SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11
Justice

Index Number : 104330/2012
CITY OF NEW YORK
vs.
SIEMENS
SEQUENCE NUMBER : 003
OTHER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the memorandum Decision filed under motion seq. no. 002.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 28, 2017

_____, J.S.C.
HON. JOAN A. MADDEN
J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11
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CITY OF NEW YORK, and STATE OF NEW YORK, CITY OF NEW YORK, ex rel. CLIFFORD WEINER,

INDEX NO. 104330/12

Plaintiff

-against-

SIEMENS ELECTRICAL LLC f/k/a SCHLESINGER-SIEMENS ELECTRICAL LLC; SIEMENS INDUSTRY INC. f/k/a SIEMENS ENERGY & AUTOMATION, INC., and SCHLESINGER ELECTRICAL CONTRACTORS, INC.,

Defendants.
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JOAN A. MADDEN, J.:

Defendants Siemens Electrical LLC, f/k/a Schlesinger-Siemens Electrical, LLC ("the LLC") and Siemens Industry, Inc., f/k/a Siemens Energy & Automation, Inc., ("Siemens Inc.")(together "the Siemens Defendants") move for summary judgment dismissing the claims against them based on the holding of the United States Supreme Court in Universal Health Services v. United States, ex rel. Escobar, 136 S.Ct. 1989 (2016) (motion seq no. 002). Defendant Schlesinger Electrical Inc. ("Schlesinger") separately moves to join in the Siemens defendants' motion (motion seq no. 003).[1] Plaintiff the City of New York ("the City") opposes both motions and cross moves to lift the stay of discovery caused by service of the summary judgment motion, to stay the summary judgment motion until discovery is complete or, in the alternative, to adjourn the motion for 60 days to permit the City to further oppose the motion on the merits.

[1]Motion sequence numbers 002 and 003 are consolidated for disposition.

Background

In this action, the City asserts claims against the Siemens defendants and Schlesinger under the New York State False Claims Act (NYSFCA), State Finance Law § 189, et seq, the New York City False Claims Act (NYCFCA) , New York City Administrative Code § 7-803, et seq (together "the FCA claims"). Siemens Inc. and Schlesinger formed the LLC, a Delaware limited liability company in August 2004, with the two companies as the LLC's two members.[2] The purpose of the LLC was to bid on and, if successful in bidding, perform under contracts with the City of New York Department of Environmental Protection ("DEP").

At issue in this action is defendants' conduct in connection with five electrical contracts DEP awarded to LLC between August 31, 2005 and January 19, 2007, for a total of $234,798,844 (hereinafter "the DEP Contracts"). The five contracts included: one to upgrade the 26th Ward Wastewater Treatment Plant in Canarsie, Brooklyn (the "26th Ward" contract);two contracts for upgrades of the Wards Island Wastewater Treatment Plant on Wards Island in Manhattan (the "Wards Island 79" and "Wards Island 87" contracts); and two contracts for construction of the new Croton Water Filtration Plant in the North Bronx (the "Croton E1" and "Croton E2" contracts).

Each of the five DEP Contracts required the LLC to comply with the State of New York Minority and Women Business Enterprise program ("MBE program") by making good faith efforts to subcontract a specific percentage of the contract amount for each of the DEP Contracts to certified MBE companies. In addition, DEP requires all contracts for electrical work to

[2]It appears that in 2012, the LLC was restructured so that Schlesinger was no longer a member.

comply with certain master electrician regulatory requirements, including that work be awarded to licensed electrical contractors, and that the electrical contractors comply with the New York State electrical code. The FCA claims in this action arise out of defendants' conduct of, *inter alia*, falsely overstating the participation of MBE companies and their knowing violation of certain master electrician requirements.

On January 10, 2013, the LLC entered into a Deferred Prosecution Agreement ("DPA") with the District Attorney's Office for the County of New York ("DANY") under which the LLC accepted responsibility for its conduct in connection with the DEP Contracts underlying the criminal and forfeiture claims against it, paid $10 million and agreed to various internal controls and compliance procedures.[3] A Statement of Facts attached to, and expressly incorporated into, the DPA states, *inter alia*, that:

> Through their conduct, certain high managerial agents of [the LLC] defrauded the DOB [i.e. the New York City Department of Buildings] and DEP by falsely overstating the actual participation of MBE companies, knowingly violated the New York City Electrical Code as it relates to electrical contractors and Master Electricians, and caused false documents to be submitted to both the DEP and the DOB.

