

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

WP COMPANY LLC d/b/a THE
WASHINGTON POST, BLOOMBERG
L.P., DOW JONES & COMPANY, INC.,
PRO PUBLICA, INC., THE NEW YORK
TIMES COMPANY, AMERICAN
BROADCASTING COMPANIES, INC.
d/b/a ABC NEWS, AMERICAN CITY
BUSINESS JOURNALS, CABLE NEWS
NETWORK, INC., NBCUNIVERSAL
MEDIA, LLC d/b/a NBC NEWS, THE
ASSOCIATED PRESS, THE CENTER FOR
INVESTIGATIVE REPORTING
d/b/a REVEAL,

Plaintiffs,

v.

U.S. SMALL BUSINESS
ADMINISTRATION,

Defendant.

Case No. 1:20-cv-01240
(JEB)

**DEFENDANT'S RESPONSE TO
PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS**

Dated: September 22, 2020

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

INDRANEEL SUR
JAMES BICKFORD
Trial Attorneys

Federal Programs Branch,
Civil Division
United States Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 616-8448
E-mail: Indraneel.Sur@usdoj.gov

Counsel for Defendant

Under Federal Rule of Civil Procedure 56, Defendant submits this response to Plaintiffs' statement of material facts in support of Plaintiffs' motion for summary judgment (Doc. 18-2). Defendant notes that this response is solely designed to respond to Plaintiffs' statement of undisputed material facts (Doc. 18-2), by identifying which of the factual grounds for Plaintiffs' motion are not undisputed in Plaintiffs' favor. In light of Defendant's separate motion for summary judgment, the use of the word "disputed" or similar references herein should not be construed to mean that Defendant believes that there are genuine issues of fact that would necessitate a trial. Rather, such language simply means that Defendant disputes Plaintiffs' statement regarding that matter. Defendant maintains its position that there are no genuine issues of material fact with respect to the grounds entitling Defendant to summary judgment.

Where Defendant represents herein that a statement of material fact is "undisputed" in whole or in part, such a statement applies exclusively to this action and does not constitute an admission for any other purposes, including any other administrative or judicial determinations or proceedings.

Allegations and purported facts that are not material are not properly included in a statement of undisputed material facts. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 ("As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.").

The format of this document is as follows. The text of the facts originally alleged in Plaintiffs' statement is set forth in italics at the beginning of each paragraph. The balance of each numbered paragraph contains Defendant's response as to that particular alleged fact.

1. *To date, COVID-19 is believed to have infected at least 6,301,649 people and killed 189,226 people in the United States alone. See Johns Hopkins Univ. & Med., Coronavirus Resource Center: Global Map, <https://coronavirus.jhu.edu/map.html>.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required.

2. *To date, the SBA reports having approved \$525,012,201,124 in loans under the Paycheck Protection Program ("PPP"). See SBA, Paycheck Protection Program (PPP) Report: Approvals through Aug. 8, 2020, https://www.sba.gov/sites/default/files/2020-08/PPP_Report%20-%202020-08-10-508.pdf at 2.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required.

3. *To date, the SBA reports having approved \$188,022,021,024 in COVID-related loans under the Economic Impact Disaster Loan ("EIDL") program. See SBA, Disaster Assistance Update: Nationwide EIDL Loans, <https://www.sba.gov/sites/default/files/2020-08/EIDL%20COVID-19%20Loan%208.24.20-508.pdf> at 2.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required.

4. *Together, this \$713 billion is more than the government spent on Medicaid in Fiscal Year 2018, see Ctrs. for Medicare & Medicaid Servs., NHE Fact Sheet, Mar. 14, 2020, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet>, and more than the President has requested for the Department of Defense's entire Fiscal Year 2021 budget, see Dep't of Def., DoD Budget Request, <https://comptroller.defense.gov/Budget-Materials/>.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required.

5. *Press reports have identified seemingly well capitalized public companies among the PPP loan recipients. See, e.g., Inti Pacheco & Theo Francis, Public Companies Got \$500 Million in Small Business Loans, The Wall Street Journal, Apr. 22, 2020, <https://www.wsj.com/articles/these-are-the-public-companies-that-got-small-business-loans-11587493742>.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required. Moreover, news reports generally are inadmissible hearsay and may not be considered for the truth of the proposition asserted

in support of a motion for summary judgment.

6. *On May 8, 2020, the U.S. House of Representatives Select Subcommittee on the Coronavirus Crisis sent letters to several PPP borrowers “demanding that [these] large, public corporations immediately return taxpayer funds that Congress intended for small businesses struggling to survive during the coronavirus crisis.” See House Comm. on Oversight & Reform, In First Official Action, House Coronavirus Panel Demands That Large Public Corporations Return Taxpayer Funds Intended for Small Businesses, May 8, 2020, <https://oversight.house.gov/news/press-releases/in-first-official-action-house-coronavirus-panel-demands-that-large-public>*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties’ pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required.

