

## DOJ Continues to Use the False Claims Act to Protect PPP Funds

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On August 26, 2021, the Department of Justice (DOJ), the U.S. Attorney's Office for the Southern District of Florida, and the Small Business Administration's (SBA) Office of Inspector General (OIG) announced a \$287,055 settlement resolving alleged violations of the False Claims Act (FCA) related to a false loan application and misappropriated Paycheck Protection Program (PPP) loan proceeds by All in Jets LLC (d/b/a/ JetReady) owner, Seth A. Bernstein.<sup>1</sup> This settlement comes just two months after the DOJ announced another FCA settlement with KC Investments Group, Inc., and its owner, Sunu P. KC, to resolve claims of alleged false statements made in connection with the PPP.<sup>2</sup>

The PPP was enacted as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act on March 29, 2020, to help small businesses and their employees financially survive the COVID-19 pandemic. Under the PPP, businesses that received loans were required to use the borrowed funds for payroll, rent or mortgage, and other specified expenses. If certain requirements were met, the total loan amount could be forgiven.

According to the DOJ's press release and the settlement agreement, Bernstein, on behalf of JetReady, applied for and received a PPP loan totaling \$1,173,382 on April 27, 2020. Just one day after receiving the loan proceeds, Bernstein allegedly diverted nearly \$100,000 of the PPP loan to pay for personal, noncompany-related expenses. Victoria Hablitzel, a former JetReady employee, filed a qui tam action<sup>3</sup> after becoming aware of the alleged misappropriation. Bernstein's company, JetReady, has since filed for bankruptcy in the Southern District of New York and is not subject to the terms and conditions of Bernstein's settlement agreement.

### KEY TAKEAWAYS:

- **The government continues to use the FCA as a tool to recover COVID-19 relief funds.** The Bernstein settlement is just the most recent example of the DOJ using the FCA as a significant tool for detecting PPP abuses in an effort to protect the integrity of the program and harks back to comments made by Acting Assistant Attorney General Brian Boynton at this year's annual Federal Bar Association Qui Tam Conference. In his remarks, Boynton stated that the "[FCA] will play a significant role in the coming years as the government grapples with the consequences of [the COVID-19 pandemic]."<sup>4</sup> Boynton stressed that while the "circumstances of the current pandemic may be novel . . . the inevitable fraud schemes it will produce," such as "misuse of program funds and

false certifications pertaining to loan forgiveness,” “will in many cases resemble misconduct that the [FCA] has long been used to address.”<sup>13</sup>

- **SBA’s \$2 million “safe harbor” threshold will not deter government agency enforcement.** SBA’s \$2 million “safe harbor” threshold<sup>14</sup> does not mean that PPP loans of under \$2 million will escape scrutiny entirely. Rather, PPP loans under \$2 million can still give rise to FCA liability where—as here—there is evidence that the defendant knowingly submitted a false loan application and misappropriated PPP loan funds. Thus, this case further demonstrates the importance of ensuring that all PPP requirements are met regardless of the size of the loan.
- **Whistleblowers continue to be vital to the DOJ’s pursuit of FCA cases.** This settlement emphasizes that whistleblowers will continue to be crucial to the government’s efforts to recover misappropriated funds. For their efforts, whistleblowers may be awarded a portion of the recovery. Indeed, the whistleblower here received \$57,411, plus attorney’s fees and costs.
- **The DOJ makes clear that individuals will be held responsible.** Similar to FCA settlements announced earlier this year, the government again held the borrower’s owner responsible, driving home the point that individuals will be held accountable for misappropriating PPP loan proceeds.
- **Various government agencies are coordinating to stop PPP misappropriation.** This settlement also showcases enhanced efforts and coordination among federal agencies, such as the SBA, and various branches within the DOJ, including the Commercial Litigation Branch and the Fraud Section. In announcing this FCA settlement, Inspector General Hannibal “Mike” Ware of the SBA OIG stated that the “OIG will aggressively investigate allegations of wrongdoing in the SBA’s pandemic response programs.”<sup>15</sup>
- **This settlement emphasizes the importance of strict compliance with PPP program requirements to minimize FCA risk.** Individuals and their organizations should carefully review PPP eligibility and fund-usage requirements and ensure that all conditions are met and properly documented.

If you have additional questions or need further assistance, please reach out to **Suzanne Jaffe Bloom** (Co-chair, White Collar, Regulatory Defense, and Investigations), **Cristina Calvar** (Partner, White Collar, Regulatory Defense, and Investigations), **Christopher Parker** (Associate, White Collar, Regulatory Defense, and Investigations), or your Winston & Strawn relationship attorney.

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<sup>13</sup> The DOJ press release is available here: <https://www.justice.gov/opa/pr/owner-jet-charter-company-settles-false-claims-act-allegations-regarding-misappropriation>. The settlement agreement entered into by the DOJ, the relator, and Seth A. Bernstein is available here: <https://www.justice.gov/opa/press-release/file/1428066/download>.

<sup>14</sup> See DOJ Press Release, Virginia Company Agrees to Settle Civil Fraud Allegations for Paycheck Protection Program Loans (June 2, 2021), available at <https://www.justice.gov/usao-edva/pr/virginia-company-agrees-settle-civil-fraud-allegations-paycheck-protection-program>; see also Suzanne Jaffe Bloom, *Important Lessons from the Second FCA Settlement Involving Alleged False Statements by PPP Borrower and Its CEO*, Winston & Strawn (May 6, 2021), available at <https://www.winston.com/en/government-program-fraud-false-claims-act-and-qui-tam-litigation-playbook/important-lessons-from-the-second-fca-settlement-involving-alleged-false-statements-by-ppp-borrower-and-its-ceo.html>.

<sup>15</sup> See *United States ex rel. Hablitzel v. All in Jets, LLC & Seth A. Bernstein*, No. 20-cv-61410 (S.D. Fla.).

<sup>14</sup> Brian M. Boynton, Acting Assistant Att’y Gen., Dep’t of Just., Address at the Federal Bar Association Qui Tam Conference (Feb. 17, 2021), available at <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-m-boynton-delivers-remarks-federal-bar>.

<sup>15</sup> *Id.*

<sup>16</sup> SBA, Paycheck Protection Program Loan: Frequently Asked Questions (FAQs) (as of Jun. 8, 2021), available at <https://www.sba.gov/sites/default/files/2021-06/PPP%20FAQs%206.8.21%20FINAL-508.pdf> (explaining that “any borrower that, together with its affiliates, receive[s] First Draw PPP loans with an original principal amount of less than \$2 million, will be deemed to have made the required certification concerning the necessity of the First Draw PPP Loan request in good faith”).

<sup>17</sup> DOJ Press Release, Dep’t of Just. Off. of Pub. Affairs, Owner of Jet Charter Company Settles False Claims Act Allegations Regarding Misappropriation of Payment Protection Program Loan (Aug. 26, 2021), available at <https://www.justice.gov/opa/pr/owner-jet-charter-company-settles-false-claims-act-allegations-regarding-misappropriation>.

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