(Siemens defendants' motion, Exh. 3, ¶ 18).

In September 2014, following a jury trial relating to charges in connection with the five DEP Contracts, Schlesinger was convicted of two counts, *i.e.* a scheme to defraud and offering a

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[3]The Siemens defendants maintain that they accepted responsibility for the actions of their business partner, Schlesinger, and that if this motion is denied, they will demonstrate that "there is no evidence that Siemens personnel were aware of the MBE or the master electrician misconduct at the time that it occurred, and that as the Siemens personnel became aware of potential issues, they took various actions including replacing Schlesinger personnel, sought advice of counsel and engaged in robust dialogue with the relevant City officials, as well as conducted an internal investigation and cooperated with DANY."

false instrument for filing, and its owner Jacob Levita was convicted of one count of a scheme to defraud.

In November 2015, after settlement discussions in this action failed, the City filed a superceding complaint in this action (hereinafter "the Superceding Complaint") which originally was filed in 2012, under the *qui tam* provisions of the NYSFCA. The Superceding Complaint alleges, *inter alia*, that defendants violated the FCA (i) by falsely overstating the actual participation of MBE companies, including through the use of MBE subcontractors as pass-throughs as opposed to serving a commercially useful function, (ii) by their knowing violation of the New York State Electrical Code, through its submission of false documents with respect to its compliance with the Code, including with respect to the LLC's employment of a master electrician, and making false representations that the work was performed by the LLC when it was in fact performed by Schlesinger, and falsely representing during the procurement process that the LLC did not share staff with Schlesinger. Notably, the allegations in complaint relate to violations that occurred before the Siemens defendants entered into the DPA and Schlesinger's conviction.

The Siemens defendants and Schlesinger each filed an answer denying the allegations in the Superceding Complaint. A preliminary conference was held on May 26, 2016, and provided for document production to be complete by October 14, 2016, and that depositions be held by December 15, 2016.

Before document production was completed, or any depositions were conducted, the Siemens defendants filed this motion for summary judgment, which has been joined by Schlesinger. While the Siemens defendants admit there was misconduct in connection with the

MBE and master electrician requirements, they argue that they are entitled to summary judgment dismissing the complaint since the City had "full knowledge of [these] regulatory failures," but continued to accept and pay monthly contract amounts.[4] Moreover, they argue that discovery is not needed since the DEP' s knowledge and payment is the only relevant evidence and is not in dispute, and the City is already in possession of the necessary facts since "the relevant inquiry is DEP's knowledge of the alleged misrepresentations and DEP's actions [and that] the City needs no discovery of itself."

In support of their argument that DEP's knowledge of their misconduct provides a basis for dismissal of the complaint, the Siemens defendants rely on the U.S. Supreme Court's decision in Universal Health, supra, which held that FCA claims based on implied certifications of regulatory compliance cannot proceed unless the certifications were"material to the Government's payment decision," and that it is "very strong evidence" that a requirement is not material "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated." 136 S. Ct. at 2002-2003. The Siemens defendants argue that as the DEP continued to pay the approved contract amounts despite the DEP's knowledge of their admitted misconduct, the violations cannot be material under the holding in Universal Health and the complaint must be dismissed.

The Siemens defendants support their motion with documentary evidence and other proof which, they argue, shows that even though the DEP knew the Siemens defendants did not comply

[4]Each of the DEP Contracts contains provisions governing DEP's payments to Siemens LLC during contract performance, including that Siemens LLC could submit a partial payment requisition, as often as once a month, in a form prescribed by DEP, and that every requisition include payroll reports for the contractor and its subcontractors.

with the MBE requirements and the master electrician regulations, it nonetheless paid them.

With respect to payment, the Siemens defendants submit an affidavit from Bernhard Leiner, the CEO of the LLC, who attaches a chart from publically available information showing payments made by DEP to the LLC under the DEP Contracts.[5] He also states that "[t]he DEP has not withheld any payments on any of the Contracts on grounds that Defendants have misrepresented compliance with master electrician requirements or the [MBE] program."

