weight, or both were not available, Paula West would simply fabricate the weights by using one of her old carbon copies of weight tickets." Swenson Aff. ¶ 3. West's former assistant manager, corroborates these allegations, explaining that he personally witnessed West conducting a conversation with

[25] Attached as **Exhibit V**.
[26] Attached as **Exhibit W**.

regional vice president Gary Adams during which West used whiteout to alter weight tickets. J. Alverez Aff. ¶ 3.

E. Corporate executives and regional managers had actual knowledge of widespread weight bumping and intentional wrongdoing.

Beyond Brakefield and Baker, other regional vice presidents and corporate executives had actual knowledge of weight bumping inside the company and took no action. This knowledge dates back as far as June 2009 when Farish circulated a memoranda titled "Updates for week ending 6/6/09" and supporting documentation to company president Jim Coleman, and co-CEOs Jeff Coleman and Brakefield. See J. Farish Email, June 7, 2009.[27] This memorandum (presumably authored by Farish) reports:

> I have been made aware of a driver, Brian Lloyd, that has inflated at least one weight ticket substantially. Because of suspicion, Andy Coleman had a shipment reweighed in Tampa with Robert Read, Tampa manager, as a witness. I understand that Andy has put the driver on a probationary period and a write-up of the incident will be placed in his file. The driver was recruited by Savannah so Andy has made George Parrow aware of the problem. Maggie Nickoley (presently Assistant Controller & previously Billing Director) has mentioned some suspicious weights to dispatch previously on this driver. Lloyd has been driving for us since October 2008. We intend to audit his shipments.

Id. Notably, Defendants have never produced any such audit in response to Plaintiffs' document requests.

The memorandum also reports *another* incident of weight bumping by a driver named Scott Delano brought to Defendants' attention by a third-party company's audit. See id. The auditing company became suspicious after it discovered that the location where the weight tickets were purportedly created did not have scales, an allegation corroborated by Defendants and reported in the Farish memo. Id. Also telling Farish's plea for greater internal controls:

[27] Attached as **Exhibit X**.

> We must realize that companies are more diligent in auditing than they have been in the past. This can be attributed both to good business practices as well as a method of paying the very least possible (especially during these difficult economic conditions).
>
> It is my recommendation that we, too, look at more intense auditing as a good business practice during these depressed market conditions. This will assist us in paying the least amount as well as reviewing for internal controls. We want to maintain integrity among our customers and avoid any type of unfavorable comments due to incorrect weights.

Id. While the memorandum urges remedial and prospective action, the record is void of any evidence such steps were taken and Defendants' document production never disclosed the existence of any internal weight audits aside from those conduction during this lawsuit.

Top executives also received reports of complaints from United States service members arising from fraud. For example, in November 2011, company vice president Jon Coon emailed Brakefield about a military VIP shipment and an insurance claim for more than $20,000. See Email thread with J. Farish, Nov. 2, 2011.[28] Weight bumping was one of many problems with the shipment which "was **witness reweighed at destination by a military inspector** and is **light by 1980 lbs** after all 22 crates were delivered." Id. (emphasis original). Notably, Coon's primary concern in this correspondence is *not* the fraud, but which warehouse service center would be allocated financial responsibility for the insurance claim.

Eight months later, Jim Coleman, Jeff Coleman, Brakefield, and other executives received a detailed complaint from a service member moving from Woodbridge, Virginia to Kapolei, Hawaii, complaining of "the worst move he's had in nearly 30 years of military service!" See Email from S. Neal, July 27, 2012.[29] Included among allegations of theft and damages, the shipper was "also angry over the moving company reporting a net weight of nearly

[28] Attached as **Exhibit Y**.
[29] Attached as **Exhibit Z**.

3000 lbs greater than what he had when he's arrived at his duty station. This, without any new acquisitions to explain the weight increase." Id. "Destination services confirmed the error in weight via a re-weight." Id.

Corporate executives and regional managers also received notice of wrongdoing from employees with knowledge of fraud occurring across the country. For example, Scot Dannen, Defendants' former general manager in Colorado Springs, Colorado, testified he reported fraud to his superiors but was ignored by the corporate supervisors whose assistance he sought. Mr. Dannen was hired by Paul Hansen to run the Colorado Springs facility in July 2006 and worked for Defendants until early 2012. See Dannen Dep.: 8:18-9:19, 17:24-18:9. Mr. Dannen explained he tried to run an honest operation and never improperly bumped weights or submitted weights he knew to be bumped. Id. at 25:13-23. But Mr. Dannen, who was new to the moving business, did observe subordinate employees engaged in fraud and slowly become aware of systemic weight bumping problem.[30]

Initially Mr. Dannen observed his operations manager bumping weights to achieve density goals. Id. at 26:3-27:7 (confirming what he previously told federal agents). These weights were used to bill the federal government. Id. Mr. Dannen reported this information to his manager, Paul Hansen. Id. at 27:20-22. On another occasion, one of Defendants' line-haul drivers confessed to a common weight bumping scheme, explaining he was going to "fuel up" after he picked up the shipment but *before* he obtained a heavy weigh ticket. Id. at 45:1-23. Mr. Dannen also recounted a "weight crate" scheme so brazen that multiple truck drivers openly

[30] While not central to this action, it is nonetheless noteworthy that even though Mr. Dannen was the general manager responsible for Defendants' entire Colorado Springs operation, the company misrepresented another employee to be the general manager of one of Defendants' affiliate entities (also operating at that location) to create an appearance of compliance with Defense Personal Property Program regulations. Id. at 20:7-21:9, 51:19-52:20.

sought his assistance wrongly assuming his practice would be the same as the assistance they received from managers elsewhere.

