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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, EX
REL. PECANIC,

Bringing this Action
On Behalf of the
United States of
America,

v.

SUMITOMO ELECTRIC
INTERCONNECT PRODUCTS, INC., et
al.,

Defendants.

Civil No. 12-cv-0602-L (NLS)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS SECOND
AMENDED COMPLAINT AND
GRANTING MOTION TO STRIKE
SECTION VII FROM SECOND
AMENDED COMPLAINT [doc. # 27]**

On May 31, 2011, the United States declined to intervene in this *qui tam* action on its own behalf. (doc. #8.) Accordingly, on June 8, 2011, Relator Robert Pecanic, Jr.'s First Amended Complaint was ordered unsealed. (doc. # 9.) On January 17, 2012, Relator filed his Second Amended Complaint ("SAC") against Sumitomo Electric Interconnect Products, Inc.; Sumitomo Electric Fine Polymer, Inc.; Chris Foeger; Nobuyoshi Fujinami; and Jon Mills ("Defendants"). (doc. #22.) Relator seeks damages on behalf of the United States for Defendants' alleged violations of the False Claims Act ("FCA"), §§3729, *et seq.* (SAC ¶ 2.) Defendants move to dismiss the SAC pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) on the grounds that Relator does not plead fraud with the required particularity and fails

1 to state a claim upon which relief can be granted. (doc. #27.) In the alternative, Defendants also
2 move to strike a portion of the SAC. (*Id.*) The motion has been fully briefed, and the Court finds
3 this motion suitable for determination on the papers submitted and without oral argument. *See*
4 Civ. L.R. 7.1(d.1). (doc. #48.) For the following reasons, the Court **GRANTS IN PART** and
5 **DENIES IN PART** Defendants’ motion to dismiss the SAC and to strike Section VII from the
6 SAC.

7 **I. BACKGROUND**

8 Relator Robert Pecanic is a former sales representative of Defendant Sumitomo Electric
9 Interconnect Products, Inc. (“SEIP”). (SAC ¶ 3.) SEIP is a California corporation located in San
10 Marcos, California. (*Id.* ¶ 4). SEIP is also a wholly-owned subsidiary of Defendant Sumitomo
11 Electric Fine Polymer, Inc. (“SFP”), which is based in Osaka, Japan. (*Id.* ¶¶ 4-5.) The remaining
12 Defendants hold or held various senior management positions within these two companies.
13 Defendant Chris Foeger is the current national sales manager and former president and CEO of
14 SEIP, whereas Defendant Nobuyoshi Fujinami is the current president and CEO of SEIP. (*Id.* ¶¶
15 8, 9.) Mr. Fujinami also previously worked for SFP prior to taking over at SEIP in February
16 2010. (*Id.*) Lastly, Defendant Jon Mills is a former employee of SEIP who was the product
17 manager for the division that manufactured the shrinkable wire tubing products underlying this
18 case. (*Id.* ¶ 7.)

19 Relator alleges that these Defendants “knowingly made, and caused to be made, false
20 claims, certifications and statements in order to obtain payments under government contracts for
21 military specification electrical products.” (SAC ¶ 2.) Specifically, Relator asserts that false
22 claims and certifications were made to the United States regarding two groups of products sold
23 by SEIP. The first group of products includes all variations of the “Sealed Crimp Slice Kit”
24 (“Crimp Splice”), which is used to “create an environmentally sealed ‘splice’ connecting the
25 ends of two electric wires.” (*Id.* ¶¶ 24, 26.) “A crimp splice consists of a short metal ‘crimp
26 barrel’ inside a shrinkable plastic ‘insulation sleeve’ with a meltable ‘sealing ring’ at either end.”
27 (*Id.* ¶ 26.) The second group of products encompasses all variations of SEIP and SFP’s “Solder
28 Termination Sleeve” (“STS”) products. (*Id.* ¶ 29.) An STS is also used to create an

1 “environmentally sealed connection” between two wires by connecting a shielded wire with a
2 “second ‘lead’ wire that will be connected to the ground.” (*Id.* ¶ 30.)