In opposition, the City argues that the evidence relied on by the Siemens defendants is insufficient to eliminate issues of fact as to whether the DPA knew the nature and extent of the Siemens defendants' violations, and cross moves pursuant to CPLR 3212(f) for relief allowing discovery to continue or, alternatively, to permit the City to submit further evidence regarding the merits of its claims. In addition, the City argues that the summary judgment motion ignores that the analysis in Universal Health is inapplicable to the extent that the Superceding Complaint alleges that Siemens defendants made expressly false representations, including that the work was performed by the LLC was in fact performed by Schlesinger, and that the Siemens defendants fraudulent induced the DEP to enter the contracts during the procurement process by falsely representing that the LLC did not share staff with Schlesinger.

In reply, and in opposition to the cross motion, the Siemens defendants assert that the

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[5]Mr. Leiner states that the payments made include the following: with respect to the 26th Ward contract there were 104 payments totaling $28,281,019 from May 27, 2006 and March 7, 2014; with respect to the Ward Islands 79 contract there were 67 payments totaling $29,865,085 from June 19, 2007 to August 11, 2014; with respect to the Wards Island 87 contract there were 31 payments totaling $13,160,109 from November 13, 2007 to August 24, 2014; with respect to the Croton E1 contract there were 66 payments totaling $159,049,020 from September 19, 2007 and April 6, 2016; with respect to the Croton E2 contract there were 63 payments totaling $44,684,033 from September 19, 2007 to April 8, 2016. He also states that work and payments under the Croton E1 and Croton E2 contracts are continuing.

City has received six separate document productions totaling over 100,000 pages of responsive materials. They also argue that the express representations cited by the City do not provide a basis for an FCA claim as they were not made in connection with a request for payment. In reply, Schlesinger states that it has produced approximately 59,071 pages responsive to the City's discovery requests.

Discussion

To state a claim under the NYS FCA or NYC FCA, a plaintiff must allege that the defendant submitted a claim to the government was "false or fraudulent." N.Y. State Fin. Law § 189(1); N.Y.C. Admin. Code §§ 7-802(4), 7-803(a)(1)-(2). As New York's False Claims Act "follows the federal False Claims Act (31 USC § 3729 *et seq.*) . . . it is appropriate to look toward federal law when interpreting the New York act." State of New York ex rel. Seiden v Utica First Ins. Co., 96 AD3d 67, 71 (1st Dept), lv denied 19 NY3d 810 (2012).

There are two cognizable theories of "legally false" False Claims Act liability: express false certification and implied false certification. Universal Health, 136 S. Ct. at 1999. These theories apply when, in connection with a request for payment, a defendant falsely certifies its compliance with a federal statute, regulation, or contractual provision containing a material condition for government payment. Id. An express false certification involves a defendant's express representation of compliance when it is actually not compliant. Mikes v. Straus, 274 F3d 687, 698 (2d Cir. 2001), abrogated on other grounds by Universal Health Servs., Inc. v. United States, supra. The implied false certification theory is based on the concept that when a contractor submits a claim it impliedly certifies compliance with conditions of payment, and that when "[such] claim fails to disclose the defendant's violation of a material statutory, regulatory,

or contractual requirement... the defendant has made a misrepresentation that renders the claim 'false or fraudulent,' under the False Claims Act." Universal Health, 136 S. Ct. at 1995.

In Universal Health, supra the Supreme Court "granted certiorari to resolve the disagreement among the Courts of Appeals over the validity and scope of the implied false certification theory of liability.[6]" 136 S.Ct at 1998. The Supreme Court held that the implied false certification theory can be a basis for liability where two conditions are satisfied: "first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." Id. at 2001. With respect to the materiality requirement, the FCA defines materiality as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." Id at 2002 (quoting 31 U.S.C. § 3729(b)(4)). Thus, the misrepresentation "must be material to the Government's payment decision in order to be actionable under the [FCA]." Id.