> Mr. Dannen: And then -- and then, of course, there were -- there were incidents of -- of -- for the first two years, I would have Covan drivers come in and say, Where's your – where's your weight crate?"
>
> And -- and, of course, I -- I was new enough in the system, I had no idea what they were talking about. And I -- I finally got into -- finally took the time to go out and confront a driver and say, Okay. What is a weight crate? What are you looking for? What do you have to have?
>
> He said, Well, I have a shelf that I pull out, and I want an extra heavy crate to put on there before I go weigh.
>
> Ms. Hoerster: Did he tell you that other managers were doing that?
>
> Mr. Dannen: Yes.
>
> Ms. Hoerster: And did he tell you who?
>
> Mr. Dannen: No, he did not. He looked at me like I was from outer Mars and said, Well, you know, everybody is doing it. Why aren't you?
>
> I said, Well, maybe. I'm new. I don't know, but I ain't doing it.

Id. at 45:24-46:20. Mr. Dannen explained that, as described to him, the "weight crate" was supposed to be filled with "some heavy stuff" like bricks. Id. at 56:18-57:15.

Mr. Dannen also explained that as he became more familiar with the business, the weight of the shipments in his warehouse "became a problem that concerned me [...] there were a lot of things that -- that were not done properly." Id. at 27:23-30:15. Mr. Dannen's exasperation was palpable as he explained his inability to correct an overwhelming number of shipments billed in excess of their actual weight.

Ms. Hoerster: Okay. So back to -- I really am just talking about when you were -- you said that you were re-weighing shipments to make sure that they matched the reported weight?

Mr. Dannen: Yes.

[…]

Ms. Hoerster: And what did you do if the reported weight didn't match?

Mr. Dannen: Depending upon how much it varied, normally if -- if it was higher, I would -- I would -- I would change the report and say, Okay, this -- we -- we can't let this go through because I've seen it with my own eyes. This is the actual weight of -- of the shipment and -- and change the reports. So -- so --

[…]

Ms. Hoerster: But I imagine that -- isn't it true that you didn't change every single weight?

Mr. Dannen: No, no. This was -- you have to understand, quite often we were working 14, 16 hours a day. For eight months out of the 66, my little 24,000 square foot facility produced more gross weight in shipments than any other facility in the -- in the Coleman American system in the U.S. I was one of the top producers for -- for eight months. *There wasn't time to check every shipment.*

Id. at 28:12-29:25 (emphasis added). Mr. Dannen also explained how he learned to spot overbilled shipments and repeatedly testified that he reported these alarming variances to his superior, Mike Tatum, with no avail.

Mr. Dannen: Now, what -- what -- what would key me to get involved and -- and get out of my office and get out on the floor was -- well, as an example, there was one shipment that came in and -- and I think there were like eight or nine crates. It was like a 19,000 pound shipment.

And I'm scratching my head and saying, that's not very probable. That's an anomaly. You're normally looking at somewhere around 12, 1,300 pounds per crate unless you – there's something special going on.

> So I -- I kind of thought that there was some missing crates. I mean, that's the first thing.
>
> And -- and we -- we started backtracking the shipment, and we couldn't find any missing crates. So I said, Okay. Put it on the scale. Let's -- let's see what's going on. And we were like 6,500 pounds short.
>
> And I immediately reported that to Mike Tatum. And we get into the -- we got into the system and said, Okay. Where are the rest of the crates? Something's wrong. And we were notified that there weren't any extra crates.
>
> I got on the phone with Mike Tatum and said, What in Heaven's name is going on? How can a shipment be 6,500 pounds overweight? It's just not --
>
> Ms. Hoerster: There's a mistake here?
>
> Mr. Dannen: Yeah. There has to be a mistake.
>
> Ms. Hoerster: Yeah.
>
> Ms. Hoerster: Because I'm -- I was a little naive in those days.
>
> And -- and Mike said he would look into it. And I -- and -- and even after a follow-up telephone call, *I was just told to deliver the -- the -- the shipment and let it go*.

Id. at 31:7-32:13 (emphasis added). Mr. Dannen tried to follow up with Tatem, communicating via email, phone, and eventually in person, but received no response. Id. at 54:14-55:5.

Reports of dramatic weight variances in Defendants' NTS shipments across the country also flowed directly into corporate headquarters in the form of complaints from truck drivers expecting to deliver shipments of a certain size out of NTS warehouses only to discover the actual weight of the shipment to be far lower than reported. For example, Chad Holsteen an independent long-haul driver, former active duty Army Ranger, and current reservist, specifically singled out Defendants' Woodbridge, Virginia location as "horrible" when it came to accurate NTS weights.

