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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

United States of America ex rel. Bryan Quesenberry, Plaintiffs, v. Passive Income Advisors, LLC, and Gena Lofton, Defendants.	Case No. 2:20-cv-01537-RFB-MDC **United States' Complaint in Intervention** Jury Trial Demanded

INTRODUCTION

1. The United States brings this action for damages and statutory penalties under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33 and the common law, including equitable theories of unjust enrichment and payment by mistake, in connection with a federally guaranteed Paycheck Protection Program ("PPP") loan improperly obtained and retained by Passive Income Advisors, LLC ("PIA") and its owner Gena Lofton ("Lofton").

2. PIA and Lofton, collectively referred to herein as "the Defendants," made false or fraudulent statements and caused false claims to be submitted to the United States in an effort to obtain a federally guaranteed PPP loan. Specifically, the Defendants

improperly obtained and retained a PPP loan for $1,199,999, despite the fact that the Defendants knew that PIA did not have any (1) employees, (2) payroll, or (3) eligible owner compensation. As a result, the Defendants caused the United States Small Business Administration ("SBA") to pay Federal funds to a financial institution that disbursed the nearly $1.2 million PPP loan to PIA. If the Defendants had truthfully stated that PIA did not have any employees, payroll, or eligible owner compensation, PIA never would have received a PPP loan. The Defendants' false statements and improper retention of the PPP loan caused the United States to pay lender processing fees of $35,999.97 and purchase the guaranty of the improper PPP loan in the amount of $1,199,999 causing the United States to sustain a total loss of $1,235,998.97.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over the United States' claims brought under the FCA, 31 U.S.C. §§ 3279, *et seq.*, pursuant to 31 U.S.C. §§ 3730 and 3732. This Court has supplemental jurisdiction to entertain the common law and equitable causes of action under 28 U.S.C. § 1367(a).

2. This Court has personal jurisdiction over Defendants pursuant to 31 U.S.C. § 3732(a) because (A) at all times material hereto PIA transacted business in the District of Nevada; and (B) individual defendant Lofton resided in the District of Nevada, and acts proscribed by 31 U.S.C. § 3729 occurred in this district.

3. Venue is proper in this district pursuant to 31 U.S.C. § 3732(a), and under 28 U.S.C. §§ 1391(b) and 1395(a) because (A) PIA can be found in the District of Nevada; and (B) individual defendant Lofton resided within the District of Nevada. Furthermore, acts that form the basis of this Complaint in Intervention occurred in the District of Nevada.

PARTIES

I. The United States

4. The United States brings this action on behalf of the SBA. The SBA is the federal agency that administers the PPP.

II. Relator

5. Bryan Quesenberry ("Relator") is a resident of Oregon. In his capacity as a Relator, he filed the original *qui tam* complaint in this action on behalf of the United States, the real party in interest.

III. Defendants

6. Defendant PIA is a limited liability company organized in Wyoming and registered with the Nevada Secretary of State as a "foreign limited liability company." Gena Lofton is named as PIA's "Manager" with an address in Minden, Nevada. PIA purports to be an "asset management company" that manages apartment buildings. PIA listed its business address as Las Vegas, Nevada, on its PPP loan application.

7. Defendant Lofton has a residence in Las Vegas, Nevada. Lofton is PIA's owner and she signed PIA's PPP loan application on behalf of PIA. Lofton listed her address as Las Vegas, Nevada, on PIA's PPP loan application.

LEGAL BACKGROUND

I. The CARES Act and Paycheck Protection Program

8. On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") (Pub. L. 116-136) was enacted to provide emergency assistance and health care response for individuals, families, and businesses affected by the Coronavirus Disease 2019 (COVID-19) pandemic. Section 1102 of the CARES Act temporarily permitted the SBA to guarantee 100 percent of 7(a) loans made by participating lenders under a new program titled the "Paycheck Protection Program," pursuant to section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)). Section 1102(F)(ii)(I) of the CARES Act stated that all PPP lenders were deemed to have been delegated authority by the SBA Administrator to make and approve PPP loans (15 U.S.C. 636(a)(36)(F)(ii)(I)). Section 1106 of the CARES Act provided for forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP.