3 These two families of tubing products were sold by SEIP and SFP to the United States
4 and government contractors for use in military aircraft, weapon systems, and other applications.
5 (SAC ¶ 37.) Relator contends that the Crimp Splice and STS products contained a “variety of
6 defects that could lead to catastrophic failure of systems in which they are installed.” (*Id.* ¶ 36.)
7 These alleged defects include, but are not limited to, using improper tubing and barrel materials,
8 inserting unapproved adhesives and components, and making “other material deviations” from
9 the required product specifications. (*Id.*)

10 Before each of these products could be sold to the United States or government
11 contractors, they were required to be tested by Naval Air Systems Command (“NAVAIR”) and
12 be qualified for inclusion on NAVAIR’s “Qualified Products Lists” (“QPLs”). (*Id.* ¶¶ 50- 51,
13 54.) This qualification process included providing samples for testing, meeting set standards and
14 military specifications, and certifying that the product conforms to the required specifications
15 based on supplemental testing. (*Id.* ¶¶ 23, 54, 56.) After approval, the manufacturer also must
16 periodically certify that “the listed product is still available from the listed [manufacturing] plant,
17 can be produced under the same conditions as originally qualified, and meets the requirements of
18 the current issue of the specification.” (*Id.* ¶ 67.) SEIP and SFP completed this process and
19 obtained approval for the Crimp Splice and STS products to be included on the QPLs. (*Id.* ¶
20 68.)

21 However, Relator alleges that SEIP and SFP’s product certifications were false and
22 concealed the aforementioned defects in the Crimp Splice and STS products. (SAC ¶ 22.) These
23 asserted discrepancies in the QPL applications and the certification process include: falsely
24 identifying the San Marcos facility as the manufacturing plant when the products were being
25 produced in Mexico from Chinese parts, (*Id.* ¶¶ 72, 77-78.), concealing the true origin of the
26 products by using removable “Made in Mexico” stickers, (*Id.* ¶¶ 74-75.), skewing the testing
27 process by selecting components that appeared most likely to pass inspection, (*Id.* ¶ 92.), and
28 improperly color coding the Crimp Splice components (*Id.* ¶¶ 153, 155.) Relator repeatedly

1 brought his concerns about these discrepancies to the attention of management over the course of
2 several years. (SAC ¶¶ 114, 156, 223, 247, 266.) Yet, management allegedly ignored Mr.
3 Pecanic’s complaints, did not address the underlying issues, and threatened to terminate him. (*Id.*
4 ¶¶ 199, 217, 248, 284.) Ultimately, Relator refused to continue selling the allegedly defective
5 products and was eventually terminated. (*Id.* ¶¶ 288-89.)

6 Out of these allegations, Mr. Pecanic asserts the following separate counts under the
7 FCA: violations of 31 U.S.C. § 3729(a)(1)(A), violations of 31 U.S.C. § 3729(a)(1)(B),
8 violations of 31 U.S.C. § 3729(a)(1)(G), violations of 31 U.S.C. § 3729(a)(1)(c), violations of 31
9 U.S.C. § 3729(a), and violations of 31 U.S.C. § 3730(h). Mr. Pecanic’s Count VI is not a
10 separate cause of action because 31 U.S.C. § 3730(c)(5) contains an alternative remedy
11 provision that is only appropriate when the U.S. Government has recovered damages.

12 Defendants move to dismiss all of Relator’s counts under Rule 9(b) of the Federal Rules
13 of Civil Procedure because the SAC does not plead fraud with the requisite particularity. (Defs’
14 Mot. Dismiss 2-7.) Defendants additionally move to dismiss with prejudice Counts III, IV, V,
15 VI, and VII under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the basis that these
16 counts fail to state claims for which relief may be granted. (*Id.* 7-15.) Defendants further move to
17 strike paragraphs 182-84 of the SAC because those allegations are irrelevant and highly
18 prejudicial to Defendants. (*Id.* 15.) In response, Relator opposes and also requests judicial notice
19 of several documents regarding product specifications underlying his claims. (doc. #39.) Lastly,
20 in reply, Defendants request judicial notice of additional similar records. (doc. #41.) The Court
21 **GRANTS** Relator and Defendants’ requests for judicial notice.¹