Mr. Holsteen, no stranger to the moving business, was employed by Defendants from 1999 to 2001 in Manhattan, Kansas as an over-the-road driver. C. Holsteen Dep. 19:8-23, Dec. 22, 2014.[31] Mr. Holsteen left the moving business in 2001 after his first child was born, but returned to the industry in 2007 as an owner/operator. Id. at 20:8-25. As an owner/operator driver, Mr. Holsteen was "100 percent dedicated to Covan" but was responsible for his own truck, fuel, and labor. Id. at 20:19-21:9. Owner/operators like Mr. Holsteen receive solicitations directly from Defendants' dispatcher seeking to book his services to pack, ship, and deliver civilian and military Code 1 HHG shipments. Id. at 21:15-22:13.

Mr. Holsteen explained that if his current load did not fill his trailer, he would review the list of NTS shipments scheduled to be released from the terminal he was departing from and request permission to add a NTS shipment that would fill his trailer. Id. at 170:16-171:10. About NTS shipments he explained, "it's never the load you want on. But if you load a shipment that does 17,000 [lbs.] and you know you got room for 12 [thousand lbs. more], if its 2:00 in the afternoon, a non-temp shipment is sitting right there, you can load it fast." Id. Once the NTS shipment is loaded onto his trailer, it becomes a Code 1 shipment and he was required to get a new weight ticket like any other Code 1 shipment he handled. Id. at 171:15-25.

Mr. Holsteen testified that even though he never bumped the shipments he was responsible for weighing, he regularly discovered the shipments he removed from Defendants' NTS facilities weighed far less than reported once he removed them from NTS and weighed them himself. See id. at 170:9-171:10. When asked during his deposition whether he told federal investigators that Defendants' military NTS shipments were "horrible," Mr. Holsteen explained:

Mr. Holsteen: For the Woodbridge especially, I did say that.

[31] Excerpts attached as **Exhibit AA**.

Mr. Kenney:	What do you mean? What does that mean?
Mr. Holsteen:	Whatever the weight that you are normally told that you are going in to pick up, it would be way off.
Mr. Kenney:	How so?
Mr. Holsteen:	By thousands of pounds. Like if you -- says right here. My example earlier was if it's supposed to be 12,000 pounds, you might go in and only get 7,000 pounds.
Mr. Kenney:	Okay. Now, how do you know it is supposed to be 12,000 pounds?
Mr. Holsteen:	Because that's what it -- when they put it into non-temp, that's the weight that went into non-temp, that's all the computer systems show it's non -- the weight is 12,000.

Id. at 24:20-25:21. Mr. Holsteen explained that, based on his experience, NTS crates typically weighed about 1,000 per crate, "[s]o if you have 15,000 [lbs.] and only eight crates come out or only eight pages of inventories, you know, there's already a red flag[.]" Id. at 172:1-18; see also id. at 28:11-29:1. As a new Code 1 shipment, Mr. Holsteen was required to, and did, obtain new weight tickets on the shipment and compared his measurement to Defendants' terminal records and the shipping file he received from Defendants' employees. See id. at 172:19-174:2; see also id. at 25:16-27:8 (explaining how he knew what the shipment was supposed to weigh).

Mr. Holsteen observed the same problem with bumped weights at other locations. He explained that while he picked up shipments in Fayetteville, Augusta, Kansas, and Nebraska, his typical "run" was a triangle from San Diego, California to Maryland or Virginia, down to Florida, and back to California. Id. at 30:13-31:4. When pressed to identify where he had the experience of picking up bumped NTS shipments, he identified problems in Killeen and El Paso, Texas, described San Diego as "a crap shoot" but was unequivocal as to which locations were

the worst offenders: "Woodbridge and Fayetteville are the two that always stick out to my head that I can remember the most troubles with." Id. at 31:5-21.

Unless he was willing to also bump the weight (something he refused to do), these bumped NTS shipments had a deleterious effect on Mr. Holsteen's bottom line and caused him to repeatedly complain to a top company executive. He explained:

> Mr. Holsteen: Well, the horrible -- the word horrible is just because if we're going in to pick up 12,000, that means we have room for 12,000. If I'm in Woodbridge, Virginia, I'm probably loaded going to California. I have exactly room for 12,000 pounds to fill my trailer. And that means I can roll across the United States with a full trailer. When you go in and you check off a shipment and it only goes 7,000, you're thinking it's going to be 12,000, you are 5,000 off. The other bad part is, your guys work for a dollar a hundred weight. They expected to load 12,000, they are expecting to make $120. When it only goes 7,000, they get upset, too, because now you are only going to pay them $70. And they might have took a job that paid $110 for another driver; instead, they hung out with you thinking you were going to have a better shipment.