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[6]The alleged false claims at issue in Universal Health were made in connection with the Massachusetts' Medicaid program and involved a teenage beneficiary of the program who received counseling services from Arbour Counseling Services ("Arbour"). Counselors at Arbour intermittently treated the teenager and prescribed medication, to which the teenager reacted adversely on several occasions, and which eventually caused the teenager's death from a seizure. An Arbour counselor revealed to the teenager's parents that few Arbour employees were licensed to provide mental health counseling and many performed medical services without required supervision, and the teenager's parents filed a *qui tam* suit under an implied false certification theory of liability. In Universal Health the Supreme Court vacated the judgment of the First Circuit Court of Appeals and remanded for a determination of whether the requirements were "so central to the provision of mental health counseling that the Medicaid program would not have paid the[ ] claims had it known of the[ ] violations." Id. at 2004.

The "materiality standard is demanding," and cannot be satisfied "where noncompliance is minor or insubstantial." Id at 2003. "Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance." Id. The Supreme Court described the materiality analysis as follows:

> In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, and has signaled no change in position, that is very strong evidence that those requirements are not material.

Id.

The primary issue on this motion concerns the viability of the City's claims based on an implied certification theory and, specifically, whether under the materiality standard set forth in Universal Health, it can established at this stage of the proceedings that City knew about the defendants' failure to comply with the MBE requirements and the regulations regarding master electricians and nonetheless paid defendants, so that the violation of such regulations cannot said to be material for the purposes of the FCA.

MBE Requirements

As indicated above, each DEP Contract provided that the LLC was to comply with MBE requirements by making good faith efforts to subcontract a specific percentage of the contract amount for each of the DEP Contracts to a certified MBE subcontractor, which subcontractor

performed a "commercially useful function."[7] DEP, with approval from the New York State Environmental Facilities Corporation (EFC), can waive strict compliance with the MBE requirements when a contractor made good faith efforts to comply but nonetheless fell short of the target percentages. See N.Y. State Executive Law § 313(6).

At issue in this action is defendants' alleged violation of MBE requirements by making false statements as to their compliance with such requirements, including by claiming credit for equipment manufactured by Siemens, Inc. and passed through three different MBE subcontractors--J&R Rey, A-Tech, and Angel-- which performed no commercially reasonable function.

In support of their position that DEP knew of these violations, the Siemens defendants point to evidence that they submitted periodic utilization reports to DEP reflecting the work being performed by MBE companies, and that for three of the DEP Contracts, the report showed the work included Siemens Inc. equipment valued at $10 million. They also attach correspondence that the defendants argue disclosed to the DEP that the Siemens equipment had been included in the value of its MBE subcontracts.[8]

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[7]Under New York City Administrative Code § 6-129(8), factors considered in determining whether an MBE company performs a commercially useful function, include "(a)whether it has the skill and expertise to perform the work for which it is being utilized, and possesses all necessary license, (b) whether it is in the business of performing, managing, or supervising the work for which it has been certified and is being utilized, and (c) whether it purchases goods and/or services from another business and whether its participation in the contract would have the principal effect of allowing it to act as a middle person or broker in which case it may not be considered to be performing a commercially useful function for the purposes of this section."

[8]See Affirmation of Wendy H. Schwartz, dated September 15, 2016 ("Schwartz Aff."), Exhs. 8-14.

Contrary to the Siemens defendants' position, the documentary evidence is insufficient to eliminate issues of fact as to whether the DEP knew that the LLC failed to comply with MBE regulations. With respect to the correspondence relating to MBE subcontractor J&R Rey, the court notes that in the letter dated July 13, 2007, DEP responded to the LLC's statements in its June 28, 2007 correspondence as to its hiring of J&R Rey, by rejecting the LLC's use of J&R Rey "as a passive conduit of funds." Moreover, while the responsive letter from the LLC dated July 24, 2007 referred to equipment to be purchased by J&R Rey from Siemens Inc. at a future date, which purchase was apparently approved in a DEP letter dated August 7, 2007, such approval of the purchase of equipment alone does not mean that the DEP permitted J&R to be used as a pass-through. Furthermore, the July 24, 2007 letter also stated that J&R was being used to install electrical equipment at the work site and that J&R employees are at the worksite, and the record does not establish the veracity of such statements.[9] As for the documents related to the MBE subcontractor A-Tech, the October 20, 2008 letter from the LLC to DEP stating that A-Tech performed work totaling approximately $1,622,000, which is $400,000 less than the MBE participation goal, does not resolve issues of fact as to whether this statement was false and misleading.