9. In order to obtain a PPP loan, a qualifying business, through its authorized representative, signed and submitted a PPP loan application to the lender with delegated

authority from the SBA, using SBA Form 2483 (hereafter "Application Form 2483"). Application Form 2483 required the applicant to acknowledge the PPP program rules and make certain affirmative certifications regarding program eligibility.

10. If the lender approved the borrower's application, the lender submitted information from the borrower's application to the SBA via the agency's electronic "E-Tran" processing system. E-Tran prompted the lender to enter information from Application Form 2483 into certain data fields. Based on the lender's electronic submission, the loan was assigned a loan number, and the SBA provided a loan guarantee to the lender. The lender then disbursed the loan to the borrower using its own funds and notified the SBA that the loan was fully disbursed. Upon receipt of that notification, the SBA paid the lender a processing fee.

11. To be eligible for a PPP loan in 2020, a borrower was required to have documented eligible payroll expenses or, in the case of sole proprietorships, owner compensation.

12. Assuming that a borrower met all other eligibility criteria and had payroll expenses or owner compensation, the dollar amount of a PPP loan was generally determined by the company's average monthly payroll costs for the one-year period before the date the loan was made, multiplied by 2.5. The PPP loan application further stated, "For purposes of calculating 'Average Monthly Payroll,' most Applicants will use the average monthly payroll for 2019, excluding costs over $100,000 on an annualized bases for each employee."

13. A PPP loan recipient could apply for forgiveness at any time up to the maturity date of the loan. If borrowers did not apply for forgiveness within ten months after the maturity date, PPP loan payments were no longer deferred, and borrowers had to begin making loan payments to their PPP lender. If a borrower's PPP loan was over 60 days past due, the lender could request purchase of the loan by the SBA pursuant to the agency's loan guarantee.

II. The False Claims Act

14. Originally enacted in the 1863 to combat fraud against the Union Army during the Civil War, the False Claims Act is the primary tool with which the United States combats fraud against the Government and protects the federal fisc. The Supreme Court has held that the FCA's provisions must be construed broadly to reach "all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

15. The FCA establishes liability for various forms of conduct related to the submission of a false or fraudulent claim for payment from the federal government. The FCA imposes liability for knowingly presenting false claims for federal funds, or for causing such false claims to be presented. 31 U.S.C. § 3729(a)(1)(A). The statute also establishes liability for knowingly making, using, or causing a false record or statement material to a false claim for federal funds. 31 U.S.C. § 3729(a)(1)(B). Finally, the statute establishes liability for knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the Government. 31 U.S.C. § 3729(a)(1)(G).

16. The terms "knowing" and "knowingly" are defined by the FCA to mean that, with respect to the subject false information, a person has actual knowledge of the falsity, acts in deliberate ignorance of the truth or falsity, or acts in reckless disregard of the truth or falsity, and proof of specific intent to defraud is not required. 31 U.S.C. § 3729(b).

17. As defined in the FCA, the term "claim" means any request or demand for money or property that is presented or caused to be presented to the United States; or that is made to a contractor, grantee, or other recipient, if the money is to be spent or used on behalf of the Government or to advance a Government program or interest, so long as the United States provides or has provided any portion of the subject money or property or will reimburse such contractor, grantee, or other recipient for any portion of the subject money or property. *Id.*

18. The term "material" is defined in the FCA to mean having a natural tendency

to influence, or be capable of influencing, the payment or receipt of money or property. *Id.*

19. The FCA provides for a recovery of three times the damages sustained by the United States (treble damages), plus a civil penalty for each violation. 31 U.S.C. § 3729(a)(1). Pursuant to the Bipartisan Budget Act of 2015, all civil statutory penalties, including those set forth in the FCA, are required to be adjusted annually for inflation. *See* Pub. Law. No. 114-74, § 701, 129 Stat. 584, 599. At this time, FCA penalties assessed after February 12, 2024, whose associated violations occurred after November 2, 2015, are no less than $13,946 and no more than $27,894 for each violation. *See* 28 C.F.R. § 85.5 (Adjustments to penalties for violations occurring after November 2, 2015).