Id. at 27:15-28:10. Mr. Holsteen paid his packers the difference out of his own pocket and complained to vice president of operations Andy Coleman. Id. at 31:22-32:22, 34:22-35:3. By Mr. Holsteen's estimate, he raised this problem with Coleman "at least once a month." Id. at 31:22-32:22; see also id. at 35:15-19 (explaining he complained to Coleman "more than ten times I'm sure."). Coleman attempted to placate Mr. Holsteen by saying "he would look into it and then normally he would either offer to pay fuel for the trip or throw extra cash on your TCH [gas] card to cover the guys you are going to have to pay extra […] because the shipment went so light." Id. at 32:23-33:15. Mr. Holsteen's experience was not unique. He testified that "everybody would get reimbursed" to paper over problems with light shipments. See id. at 39:7-

41:18 (specifically identifying a company driver he spoke to as also receiving compensatory fuel card credits from Andy Coleman).[32]

When Andy Coleman was asked during his deposition about reports of weight bumping, he did no mention the incident described in the Farish memorandum or the reports he received from Mr. Holsteen, but testified instead that he had *no recollection* of any such communications. See A. Coleman Dep. 102:20-103:4.

F. Reweigh data corroborates the existence of a widespread fraud and Defendants' intentional submission of false claims.

As the Court is aware, this case presents a unique problem of how to measure the loss suffered by the United States Government. As forensic accountant and fraud examiner Roy Strickland, CPA, CFF, MAFF, explained, Defendants' business is "a little unusual from a lot of businesses" because "in most situations when you transact with goods or services, the party provides those goods and then the party receiving them can count or verify those goods." R. Strickland Dep. 29:6-11, Jan. 12, 2015. But here, "you have transactions that are taking place over a period of years that have been consummated, been completed" but "[t]here's no way to go back now and weigh that product. Id. at 29:12-23. However, armed with the knowledge that Defendants are in fact engaged in fraud, Plaintiffs have gathered available data in an effort to calculate an admittedly incomplete calculation of the true loss suffered on account of Defendants' weight bumping scheme.

Plaintiffs' damages calculation, as explained by Mr. Strickland's report, gathered data from seven different sources in order to identify 2,530 false claims submitted by Defendants since just 2009. See Ex. V. While some of the data evidencing bumped shipments comes from

[32] When he was a manger employed by Defendants, Mr. Holsteen received similar complaints from drivers that "the weight is off[.]" See id. at 175:19-176:21.

sources Defendants are likely to dispute, such as documents gathered by the Figueroas or an audit of the August warehouse, Defendants cannot dispute the fraudulent nature of most of the weight discrepancies identified by Mr. Strickland. For example, the Court-ordered reweighs conducted in the Defendants' presence revealed 1,358 false claims from just two of Defendants' warehouse locations. See Ex. V at 13. Moreover, Plaintiffs relied on reweigh data gathered by Defendants' themselves, which revealed hundreds of false claims arising from weight discrepancies Plaintiffs have taken at face value. See id.

Mr. Strickland also looked to Government data for historical reweigh information that could be reviewed in light of the fact that Defendants were actively engaged in fraud when those claims were submitted. Specifically, some shipment reweighs occur pursuant to either SDDC or servicemember request. John Becker, SDDC's business process mapping owner for the personal property program, explained that reweigh requests often issue because a servicemember's shipment weight exceeds his allotment (requiring the servicemember to pay the difference) or if there is an obvious discrepancy between the weight and the inventory. See J. Becker Dep. 117:15-118:21, Dec. 3, 2014.[33] Mr. Becker explained that TSP's were obligated to correct their bills when a reweigh indicates the actual shipment weight is less than the billed weight. Id. at 67:7-67:18. Once payment occurs, the General Services Administration (GSA) conducts a post-payment audit of TSP invoices to identify billing errors and issue notices of overcharge attempting to claw back improperly billed and paid funds. As Jeff Adcox, GSA's chief of audits and collections in the transportation audit division, explained, "We don't look for patterns of

[33] Excerpts attached as **Exhibit BB**.

fraud or misconduct, that's not in our edict. We look to see if the charges are supported by the documents and that they were billed correctly." J. Adcox Dep. 169:2-5, Dec. 11, 2014.[34]

However, Mr. Strickland was able to review data from the General Services Administration and the Surface Deployment and Distribution Command's (SDDC) to isolate a group of shipments where notices of overcharge issued because the GSA identified the Defendants' failure to accurately bill even though a reweigh occurred. In other words, these shipments were billed in excess of the actual shipment weight *after* Defendants' knew it weighed less than claimed. See Ex. V at 16. This analysis, which identified over 400 false claims during the relevant period, is also indicative of a knowing submission of a false claim.

Notably, Mr. Strickland *excluded* weight variances falling within safe harbors contemplated by SDDC regulations from his calculation of false claims. See R. Strickland Dep. 110:17-111:4 & 145:23-147:2.

II. A jury could conclude Defendants knowingly submitted false claims or that they acted with reckless disregard.

The FCA is designed to reach all types of fraud that might result in financial loss to the Government and therefore is to be construed broadly to effectuate this purpose. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999) (Harrison I) (citing United States v. Neifert–White Co., 390 U.S. 228, 232 (1968)). "Thus, any time a false statement is made in a transaction involving a call on the U.S. fisc, False Claims Act liability may attach." Id. In addition to a claim for payment, the test for whether FCA liability attaches is:

> (1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a "claim").