With regard to correspondence as to MBE subcontractor Angel Electric, the Siemens defendants rely, *inter alia*, on a June 1, 2010 letter, disclosing that the DEP contract would include $7 million of equipment procured by Angel Electric from Siemens Inc. While the June 1, 2010 letter appears to show that the DEP knew Angel Electric purchased equipment from

[9]In fact, the Statement of Facts annexed to the DPA states that J& R did not install certain of this equipment valued at $756,000, which was used by defendants to meet the MBE goals.

Siemens, Inc., such knowledge is not dispositive of the issues on the motion. For example, the June 1, 2010 letter also states that Angel Electric will be paid for performing work on the project, including $2,355,000 for labor, and $1,345,000 for general electrical material, and the documents submitted by the Siemens defendants do not establish the accuracy of these representations.

The Siemens defendants also argue that they are entitled to summary judgment based on documentary evidence demonstrating that after they entered into the DPA, the DEP allowed the LLC to waive certain MBE requirements, agreed to the close the three of the five DEP Contracts (the work on the Croton E1 and Croton E2 Contracts was not completed), and to release payments to the LLC. In support of their position, the Siemens defendants submit requests by the LLC for equipment waivers for the DEP Contracts, seeking to exclude certain specialized Siemens equipment from the contract value used to calculate the MBE percentage,[10] documents that purportedly show that even with the specialized equipment waivers, the LLC would not meet the MBE percentage goals,[11] and correspondence from EFC and DEP allowing the contracts to be closed with respect to the MBE program and the release of payments to the LLC.[12]

In response, the City argues that as the payments to the LLC after it entered into the DPA were made after the misconduct had ceased, such payments are irrelevant to the issue of materiality. Moreover, the City argues that the DPA did not reveal the full scope of the defendants' misconduct, which can only be ascertained through discovery.

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[10]Schwartz Aff., Exhs. 15-18.

[11]Id., Exhs. 19- 23.

[12]Id., Exhs. 19, 21, 24, 26.

Upon review of the record, the court finds that it would be premature to grant summary judgment with respect to the materiality of the MBE requirements, particularly as the documents relied on by the Siemens defendants are not self explanatory and the submissions do not include affidavits from the authors of the documents or any person with knowledge of their contents. Specifically, it cannot be said that the defendants have established that compliance with the MBE was not material to payment under the DEP contracts. See Universal Health,136 S.Ct at 2002 (a misrepresentation under the FCA must be material to the government's decision to pay).

In addition, to the extent the documents show that, in certain instances, DEP permitted the Siemens defendants to use the purchase of Siemens, Inc. equipment to meet MBE requirements, the documents do not establish that DPA knew such purchases were merely pass-throughs and did not serve a commercially useful function as defined under the Administrative Code. These documents are also insufficient to eliminate issues of fact as to whether DEP knew of defendants' misconduct, particularly as the record shows that Siemens defendants provided false statements to DEP as to its compliance with MBE requirements. In fact, in connection with the criminal proceeding, the Siemens defendants admitted that they "defrauded the DOB and DEP by falsely overstating the actual participation of MBE companies."

As for the period after the DPA was entered into, DEP's grant of legally permissible waivers of certain MBE requirements, and its payments to the Siemens defendants after their misconduct allegedly ceased, are insufficient to establish as a matter of law that the violations by the defendants, which preceded such waiver and payments, were not material for the purposes of

the FCA.[13] In this connection, the record shows that the majority of payments with respect to the five contracts were made , and the Superceding Complaint alleges that defendants' wrongdoing occurred, before the LLC entered into the DPA on January 10, 2013. In addition, without more discovery, the circumstances surrounding the payments after the LLC entered into the DPA and any explanation for such payments cannot be evaluated. In the absence of such evaluation, it cannot be said that the City's subsequent knowledge of defendants' violations is material.

Master Electrician Requirements

As indicated above, DEP requires that all contracts for electrical work be awarded to licensed electrical contractors and that all electrical contractors comply with the New York City electrical code. The DOB regulates electrical contracting companies and master electricians in New York City and requires that all electrical companies doing business in New York City have a licensed master electrician supervise and inspect electrical work performed by the electrical company's employees.