7. *The press and public have questioned whether businesses that were unable to secure PPP loans were hindered in their attempts by race or geography. See, e.g., Ben Popken, Why are so many black-owned small businesses shut out of PPP loans?, NBC News, Apr. 29, 2020, <https://www.nbcnews.com/business/business-news/why-are-so-many-black-owned-small-businesses-shut-out-n1195291>; Aaron Glantz, Bailout money bypasses hard-hit New York, California for North Dakota, Nebraska, Reveal, Apr. 23, 2020, <https://www.revealnews.org/article/bailout-money-bypasses-hard-hit-new-york-california-for-north-dakota-nebraska/>.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of

the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required. Moreover, news reports generally are inadmissible hearsay and may not be considered for the truth of the proposition asserted in support of a motion for summary judgment.

8. *On May 8, 2020, the SBA's Office of Inspector General issued a "Flash Report" on the agency's implementation of the PPP, finding several "areas . . . that did not fully align with the [CARES] Act's provisions," including that the "SBA did not provide guidance to lenders about prioritizing borrowers in underserved and rural markets," such that "these borrowers, including rural, minority and women-owned businesses may not have received the loans as intended." See SBA Inspector Gen., Flash Report: Small Business Administration's Implementation of the Paycheck Protection Program's Requirements, May 8, 2020, https://www.sba.gov/sites/default/files/2020-05/SBA_OIG_Report_20-14_508.pdf at 4.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required.

9. *On May 5, 2020, the Department of Justice announced that "the first individuals in the nation" had been "charged with allegedly defrauding the CARES Act SBA Paycheck Protection Program." See Dep't of Justice, Two Charged in Rhode Island with Stimulus Fraud, May 5, 2020, <https://www.justice.gov/opa/pr/two-charged-rhode-island-stimulus-fraud>.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48.

Accordingly, no response is required.

10. *To date, “[t]he Justice Department has made at least 41 criminal complaints in federal court against nearly 60 people, who collectively took \$62 million from the [PPP].” See Stacy Cowley, Spotting \$62 Million in Alleged P.P.P. Fraud Was the Easy Part, The New York Times, Aug. 28, 2020, <https://www.nytimes.com/2020/08/28/business/ppp-small-business-fraud-coronavirus.html> at 1.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties’ pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required.

11. *SBA Inspector General Hannibal Ware has characterized these prosecutions as “the smallest, tiniest piece of the tip of the iceberg.” Id.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties’ pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required.

12. *The SBA’s “fraud hotline, which received fewer than 800 calls last year, has already had 42,000 reports about coronavirus-linked graft.” Id. at 2.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties’ pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required.

13. *Representative Mary Gay Scanlon has asked the SBA to investigate whether*

Buca Restaurants Inc. received PPP funds in connection with a restaurant located in the Philadelphia suburbs that had been closed for seven years. See Jacob Adelman, Philly-area congresswoman seeks answers on bogus report of PPP loan to long-closed Buca di Beppo restaurant in Wynnewood, The Philadelphia Inquirer, Aug. 13, 2020,

<https://www.inquirer.com/news/ppp-wynnewood-buca-di-beppo-scanlon-coronavirus-relief-loan-trump-mnuchin-20200813.html>.

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required. Moreover, news reports generally are inadmissible hearsay and may not be considered for the truth of the proposition asserted in support of a motion for summary judgment.

14. *Throughout April and May 2020, Plaintiffs submitted Freedom of Information Act ("FOIA") requests to the SBA for records about the SBA's COVID-related loan programs, including the PPP and EIDL. See Am. Compl. (Dkt. 5), Exs. 1, 2, 5, 9, 12, 13, 14, 18, 20, 24, 27, 29, 31, 33, and 35.*

RESPONSE: Undisputed.

15. *The SBA either failed to respond to these requests within 20 working days or it issued responses stating that, at some indefinite point "[i]n the future," the agency hoped "to turn [its] efforts to providing loan specific data to the public." See, e.g., Am. Compl., Ex. 3.*

RESPONSE: This paragraph sets forth a legal conclusion rather than a statement of fact. Accordingly, no response is required. To the extent a response is deemed required,

Defendant respectfully refers the Court to the correspondence between Plaintiffs and SBA for a full and accurate statement of the contents of that correspondence.

16. *The SBA's responses to Plaintiffs' FOIA requests provided no concrete indication of what the data would include or when the data would actually be made available.*

RESPONSE: This paragraph sets forth a legal conclusion rather than a statement of fact. Accordingly, no response is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the correspondence between Plaintiffs and SBA for a full and accurate statement of the contents of that correspondence.