[34] Excerpt attached as **Exhibit CC**.

Id.; see also 31 U.S.C. § 3729(a)(1)(A)-(B). The FCA defines the mental culpability necessary for liability to attach, explaining that the terms "knowing" and "knowingly" mean a person "(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information[.]" 31 U.S.C. § 3729(b)(1)(A). Notably, the FCA "require[s] no proof of specific intent to defraud" in order for a defendant to have the requisite mental culpability. Id. § 3729(b)(1)(B).

Defendants argue there is insufficient evidence to allow a jury to find that any claims outside of the Augusta facility were knowingly false. Defs.' Mem., 20. As an initial matter, Defendants' argument ignores overwhelming evidence of intentional fraud throughout the company and this argument should be rejected based solely on the facts set forth above. Defendants argument also misconstrues the scienter requirement in four ways explained below.

A. Expert testimony that a pattern evidences fraudulent intent is *one way* to establish scienter, not the only way.

The bulk of Defendants' argument relies on a mistakenly narrow view of how a plaintiff can prove a culpable mental state in a FCA case. Defendants complain the record "does not contain evidence of an *intent* to defraud." Defs.' Mem., 22 (emphasis added). As explained above, the FCA requires statutory knowledge, which merely requires deliberate ignorance or reckless disregard. See 31 U.S.C. § 3729(b)(1). Similarly, Defendants argue Plaintiffs have "failed to evidence a pattern" of false claims or misconduct and that Plaintiffs' expert "does not opine there was a pattern of overbilling sufficient to establish fraudulent intent." Defs.' Mem. 22 & 25. In support of these assertions, Defendants repeatedly point to United States ex rel. Taylor-Vick v. Smith, 513 F.3d 228 (5th 2008), noting that in that case the Fifth Circuit found the scienter requirement unmet where the relator's expert witness identified a pattern of overbilling but failed to offer an opinion about the intent of physicians who submitted them. Defs.' Mem.,

22 (citing Taylor-Vick, 513 F.3d at 229); see also Defs.' Mem. 25-26. The problem with this view can be illustrated by the precedent on which Defendants rely.

To establish a FCA claim, "the evidence must demonstrate guilty knowledge of a purpose on the part of the defendant to cheat the Government[.]" Taylor-Vick, 513 F.3d at 231-32 (internal quotations and brackets omitted). When a case turns on this state of mind determination, it is not well-suited for summary judgment. Id. at 231. The question raised by Defendants' motion is *how* knowledge must be proven, but it is clear from the Fifth Circuit's discussion there is no one way to prove scienter. For example, the Taylor-Vick Court explained scienter was proven by evidence a contractor falsely labeled a replacement bearing and substituted them for the kind required by the government contract. Id. at 231-32 (discussing United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972)). Similarly, a plaintiff survived summary judgment by submitting affidavits from workers attesting they facilitated the fraud by failing to inspect munitions and shipping defective ones. Id. (discussing United States v. Hangar One, Inc., 563 F.2d 1155 (5th Cir.1977)). Scienter can also be proven merely through circumstantial evidence. Id. at 231 (citing Financial Acquisition Partners LP v. Blackwell, 440 F.3d 278, 287 (5th Cir. 2006) ("Circumstantial evidence can support a scienter inference.")).

Defendants' misread Taylor-Vick, and the knowledge requirement more broadly, to stand for the proposition that a fraudster's intent must be proven *in every case* by expert testimony that divines intent from a pattern discovered in false records. In Taylor-Vick, the relator suspected up-coding based on the number of patients a physician was seeing per day. Id. at 229. Unlike this case, the relator "had no direct knowledge of actual instances of 'up-coding,'" but instead "sought to make her case through circumstantial evidence." Id. The government declined to intervene. Id. Because the relator had no direct evidence the defendant physicians knew the

reimbursement claims were false, expert testimony was *the only means* through which she could establish knowledge. See id. at 232. While her expert's pattern analysis "might support an inference" of scienter, the expert's failure to opine on this missing element was fatal to the relator's claim. Id.

The relator's problem in Taylor-Vick is not present here. Here Plaintiffs have offered direct evidence of fraud perpetrated by managers and low-level employees throughout the company. See §§ I(C)-(D), supra. Internal company records and witness testimony demonstrates that Defendants adopted policies that incentivized fraudulent conduct. See § I(B), supra. Finally, Plaintiffs can also point to troubling documentary evidence that, contrary to their sworn testimony, Defendants high-ranking corporate executives had actual knowledge of this fraud. See § I(E), supra. In other words, Plaintiffs have no need for an expert to opine as to intent because the overwhelming evidence is more than adequate to establish a culpable mental state.