22 **II. DISCUSSION**

23 **A. False Claims Act**

24 The False Claims Act (FCA) imposes civil liability upon “[a]ny person” who “knowingly
25

26 ¹ The Court grants each request under Federal Rule of Evidence 201(b). Plaintiff’s request
27 includes four documents that are all records of federal administrative bodies. Defendants’
28 request similarly contains aerospace material specifications that have been formally adopted by
the Department of Defense. Accordingly, judicial notice of each of these documents is permitted
under the rule allowing judicial notice of records and reports of administrative bodies. *Anderson*
v. Holder, 673 F.3d 1089, 1094 n.2 (9th Cir. 2012).

1 presents, or causes to be presented, to an officer or employee of the United States Government . .
2 . a false or fraudulent claim for payment or approval.” 31 U.S.C. § 3729(a). Persons who do so
3 are liable for civil penalties of up to \$10,000 per claim and treble damages. *Id.* An FCA action
4 may be commenced in one of two ways. *Graham Cnty. Soil & Water Conservation Dist. v.*
5 *United States ex rel. Wilson*, 545 U.S. 409, 412 (2005). First, the Government may bring a civil
6 action against the alleged false claimant. 31 U.S. C. § 3730(a). Second, a private person, known
7 as a “relator,” may bring a *qui tam* civil action on behalf of the United States Government
8 against the alleged false claimant. *Id.* § 3730(b). Additionally, the FCA provides a “cause of
9 action for an individual retaliated against by his employer for assisting an FCA investigation or
10 proceeding” as a supplemental enforcement mechanism. *Graham*, 545 U.S. at 412 (citing 31
11 U.S.C. § 3730(h)).

12 Once a *qui tam* action is initiated, the Government receives a copy of the complaint and is
13 given sixty days to intervene in the action. 31 U.S.C. § 3730(b)(2), (4). If the Government
14 declines to intervene, as was done in this case, the relator has the exclusive right to conduct the
15 action on the Government's behalf. *Id.* § 3730(b)(2). If successful, the relator is entitled to
16 receive twenty-five to thirty percent of the action or settlement proceeds in addition to attorney's
17 fees and costs. *Id.* § 3730(d)(1).

18 Under this framework, an FCA claim “can be based on the allegation that a party has
19 falsely certified compliance with a statute or regulation as a condition to government payment.”
20 *United States v. Corinthian Colls.*, 655 F.3d 984, 992 (9th Cir. 2011) (citing *United States ex rel.*
21 *Hendow v. Univer. of Phoenix*, 461 F.3d 1166, 1168 (9th Cir. 2006)). Yet when invoking this
22 false certification basis, a claim must still be first pleaded with the required particularity for
23 fraud. *Id.* at 991-92. Additionally, in order to state a claim upon which relief may be granted, the
24 essential elements of an FCA claim must also be satisfied. *Id.* at 992.

25 **1. Pleading Fraud with Particularity**

26 Relator’s claims rest on the false certification theory, and he contends that the SAC
27 pleads violations of the FCA with sufficient particularity. This Court disagrees. Federal Rule of
28 Civil Procedure 8(a) typically governs pleading requirements and requires that a complaint

1 contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”
2 FED. R. CIV. P. 8(a). A complaint must only contain “sufficient factual matter” that, taken as
3 true, “state a claim for relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
4 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). However, a claim
5 sounding in fraud is subject to Rule 9(b)'s heightened pleading requirement that the plaintiff
6 “state with particularity the circumstances constituting fraud.” FED. R. CIV. P. 9(b). Rule 9(b)
7 requires that allegations of fraud be “specific enough to give defendants notice of the particular
8 misconduct . . . so that they can defend against the charge and not just deny that they have done
9 anything wrong.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting
10 *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)) (internal quotations omitted). To
11 satisfy Rule 9(b), the plaintiff must state the requisite “who, what, when, where, and how” of the
12 misconduct he alleges. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting
13 *Vess*, 317 F.3d at 1106) (internal quotations omitted).