DEFENDANTS' FRAUDULENT ACTIVITY

20. The Defendants knowingly made and caused to be presented false claims and statements to the SBA, in order to improperly obtain and retain the funds of a PPP loan administered by the SBA. PIA – through Lofton – improperly applied for and received a PPP loan for $1,199,999 despite having no employees, payroll, or eligible owner compensation in 2019, in violation of PPP rules.

21. On or about May 11, 2020, PIA submitted Application Form 2483 to lender Greater Nevada Credit Union seeking a PPP loan ("PIA PPP Loan"). Lofton signed the loan application on behalf of PIA. Lofton falsely certified that "the information provided in all supporting documents and forms is true and accurate in all material respects" by stating that PIA had five employees and an average monthly payroll of $1 million. Lofton knew that (a) PIA did not have any employees or payroll in 2019; (b) PIA had net negative income in 2019; (c) PIA was not eligible to receive a PPP loan in the amount of $1,199,999.

22. Lofton also falsely certified that, as of February 15, 2020, PIA "had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC." Lofton knew that PIA did not have any employees for

whom it paid salaries and payroll taxes as of February 15, 2020, and that PIA was ineligible to receive a $1,199,999 PPP loan.

23. Based on this application and the eligibility certifications therein, Greater Nevada Credit Union electronically submitted information from Application Form 2483 to the SBA. This electronic submission caused the SBA to assign a loan number and provide a loan guarantee to Greater Nevada Credit Union.

24. Lofton listed herself as the 100% owner of PIA in the PPP Loan application that she submitted on behalf of PIA.

25. On or about June 4, 2020, Greater Nevada Credit Union disbursed loan #5015517403 to PIA in the amount of $1,199,999 and notified the SBA that the loan had been funded.

26. The false and fraudulent statements and claims alleged herein were material to the SBA's decision to pay processing fees and guarantee the PIA PPP Loan.

27. In or about July 2020, Greater Nevada Credit Union transferred the PIA PPP Loan to Fountainhead SBF LLC ("Fountainhead").

28. On or about July 14, 2021, Defendants applied for loan forgiveness for the PIA PPP Loan. On the forgiveness application, Lofton stated that PIA had zero "Employees at Time of Loan Application" and that PIA had one "Employees at Time of Forgiveness Application."

29. The loan forgiveness application submitted by Defendants expressly warned that "The Borrower's eligibility for loan forgiveness will be evaluated in accordance with the PPP regulations and guidance issued by SBA through the date of this application." In the forgiveness application for the PIA PPP Loan, Defendants falsely certified, expressly or impliedly, that PIA was eligible for the loan, that PIA satisfied all PPP rules and requirements with regard to the loan, and that PIA was eligible for loan forgiveness in the full amount of the loan.

30. The SBA denied PIA's application for forgiveness of the PIA PPP Loan on or about February 2, 2022. The SBA explained:

> After review of the documentation provided, the SBA concludes that the borrower did not have any eligible payroll cost at the time of loan application. In addition, the SBA concludes that there was a failure to respond to SBA's inquiry for request of additional required information.
>
> The 2019 Schedule C Form demonstrates a negative net income, indicating the Borrower may have not been eligible to receive a PPP loan. The reviewer requested documentation to determine the maximum loan amount such as the lender analysis of the loan amount at origination on September 9th, 23rd, October 1st, 12th, 21st and November 4th, 2021, without receiving the requested documentation. Thus, the Reviewer was unable to make a conclusion due to the lack of response to requests for required documentation deeming the Borrower ineligible to participate in the Paycheck Protection Program.

31. On or about February 15, 2022, Lofton wrote to the SBA to advise that she disagreed with SBA's denial of loan forgiveness for the PIA PPP Loan. Lofton argued, in part, that "[t]he appropriate time to determine that I did not qualify, or was ineligible, seems to have been when the application was being reviewed for approval, NOT after the funds of $1,199,999.00 were approved and disbursed. Additionally, I disagree with the decision that $0.00 of the loan is forgivable."