B. Defendants' ostrich-like behavior here constitutes reckless disregard and also satisfies the scienter requirement.

Statutory knowledge can also be met through evidence of reckless disregard for the truth. See 31 U.S.C. § 3729(b)(1)(A). "Reckless disregard, as used in the False Claims Act, lies on a continuum between gross negligence and intentional harm." U.S. ex rel. Ervin & Associates, Inc. v. Hamilton Sec. Grp., Inc., 370 F. Supp. 2d 18, 41 (D.D.C. 2005) (internal quotations omitted) (quoting United States v. Krizek, 111 F.3d 934, 941 (D.C.Cir.1997)). The reckless disregard standard is best read as "an extension of gross negligence[,]" or an "extreme version of ordinary negligence" that does not require willful or deliberate conduct. Krizek, 111 F.3d at 941 (construing the term harmoniously with the deliberate ignorance standard).

When Congress amended the FCA in 1986, it sought to broaden the scope of the term "knowingly." The congressional report accompanying the amendment explained:

> S. 1562 defines this obligation as to make such inquiry as would be *reasonable and prudent to conduct under the circumstances* to ascertain the true and accurate basis of the claim. Only those who act in *gross negligence* of this duty will be found liable under the False Claims Act.
>
> * * * * * *
>
> the constructive knowledge definition attempts to reach *what has become known as the ostrich type situation* where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted. While the Committee intends that at least some inquiry be made, the inquiry need only be 'reasonable and prudent under the circumstances', which clearly recognizes a limited duty to inquire as opposed to a burdensome obligation.

Ervin & Associates, 370 F. Supp. 2d at 41 (quoting S. Rep. 99-345, at 20 (1986), reprinted in U.S.C.C.A.N. 5266, 5285 (internal quotation marks omitted)). Thus the reckless disregard standard was designed to address "not just those who set out to defraud the government, but also those who ignore the obvious warning signs." Id. at 42 (quoting Crane Helicopter Servs., Inc. v. United States, 45 Fed. Cl. 410, 433 (Fed. Cl. 1999)).

In broadening the definition of knowingly, Congress was cognizant that the ostrich-like conduct it sought to reach was particularly likely in large corporations. See S.Rep. No. 99–345, at 6-7 (1986), reprinted in 1986 U.S.C.C.A.N. at 5272. The Committee Report explained the "actual knowledge" standard imposed "insurmountable difficulties" to civil claims against corporate wrongdoers because it allowed "corporate officers [to] insulate themselves from knowledge of false claims submitted by lower-level subordinates." See id.; see also U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634, 642 (6th Cir. 2003) (discussing).

Defendants' argue there is no evidence of reckless disregard "because the undisputed facts show Defendants had no reason to believe there were systemic inaccuracies in their weight submissions or that any intentional weight manipulation had occurred until the government's search warrant was executed at the CAMS Georgia warehouse in Augusta on August 22, 2012.

Defs.' Mem., 22. To be clear, Plaintiffs believe the record here demonstrates that top corporate executives had actual knowledge of wronging. See §§ I(C)-(E), supra. However, even under the most charitable construction of the record, Defendants' corporate executives and managers engaged in precisely the sort of "ostrich-like" behavior Congress sought to punish by adding the reckless disregard standard to the FCA. Defendants' suggestion otherwise draws no support from the record and should be rejected.

C. The government-knowledge doctrine is inapplicable here because even assuming the Government was aware of weight discrepancies, it neither knew of, nor condoned fraud.

Defendants argue that because the military was aware of weight discrepancies evidenced by occasional reweighs, this knowledge should negate scienter for their FCA violations. While Defendants are correct that this Circuit recognizes that prior government knowledge *can* negate scienter, the doctrine has no applicability here because even assuming the Government was aware of weight inaccuracies in Defendants' shipments, it had no knowledge of the material facts underlying those inaccuracies, namely, that they were the result of fraud.

The doctrine's inapplicability here is illustrated by U.S. ex rel. Becker v. Westinghouse Savannah River Co., 305 F.3d 284 (4th Cir. 2002). In Becker, the relator claimed Westinghouse improperly retained funds appropriated by Congress by changing budget codes that concealed the fact the appropriation was made for another purpose. Id. at 288. Even though the code transfer may have been improper, the Fourth Circuit reasoned no liability attached because the Department of Energy (DOE) was not only aware of the code change, but instructed Westinghouse to change the codes. Id. The Court explained, "DOE's *full knowledge of the material facts* underlying any representations implicit in Westinghouse's conduct negates any knowledge that Westinghouse had regarding the truth or falsity of those representations." Id. at

289 (emphasis added); see also U.S. ex rel. Ubl v. IIF Data Solutions, 650 F.3d 445, 453 (4th Cir. 2011) ("if the government *with full knowledge of the relevant facts* directed a contractor to file a claim that was later challenged as false," it would "go a long way towards establishing" a lack of knowledge (emphasis added)); U.S. ex rel. Burlbaw v. Orenduff, 548 F.3d 931, 949 (10th Cir. 2008) (Secretary's certification defendant met statutory requirement negated scienter); U.S. ex rel. Costner v. United States, 317 F.3d 883, 887-88 (8th Cir. 2003) (EPA had actual knowledge of reasons for operational difficulty with contract performance); Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992) (faulty performance claim failed where "[t]he government knew of all the deficiencies identified" and the defendant was open with the government about them).