14 *Qui tam* actions under the FCA must satisfy Rule 9(b)'s heightened pleading standard
15 because they involve allegations of fraud. *Corinthian*, 655 F.3d at 992. Under this standard,
16 “Rule 9(b) does not allow a complaint to merely lump multiple defendants together but requires
17 plaintiffs to differentiate their allegations when suing more than one defendant and inform each
18 defendant separately of the allegations surrounding his alleged participation in the fraud.” *Id.* at
19 997-98 (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007)) (internal
20 quotations omitted). “In the context of a fraud suit involving multiple defendants, a plaintiff
21 must, at a minimum identify the role of each defendant in the alleged fraudulent scheme.” *Id.* at
22 765 (quoting *Swartz*, 476 F.3d at 765).

23 Here, Relator has not met Rule 9(b)'s threshold requirements by aggregating allegations
24 against multiple Defendants. At the onset, the SAC improperly lumps the separate Defendants
25 SEIP and SFP into a singular term “Sumitomo.” Relator explains that “[b]ecause of their close
26 relationship, defendants SEIP and SEFP are sometimes collectively referred to herein as
27 ‘Sumitomo,’ and in such cases, the singular pronouns ‘it’ and ‘its’ are used to avoid confusion.”
28 (SAC ¶ 6.) But, throughout the SAC's roughly 270 paragraphs of factual allegations, the term

1 “Sumitomo” is almost exclusively used to describe the alleged fraudulent conduct. The
2 commingling of these two Defendants renders the SAC unclear as to what was each Defendant’s
3 role in the alleged fraud. For example, Relator contends that “Sumitomo made these false
4 certifications each time it submitted a QPL application, each time it submitted a QPL renewal
5 application, and each time it sold these products to the government or a government contractor.”
6 (*Id.* ¶ 41.) This allegation’s merging of SEIP and SFP’s identities obscures discerning which
7 entity is submitting the applications, which is reapplying for certification, and which is selling
8 the products. When this ambiguity is extrapolated to the entire SAC, the result is that the SAC
9 fails to specifically “identify the role of each defendant in the alleged fraudulent scheme.”

10 *Corinthian*, 655 F.3d at 984 (quoting *Swartz*, 476 F.3d at 765) (internal quotations omitted). This
11 trend continues within Relator’s Opposition, and the lack of particularity persists. (Opp’n 2-9.)

12 Further, Relator’s allegations that SEIP is a wholly-owned subsidiary and that SEIP was
13 at all times subject to SFP’s control with respect to these products is insufficient to support
14 alternatively treating the two corporate entities as one. “The mere fact of sole ownership and
15 control does not eviscerate the separate corporate identity that is the foundation of corporate
16 law.” *Katzir’s Floor and Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1149 (9th Cir. 2004)
17 (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003)). As a parent company, SFP is
18 presumed to have an existence separate from its subsidiaries. *Neilson v. Union Bank of Cal.*, 290
19 F. Supp. 2d 1101, 1116 (C.D. Cal. 2003). Relator must either properly allege liability for SFP
20 under an alter ego theory or demonstrate that each entity is liable for its own role in the
21 submission of false claims or statements. The SAC fails to do so.

22 As for Defendants Mr. Foeger and Mr. Fujinami, the SAC similarly does not overcome
23 the requirements of Rule 9(b). Mr. Pecanic asserts that each of these Defendants had “full
24 knowledge of, and directly participated in, false certifications, sale of defective products, and all
25 other fraudulent activity described in this Complaint.” (SAC ¶¶ 8-9.) Further, that “[i]n
26 performing all of the acts described herein, Defendants have defrauded the United States by
27 knowingly, willfully, or recklessly presenting, or causing to be presented . . . a false and
28 fraudulent claim.” (*Id.* ¶ 291.) Aside from these wholesale allegations, Relator argues that these