32. Despite Defendants false and fraudulent certifications, and the SBA's denial of loan forgiveness, Defendants knowingly and improperly retained the PIA PPP Loan.

33. Defendants failed to make required timely payments on the PIA PPP Loan. On or about March 7, 2022, Fountainhead charged off the PIA PPP loan, which the SBA purchased pursuant to its guaranty on or about March 9, 2022.

34. On or about May 10, 2022, the SBA again denied PIA's application for forgiveness of the PIA PPP Loan in full and informed Fountainhead. In its determination, SBA explained:

> After review of the documentation provided, the SBA concludes that the borrower did not have any eligible payroll cost at the time of loan application.

> According to the 2019 Schedule C Form, the Borrower had a negative net income of -$56,265, indicating no eligible owner compensation. Additionally, there is no amount listed for salaries and wages on the 2019 Schedule C Form nor any 2019 941 Forms documenting employee compensation to determine the maximum eligible PPP loan amount. Thus, forgiveness cannot be supported in consequence of no eligible payroll costs at the time of PPP loan application.

35. As a result of PIA's fraudulent scheme and knowingly false representations of PPP eligibility, the Defendants received CARES Act funding that they would not have received but for the false statements and knowing and improper retention of the improper PIA PPP Loan as alleged herein.

COUNT I
(False Claims Act: Presentation of False Claim for Payment)
(31 U.S.C. § 3729(a)(1)(A))

36. The United States re-alleges and incorporates in this Count I the above paragraphs of this Complaint in Intervention.

37. By virtue of the acts described above, Defendants knowingly presented or caused to be presented materially false or fraudulent claims for payment or approval to the SBA in violation of the False Claims Act, 31 U.S.C. § 3729(a)(l)(A); that is, Defendants knowingly and falsely stated in Application Form 2483 that PIA had employees, payroll, or eligible owner compensation to support a $1,199,999 PPP loan and that the company was eligible under applicable rules and regulations, that resulted in the SBA disbursing processing fees to the lender, guarantying the full amount of the loan, and ultimately purchasing and forgiving the improper PIA PPP Loan. Thereafter, in the forgiveness application for the improper PIA PPP Loan, Defendants falsely certified, expressly or impliedly, that PIA was eligible for the loan, that PIA satisfied all PPP rules and requirements with regard to the loan, and that PIA was eligible for loan forgiveness in the full amount of the loan.

38. Payment of the false and fraudulent claims was a reasonable and foreseeable consequence of Defendants' conduct.

39. The United States was unaware of the falsity of the records, statements, and claims Defendants made, submitted, or caused to be submitted.

40. The false or fraudulent representations and claims Defendants knowingly made to the United States were material to the United States' decisions to make payments to Defendants.

41. By reason of the foregoing, the United States has been damaged in an amount to be determined at trial and is entitled to recover treble damages plus a civil monetary penalty for each false and fraudulent claim.

COUNT II
(False Claims Act: False Records or Statements Material to a False or Fraudulent Claim)
(31 U.S.C. § 3729(a)(1)(B))

42. The United States re-alleges and incorporates in this Count II the above paragraphs of this Complaint in Intervention.

43. By virtue of the acts described above, Defendants made, used, or caused to be made or used, false records or statements – namely, false claims and false statements in their application for the improper PIA PPP Loan that resulted in the SBA disbursing processing fees to the lender, guarantying the full amount of the loan, and ultimately purchasing and forgiving the loan – all of which were material to false or fraudulent claims that were submitted to the United States and paid and approved by the SBA, in violation of the False Claims Act, 31 U.S.C. § 3729(a)(l)(B).

44. Defendants' false certifications and representations were made for the purpose of ensuring that the United States paid the false or fraudulent claims, which was a reasonable and foreseeable consequence of the Defendants' conduct.

45. The United States was unaware of the falsity of the records, statements, and claims Defendants made, submitted, or caused to be made or submitted, and in reliance on the accuracy of these records or statements, the United States paid false or fraudulent claims.