Defendants place particular emphasis on U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co., 612 F.3d 724 (4th Cir. 2010). In Owens, the relator alleged a contractor violated the FCA by engaging in substandard construction when building the U.S. Embassy in Bagdad. Owens, 612 F.3d at 726. The Fourth Circuit applied the government-knowledge doctrine in affirming summary judgment, explaining the Government was aware of the purported deficiencies and there was no evidence of an effort to defraud.

> Here there is ample evidence that, in the words of OBO Director General Charles Williams, First Kuwaiti has never had "any shyness on correcting what we bring to their attention." Nor is there any suggestion that First Kuwaiti billed for work it knew to be defective. As Williams put it, "They want to get it right. They have tried very hard to get it right."

Id. at 729. Defendants argue this case is "directly analogous" to Owens because the government reweigh and chargeback programs constitute a knowing acceptance of Defendants' inaccurate shipment weights. See Defs.' Mem., 26-27. It is not. Owens, like all other government-knowledge decisions before it, merely stands for the proposition that there is a difference

"between a false statement sufficient to support a claim of fraud," and "honest disagreements, routine adjustments and corrections, and sincere and comparatively minor oversights[.]" Owens, 612 F.3d at 734. The record here supports a finding Defendants have been anything but candid with the Government and that a jury could find intentional fraud or, at least, reckless disregard.

Defendants' reliance on the testimony of government witnesses here is also misplaced. The testimony of government employees explaining there *could be* innocent explanations for weight variances should not outweigh the testimony of first-hand witnesses to fraud. As Mr. Adcox explained, GSA's mandate is not to investigate fraud, it is to reconcile bills. Similarly, Mr. John Becker testified that he was unaware of any SDDC investigation of weight bumping other than this action. J. Becker Dep. 134:3-10. Mr. Strickland echoed this point, explaining the Government's internal control procedures like reweighs and post-payment review, are not truly audits. "An audit assumes that you have internal controls in place for both the expenditure cycle, revenue cycle and all other cycles or you can't do the audit." See R. Strickland Dep. 258:19-258:22. While these procedures are designed to detect routine errors and mistakes that occur when all parties are acting in good faith, Plaintiffs' claims here seek to revisit these "errors" with the benefit of the knowledge there was, in fact, a widespread effort to cheat. What gave rise to the government-knowledge doctrine in each of the cases discussed above was that government's knowledge of *all* material facts and acceptance nonetheless. No Government witness testified as having actual knowledge of Defendants' fraud prior to this action.

Finally, Defendants' repeatedly argue that the record here merely reflects negligence or innocent mistake. See Defs.' Mem., 21. Since the FCA is, admittedly, not intended to punish honest mistakes or mere negligence, Owens, 612 F.3d at 728, Defendants' negligence claim is

merely an assertion they lacked a culpable mental state. This conclusion should be rejected or, at least, submitted for the jury to decide in light of the parties' factual dispute over this element.

D. The public disclosure bar is provide no basis for dismissal of any claim here.

Finally, Defendants seek dismissal of pre-March 23, 2010 claims pursuant to the public disclosure bar. See Defs.' Mem. 30-32. Defendants contend all non-Augusta claims are barred because "the underlying information on which all of Plaintiffs' non-Augusta claims are based is derived from government audits or investigations independent of any knowledge possessed by the relators." Id. at 31. Defendants' argument is based on the FCA's earlier iteration which contained a jurisdiction-stripping provision providing that,

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions […] in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation […] unless the action is brought by the Attorney General or the person bringing the action is an original source.

31 U.S.C. § 3730(e)(4)(A) (2006). This view is flawed because it misconstrues what constitutes a public disclosure in two ways.

First, the old public disclosure bar only deprives a district court of jurisdiction when the "relevant information has already entered the public domain through certain channels." Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 559 U.S. 280, 285 (2010) (Graham Cnty. II). Congress specifically identified those channels in the FCA as (1) "a criminal, civil, or administrative hearing," (2) "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation," and (3) "from the news media[.]" Id. (quoting 31 U.S.C. § 3730(e)(4)(A) (2006)). While the Supreme Court has found occasion to construe the meaning of the public disclosure bar, see id. at 283 (holding the term "administrative" hearings is broad

enough to reach state and local disclosures), no court has ever construed the bar in the manner proposed by Defendants' here.

Defendants argue the bar is implicated because in litigating this action, Plaintiffs have looked to shipment reweights and GSA post-payment audits in an effort to calculate damages. See Defs.' Mem., 31-32. But these purported public disclosures do not fall into any of the discrete categories proscribed by Congress, and Defendants make no effort to specify which channel this information implicates. Moreover, Defendants proposed rule asks the Court to construe the bar to the point of absurdity and hold that a FCA investigation is an "investigation" for the purpose of the public disclosure bar such that when the Government begins investigating an FCA claim, that investigation is a public disclosure and the action becomes barred. This is clearly Defendants' desired result as they are expressly argue, "all claims based on the NTS re-weights at San Diego and Woodbridge, or on Defendants' internal re-weighs, are based on re-weigh variances discovered as a result of the the [sic] Department of Justice's own investigation and disclosures *in this case*." Defs.' Mem., 32 (emphasis added). This argument should be rejected.