1 two individuals are responsible for the submission of false claims specifically as corporate
2 officers of SEIP and SFP that were aware of the defective products and omitted to take action.
3 (*Id.* ¶¶ 8, 9, 217, 223, 274; Opp’n 20-21.) However, because the SAC fails to sufficiently
4 identify the necessary underlying actions of SEIP and SFP in the alleged fraud, this Court rejects
5 that Relator has provided enough detail to give Mr. Foeger and Mr. Fujinami “notice of the
6 particular misconduct which is alleged to constitute the fraud charged so that they can defend
7 against the charge and not just deny that they have done anything wrong.” *United States ex rel.*
8 *Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001) (quoting *Neubronner v.*
9 *Milken*, 6 F.3d 666, 671 (9th Cir. 1993)) (internal quotation marks omitted). Lastly, Defendant
10 Mills was never served in this action and therefore the FCA claims against him will be dismissed
11 as well.

12 **2. Failure to State a Claim**

13 Mr. Pecanic does not object to the dismissal of Counts III, IV, V, or VI. (Opp’n 22.)
14 Accordingly, these counts will be dismissed. Defendants contend that the remaining Count VII,
15 for FCA retaliation, should be dismissed as well for failure to state a claim. (Defs’ Mot. Dismiss
16 12-15.) The Court finds that Count VII sufficiently states a claim.

17 The court must dismiss a cause of action for failure to state a claim upon which relief can
18 be granted. FED. R. CIV. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the legal
19 sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court
20 must accept all allegations of material fact as true and construe them in light most favorable to
21 the nonmoving party. *Cedars–Sanai Med. Ctr. v. Nat’l League of Postmasters of U.S.*, 497 F.3d
22 972, 975 (9th Cir. 2007). Material allegations, even if doubtful in fact, are assumed to be true.
23 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But, the court need not “necessarily
24 assume the truth of legal conclusions merely because they are cast in the form of factual
25 allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.2003)
26 (internal quotation marks omitted). In fact, the court does not need to accept any legal
27 conclusions as true. *Iqbal*, 556 U.S. at 678.

28 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed

1 factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'
2 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
3 of action will not do." *Twombly*, 550 U.S. at 555 (internal citations omitted). Instead, the
4 allegations in the complaint "must be enough to raise a right to relief above the speculative
5 level." *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter,
6 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. 663
7 (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads
8 factual content that allows the court to draw the reasonable inference that the defendant is liable
9 for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability
10 requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."
11 *Id.* A complaint may be dismissed as a matter of law either for lack of a cognizable legal theory
12 or for insufficient facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749
13 F.2d 530, 534 (9th Cir. 1984).

14 "Congress added 31 U.S.C. § 3730(h) to the FCA in 1986 to protect 'whistleblowers,'
15 those who come forward with evidence their employer is defrauding the government, from
16 retaliation by their employer." *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th
17 Cir. 1996). Under this provision, the FCA protects employees from being "discharged, demoted,
18 . . . or in any other manner discriminated against in the terms and conditions of employment . . .
19 because of lawful acts done by the employee . . . in furtherance of an [FCA] action . . ., including
20 investigation for, initiation of, testimony for, or assistance in an [FCA] action. . . ." 31 U.S.C. §
21 3730(h). The statute provides protection even if the target of the investigation or action to be
22 filed was innocent. *Graham*, 545 U.S. at 416. Therefore, an "an employer does not face liability
23 for the suspected or actual fraud; it faces liability for a retaliatory act against the investigating
24 employee." *Mendondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008).

25 In contrast to *qui tam* FCA actions, FCA retaliation claims are unconstrained by the fraud
26 pleading standard and need only satisfy Rule 8's general pleading standard. *Id.* "A plaintiff
27 alleging a FCA retaliation claim must show three elements: (1) that he or she engaged in activity
28 protected under the statute; (2) that the employer knew the plaintiff engaged in protected

1 activity; and (3) that the employer discriminated against the plaintiff because he or she engaged
2 in protected activity.” *Id.* (citing *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838,
3 845 (9th Cir.2002); *Hopper*, 91 F.3d at 1269).