46. The false and fraudulent representations and claims Defendants knowingly made to the United States were material to the United States' decisions to make payments to Defendants.

47. By reason of the foregoing, the United States has been damaged in an amount to be determined at trial and is entitled to recover treble damages plus a civil monetary penalty for each false and fraudulent claim.

COUNT III
(False Claims Act: Reverse False Claim)
(31 U.S.C. § 3729(a)(1)(G))

48. The United States re-alleges and incorporates in this Count III the above paragraphs of this Complaint in Intervention.

49. By virtue of the acts described above, Defendants knowingly made, used, or caused to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay or transmit money or property to the Government, in violation of the FCA, 31 U.S.C. § 3729(a)(l)(G). Defendants knowingly and improperly retained the PIA PPP Loan despite knowing PIA had no employees, payroll, or eligible owner compensation and, thereafter, Defendants knowingly and improperly avoided their obligation to repay the PIA PPP Loan that they understood they never should have received in the first instance.

50. By reason of the foregoing, the United States has been damaged in an amount to be determined at trial and is entitled to recover treble damages plus a civil monetary penalty for each false and fraudulent claim.

Count IV
(Unjust Enrichment)

51. The United States re-alleges and incorporates in this Count IV the above paragraphs of this Complaint in Intervention and pleads this count in the alternative.

52. By virtue of the acts described above, Defendants knowingly made materially false or fraudulent statements in violation of federal law that resulted in the United States

and lenders acting on behalf of the United States paying Defendants certain sums of money. Defendants' receipt of payments based on their false certifications are such that, in equity and good conscience, Defendants should not retain those payments.

53. The United States has and continues to have a reasonable expectation of payment of the monies paid to Defendants based on false or fraudulent claims.

54. Defendants should reasonably have expected and should reasonably be expected to pay to the United States the monies paid to Defendants based on false or fraudulent claims.

55. Society's reasonable expectations of person and property would be defeated by Defendants' nonpayment to the United States of the monies paid to Defendants.

56. By reason of Defendants' acts, the United States has been damaged in an amount to be determined at trial.

Count V
(Payment by Mistake)

57. The United States re-alleges and incorporates in this Count V the above paragraphs of this Complaint in Intervention and pleads this count in the alternative.

58. The United States' agents paid the claims and statements Defendants submitted or caused to be submitted based upon mistaken or erroneous understandings of material fact.

59. The United States and lenders acting on the United States' behalf, acting in reasonable reliance on the accuracy and truthfulness of the information contained in Defendants' claims and statements, paid Defendants certain sums of money, in an amount to be proven at trial, to which they were not entitled, and Defendants are thus liable to account and pay such amounts to the United States.

60. By reason of the foregoing conduct of Defendants, the United States and lenders acting on behalf of the United States made payments under mistake of fact.

61. As a result of these payments made by the United States and lenders acting on behalf of the United States under mistake of fact, the United States has sustained damages in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, the United States demands judgment in its favor and against Defendants as follows:

I. On Count I under the False Claims Act, for the amount of the United States' damages to be established at trial, trebled as required by law, and such civil penalties as are authorized by law, and all such further relief the Court deems just and proper.

II. On Count II under the False Claims Act, for the amount of the United States' damages to be established at trial, trebled as required by law, and such civil penalties as are authorized by law, and all such further relief the Court deems just and proper.

III. On Count III under the False Claims Act, for the amount of the United States' damages to be established at trial, trebled as required by law, and such civil penalties as are authorized by law, and all such further relief the Court deems just and proper.

IV. On Count IV for unjust enrichment, for the amounts by which Defendants were unjustly enriched, plus interest, costs, expenses, and for all such further relief as may be just and proper.

V. On Count V for payment by mistake, for the amount of the United States paid by mistake, plus interest, costs, and expenses, and for all such further relief as may be just and proper.

DEMAND FOR JURY TRIAL

The United States demands a jury trial in this case.

Respectfully submitted this 3rd day of October 2024

BRIAN M. BOYTON
Principal Deputy Assistant Attorney General

/s/ Jared S. Wiesner
Jared S. Wiesner
Trial Attorney, Civil Division