In connection with the DPA, the LLC admitted that between 2005 and 2008 , it was not in compliance with the New York City Electrical Code, did not employ a master electrician responsible for supervising employees who were conducting work on the DEP project, had no electrical employees of its own and no electrical work was performed on the DEP project by its

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[13]Nor is City of Chicago v. Purdue Pharma, L.P., 211 FSupp.3d 1058 (N.D. Ill 2016), cited by the Siemens defendants to the contrary. In City of Chicago , the District Court of the Northern District of Illinois granted a pre-answer motion to dismiss plaintiff's claims under the False Claims Act where the complaint alleged that the plaintiff "paid and continues to pay claims that would not be paid but for defendants' unlawful business practices," and granted it leave to replead in light of the holding in Universal Health. Id. at 1078. In contrast, the complaint here does not allege that plaintiff continued to pay the Siemens defendants after it knew of the illegal conduct.

employees. The LLC further admitted that it hired an electrician and appointed him as Vice President Electrical at the LLC, and paid him solely for the use of his license, and that the electrician was working full time at another electrical company and had no knowledge of the work on the five DEP contracts. The Siemens defendants also admitted that all electrical work on the five DEP contracts was supervised by employees of Schlesinger, who were responsible for all electrical work on the projects.

In this action, it is alleged with respect to the master electrician issues, that, (i) the LLC induced DEP to award the DEP Contracts by expressly misrepresenting on Vendex questionnaires that the LLC did not share employees with Schlesinger, when, in fact, the LLC was a shell company and had no employees of its own and relied Schlesinger 's employees to perform its electrical work; (ii) with respect to the 26th Ward Contract, the LLC induced DEP to award the contact by "falsely" representing that it would subcontract its work to Schlesinger, and with respect to the other four DEP Contracts, by falsely representing it was in compliance with the master electrician requirements, (iii) defendants paid a "nominal fee" of approximately $1,500 per month to Steve Ostrovsky ("Ostrovsky"), a master electrician, and that between approximately June 2006 and December 2008, the LLC fraudulently held out Ostrovsky as a representative of the LLC who was supervising the electrical work, even though he did not have any oversight or other involvement in the work performed under the DEP Contracts; (iv) the LLC held out Ralph Scotti ("Scotti"), who was a managerial employee at Schlesinger, as its employee and master electrician from January 2009 until April 2012,[14] even though he continued his role at

[14]The Superceding Complaint alleges that the violations with respect to the electrical regulations ended in or around April 2012, when Siemens LLC was restructured into a single member liability company.

Schlesinger, and that Scotti submitted fraudulent permits applications and other documentation representing that the subject work was performed by a joint venture between LLC and Schlesinger, and (v) the LLC submitted partial payment requisitions representing that the services had been "provided in the manner required by contract," when, in fact, the LLC failed to have its own master electrician in violation of the DEP Contracts.

The Siemens defendants argue that their violation of the electrical code requirements, including their use of Schlesinger for the performance of electrical work, were not material under the holding in Universal Health, supra , as DEP consistently paid requisitions and issued approvals, even though the record shows DEP was aware of the LLC's corporate structure in which it did not have any employees, including a master electrician, and that Schlesinger employees were performing the work on the DEP Contracts. In support of this argument, the Siemens defendants point to documentary evidence that Schlesinger's owner Jacob Levita ("Levita"), who is a master electrician, signed certified time sheets with each monthly requisition, and that when an issue came up as to the practice in January 2009, it was agreed that two sets of certified time sheets signed by Levita could be submitted, one in the name of the LLC and the other in the name of Schlesinger.[15]

The Siemens defendants also argue that documentary evidence shows that after the 26 Ward Contract was awarded, DEP obtained permission from DOB to have the LLC subcontract the electrical work to Schlesinger.[16] As for the other DEP Contracts, however, the Siemens defendants acknowledge that DEP required the LLC to get its own master electrician, but assert

[15]Schwartz Aff., Exhs. 41-44; 57-58,

[16]Id., Exhs. 31-37.