17. *Tens of thousands of non-profits received PPP loans, see Christian Berthelsen, Carnegie Hall Is Among Cultural Sites That Got PPP Aid, Bloomberg, July 6, 2020, <https://www.bloomberg.com/news/articles/2020-07-06/carnegie-hall-whitney-museum-and-s-f-symphony-got-ppp-loans>, and these organizations annually report total salaries, other compensation, and employee benefits on their IRS Form 990s, which in turn are made public, see, e.g., Ken Schwencke et al., Nonprofit Explorer, ProPublica, June 17, 2020, <https://projects.propublica.org/nonprofits/>.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required. Moreover, news reports generally are inadmissible hearsay and may not be considered for the truth of the proposition asserted in support of a motion for summary judgment.

18. *PPP borrowers did not all receive the maximum loan amount available to them.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48.

Accordingly, no response is required. Insofar as a response is deemed required, undisputed.

19. *Businesses that pay salaries of greater than \$100,000 received PPP loans.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48.

Accordingly, no response is required. Insofar as a response is deemed required, undisputed.

20. *The PPP loan application stated to potential borrowers that “[i]nformation about approved loans will be automatically released,” including “the names of the borrowers” and “the amount of the loan.” See SBA, Paycheck Protection Program Borrower Application Form, <https://www.sba.gov/sites/default/files/2020-07/PPP-Borrower-Application-Form-508.pdf> at 4.*

RESPONSE: This paragraph sets forth a legal conclusion rather than a statement of fact. Accordingly, no response is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the cited document for a full and accurate statement of its contents.

21. *The Federal Funding Accountability and Transparency Act of 2006 provides that the Office of Management and Budget “shall” publish on the Internet the “name of the entity receiving the award” and “the amount of the award” for “[f]ederal award[s]” of \$25,000.00 or more, where “[f]ederal award” is defined specifically to include “loans . . . and other forms of financial assistance.” 31 U.S.C. § 6101 note § 2(a)(4) & (b)(1)(A)-(B).*

RESPONSE: This paragraph sets forth a legal conclusion rather than a statement of fact. Accordingly, no response is required.

22. *The COVID-19 EIDL loan application stated to potential borrowers that FOIA generally requires the SBA to release “information such as names of borrowers” as well as “loan amounts at maturity.” See SBA, COVID-19 Economic Injury Disaster Loan Application, https://www.sba.gov/sites/default/files/articles/SBA_Form_3501_Economic_Injury_Disaster_Loan_Application.pdf at 12.*

RESPONSE: This paragraph sets forth a legal conclusion rather than a statement of fact. Accordingly, no response is required. To the extent a response is deemed required, Defendant respectfully refers the Court to the cited document for a full and accurate statement of its contents.

23. *Congress established the Pandemic Response Accountability Committee “to promote transparency and conduct and support oversight of covered funds and the Coronavirus response” and, inter alia, “prevent and detect fraud, waste, abuse, and mismanagement.” See Coronavirus Aid, Relief, and Economic Security Act, Public Law No. 116-136 § 15010(b).*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties’ pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required.

24. *Members of Congress are currently proposing “[t]o provide automatic forgiveness for [PPP] loans under \$150,000.” See Paycheck Protection Small Business Forgiveness Act, S. 4117 & H.R. 7777, <https://www.congress.gov/bill/116th-congress/senate->*

[bill/4117/text](#) & <https://www.congress.gov/bill/116th-congress/house-bill/7777/text>.

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required.

25. *The SBA gave "blanket approval" for "lawmakers, [SBA] staff, and other federal officials and their families" to obtain PPP loans. See Jonathan O'Connell & Aaron Gregg, SBA exempted lawmakers, federal officials from ethics rules in \$660 billion loan program, The Washington Post, June 26, 2020, <https://www.washingtonpost.com/business/2020/06/26/sba-exempted-lawmakers-federal-officials-ethics-rules-660-billion-loan-program/> at 1.*

RESPONSE: This paragraph does not set forth facts that are material to the outcome of the parties' pending motions for summary judgment. *See Anderson*, 477 U.S. at 247-48. Accordingly, no response is required. Moreover, news reports generally are inadmissible hearsay and may not be considered for the truth of the proposition asserted in support of a motion for summary judgment.

Dated: September 22, 2020

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

Respectfully submitted,

/s/ INDRANEEL SUR
INDRANEEL SUR
Trial Attorney

JAMES BICKFORD
Trial Attorney

Federal Programs Branch,
Civil Division
United States Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 616-8448
E-mail: Indraneel.Sur@usdoj.gov