Second, Defendants' proposed construction of the public disclosure bar is contrary to guidance handed down by the Fourth Circuit just this week in United States ex rel. Wilson v. Graham Cnty. Soil & Water Conservation Dist., No. 13-2345 (4th Cir. Feb. 3, 2015) (Graham Cnty. III),[35] in which the Court reiterated that the bar is designed to strike a balance between "empowering the public to expose fraud on the one hand, and preventing parasitic' actions on the other." Id. at *7. In Graham County III, a special-purpose district entered into a contract to receive federal funding in exchange for recovery work. Id. at *3-4. The relator, a secretary for

[35] Slip Op. attached as **Exhibit DD**.

the district came to suspect fraud by her colleagues and federal administrators overseeing the program and she shared those concerns with federal agents. Id. at *4-5. The relator also disclosed an ongoing audit of the program by county auditors. Id. The county audit identified violations and was disseminated to the county, the district, and the Department of Agriculture (USDA). Id. at *5. The relator continued to provide information to federal investigators, including the audit, resulting in a report by the USDA distributed to state and federal law enforcement. Id. at *6. The district court held that the county audit and USDA report constituted a public disclosure that deprived the court of subject matter jurisdiction. Id. at *8.

The Fourth Circuit disagreed applying reasoning that is further cause to reject Defendants' arguments here. Specifically, the Graham County III Court noted that the purported jurisdiction-stripping disclosures *were not public* and thus failed to implicate the bar. "By specifying that a 'disclosure' must be 'public,' Congress indicated that only disclosures made to the public at large or to the public domain had jurisdictional significance." Id. at 11. The Court noted that the county audit, nor USDA report was distributed or intended for public distribution and that the public disclosure bar "requires that there be some act of disclosure *outside of the government*." Id. at *11-13 (emphasis original) (quoting United States ex rel. Rost v. Pfizer, Inc., 507 F.3d 720, 728 (1st Cir. 2007), overruled on other grounds by Allison Engine Co. v. United States ex rel. Sanders, 553 U.S. 662 (2008)).

Even assuming the reweights and GSA post-payment reviews contained all the material facts brought to light by this action (they do not), Defendants have not made any showing that this information was public information available to the Figueroas. In rejecting Defendants' argument, this Court should also look to the Fourth Circuits' decision to reject the argument that

because the Graham County III relator *might have* obtained the county audit through a public document request:

> The argument is meritless. Appellees fail to distinguish between information theoretically or potentially available -- upon request -- and information "'affirmatively provided to others not previously informed thereof.'" Graham Cnty., [399 F. App'x 774, 776 (4th Cir. 2010)] (quoting United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1521 (10th Cir. 1996)). It is the latter that is the talisman of the public disclosure bar.
>
> To equate eligibility for disclosure with disclosure itself does more than merely place the cart before the horse; it places the cart before a horse that may never follow.

Id. at *17. Similarly here, even assuming some circumstance through which the public could obtain the reweigh and GSA information Defendants' point to here, this speculative theory fails to undermined the fact that the information brought to light by the Figueroas—overt acts of fraud—"is precisely the sort of 'whistleblowing insider[]' the statute seeks to encourage." Id. at *18-19 (quoting Graham Cnty. II, 559 U.S. at 294).; cf. U.S. ex rel. Ervin & Associates, Inc. v. Hamilton Sec. Grp., Inc., 370 F. Supp. 2d 18, 38 (D.D.C. 2005) (A relator has "direct knowledge" of any information gleaned from direct observation and analysis, as that information was acquired without any "intervening agency.").

For these reasons, Defendants' public disclosure argument should be rejected.

CONCLUSION

For the reasons set forth above, the motion should be denied in its entirety.

Respectfully submitted:

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WILLIAM N. NETTLES
UNITED STATES ATTORNEY

By: s/Frances C. Trapp
William N. Nettles (Fed. ID #6586)
United States Attorney
Frances C. Trapp (Fed. ID #6376)
Assistant United States Attorney
Stanley D. Ragsdale (Fed. ID #3197)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, SC 29201
(803) 929-3058

ATTORNEYS FOR THE
UNITED STATES OF AMERICA

And: s/Richard A. Harpootlian
Richard A. Harpootlian (Fed ID # 1730)
rah@harpootlianlaw.com
Christopher P. Kenney (Fed ID # 11314)
cpk@harpootlianlaw.com
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, SC 29202
Telephone: (803) 252-4848
Facsimile: (803) 252-4810

Herbert W. Louthian (Fed. ID # 2728)
herb@louthianlaw.com
Herbert W. Louthian Jr. (Fed. ID # 2729)
bert@louthianlaw.com
LOUTHIAN LAW FIRM, P.A.
P.O. Box 1299
Columbia, SC 29202
Telephone: (803) 454-1200
Facsimile: (803) 256-6033

ATTORNEYS FOR MARIO HUMBERTO FIGUEROA AND ELMER ARNULFO FIGUEROA

February 6, 2015
Columbia, South Carolina