that DEP's Chief Contracting Officer, Carol Fenves, failed to take any steps to enforce or confirm compliance with the requirement, citing trial testimony from Schlesinger's criminal trial.[17] They also cite trial testimony that when Ostrovsky's license expired in January 2008, DOB did not notify DEP or issue a stop work order.[18] The Siemens defendants further rely on documentary evidence, which they allege shows, that from approximately 2008 to 2009, DEP knew that the LLC did not have a master electrician license of its own;[19] and that the LLC responded to DEP's inquiries by confirming Ostrovsky's license expired and notifying DEP that it was putting Scotti in the place Ostrovsky, and that Schlesinger would continue to do the work as a joint venture with the LLC.[20] Finally, the Siemens defendants rely on the admissions they made in connection with DPA, including that between 2005 and 2008, the LLC did not have employees of its own, or its own master electrician supervising workers at the worksites, to argue that was DEP on notice of its violations of the electrical requirements but continued to make payments under the DEP Contracts.

The documentary evidence relied on by Siemens defendants, which is unsupported by explanatory affidavits, is insufficient to establish that the Siemens defendants' false statements as to their compliance with the master electrician requirements were not material. Most significant is the defendants' failure to address the LLC's lack of a master electrician, or their misrepresentations that Ostrovsky was its master electrician during a certain period when the

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[17]Id., Exhs. 37, 38.

[18]Id., Ex. 45.

[19]Id., Exhs. 49, 50.

[20]Id., Exhs. 59, 60.

LLC paid him only for the use of his license. In addition, the defendants fail to address the City's allegations that the oral joint venture agreement between the LLC and Schlesinger was a sham to support the LLC's position that Scotti, a managerial employee of Schlesinger, was the LLC's master electrician. Next, while the documentary evidence appears to show that DEP and DOB were aware, at points during the contract period, that certain issues existed relating to Siemens defendants' efforts to comply with the master electrician requirements, such evidence does not demonstrate that these agencies knew the nature and extent of the Siemens defendants' lack of compliance, or that they knew that the LLC made false statements in connection with its compliance with the electrical requirements. Moreover, as argued by the City, the documents relied on by defendants do not controvert various allegations in the Superceding Complaint, including that DEP was fraudulently induced to enter into the 26th Ward Contract based on defendants' false representations as to its intentions to hire Schlesinger as a subcontractor, and that defendants made false representations to DEP and DOB as to the existence of an oral joint venture agreement between the LLC and Schlesinger.

As for payments made after the DPA was entered into in January 2013, such payments are insufficient to establish that the Siemens defendants' noncompliance with the relevant electrical regulations were not material for the period preceding the DPA, particularly as the alleged noncompliance ended April 2012, before such subsequent payments were made. In addition, as noted by the City, the allegations in the Superceding Complaint go beyond the misconduct admitted to by the LLC in connection with the DPA.

Accordingly, Siemens defendants are not entitled to summary judgment dismissing the

FCA implied certification claims relating the to master electrician requirements.

Allegations Supporting FCA Claim Based on Express Certification

The holding in Universal Health regarding the materiality of the contractor's failure to comply with regulations applies only to liability under the FCA based on a theory of implied certification, and not to claims based on an express false certification. See Universal Health,136 S.Ct at 1998 "An expressly false claim is, as the term suggests, a claim that falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment." See Mikes v. Straus, 274 F3d at 698; United States v. Speqtrum, Inc., 47 F Supp 3d 81, 91 (D DC 2014) (noting that a false certification is "express" when "the bills or invoices submitted ... contain[ ] explicit statements that [the defendant] was in compliance with all the relevant regulations").

Here, the allegations in the Superceding Complaint relied on by the City fail to connect the allegedly false statements to the request for payment and thus are outside the purview of the an express certification claim. That said, however, the Superceding Complaint appears to contain sufficient allegations to state a FCA claim based on an express certification theory (See e.g., Superceding Complaint ¶ 74), and the materiality analysis relied on by defendants on this summary judgment motion is inapplicable to such a claim.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by the Siemens defendants (motion seq. no. 002) is denied; and it is further

ORDERED that the motion for summary judgment by Schlesinger (motion seq. no. 003) is denied; and it is further

ORDERED that the City's cross motion is denied.

ORDERED that as this action has been transferred to Hon. Margaret Chan, the parties are directed to contact Judge Chan's part to scheduled a compliance conference.

DATED: July 28, 2017

J.S.C.

HON. JOAN A. MADDEN
J.S.C.