4 An imperfect complaint containing sufficient facts alleging all three elements of an FCA
5 retaliation is enough to survive dismissal under Rule 12(b)(6). *Mendiondo*, 521 F.3d at 1104. In
6 *Mendiondo*, plaintiff filed an “inartfully drafted” complaint that claimed retaliation under the
7 FCA for investigating certain practices at defendant medical center that were intended to inflate
8 Medicare reimbursements and unsafely cut costs. *Id.* at 1100-01. Mendiondo resisted engaging
9 in these practices, and informed the defendant’s CEO that her supervisors expected her to
10 engage in activities that “were below the standard of care” and “could lead to civil and criminal
11 violations.” *Id.* at 1101. When she was assigned to a new supervisor, the supervisor demanded
12 that Mendiondo cut costs or be fired and that she follow the suspect practices regardless of her
13 continued objections. *Id.* Mendiondo was subsequently terminated. *Id.* In reversing the district
14 court’s decision to dismiss the complaint, the 9th Circuit held that Mendiondo’s complaint
15 satisfied all three elements of an FCA retaliation claim. *Id.* at 1105. The court reasoned that the
16 first element of engaging in protected activity was satisfied because the complaint contained
17 examples of specific practices at the medical center that Mendiondo was investigating and
18 suspected to be fraudulent. *Id.* Additionally, the complaint satisfied the second element because,
19 although her statements to management about possible civil violations were “vague,” this
20 reference to civil violations could be construed to include the suspected fraud. *Id.* Lastly,
21 Mendiondo’s claim that the defendant terminated her “because of her investigation into facts
22 relating to” the “submission of false claims” was enough at the pleading stage to satisfy the final
23 requirement because she provided notice that she believes the defendant terminated her for
24 investigating the practices alleged in the complaint. *Id.* (citing *Edwards* , 356 F.3d at 1061);
25 *compare, with Hopper*, 91 F.3d at 1268-70 (holding district court erred in refusing to grant
26 motion for judgment as a matter of law when the “entire record” failed to demonstrate that
27 Hopper was engaged in a protected activity in furtherance of the FCA).

28 Here, Mr. Pecanic’s complaint sufficiently states a claim for FCA retaliation under the

1 Rule 8 standards and Rule 12(b)(6)'s requirements. To start, the complaint contains various
2 examples of practices and defects that Mr. Pecanic asserts he believed were leading to false or
3 improper product certifications. (SAC ¶¶ 72, 74-75, 77-78, 92, 140-41, 153, 155.) Mr. Pecanic
4 investigated these events by confronting employees, discussing with third parties the products'
5 failure to conform with required standards, and assisting government investigators. (*Id.* ¶¶ 216,
6 238, 262, 275, 330.) These allegations suffice to show that Mr. Pecanic was engaged in a
7 protected activity by investigating conduct that a person in his situation could reasonably believe
8 was leading to fraud being perpetrated against the government. *See Moore*, 275 F.3d at 845
9 (“[S]pecific awareness of the FCA is not required, but the plaintiff must be investigating matters
10 which are calculated, or reasonably could lead, to a viable FCA action.” (*quoting Hopper*, 91
11 F.3d at 1269) (internal quotations and alterations omitted)).

12 Additionally, the SAC sufficiently alleges that Mr. Pecanic's employer knew he was
13 engaged in a protected activity. Specifically, other than his numerous complaints about the
14 alleged problems, Mr. Pecanic claims that he informed management that he had been gathering
15 “documentation and evidence” that showed the failure of products that were underlying the
16 alleged false certifications in this case. (*Id.* ¶¶ 284, 286.) Mr. Pecanic also informed executives
17 that the business was “mandated by the QPL approval to immediately contact NAVAIR, so that
18 an official recall and investigation into the QPL-approved parts could commence” and that the
19 business take the “legal and specified actions” to correct the improper procedure. (*Id.* ¶ 268.)
20 Albeit more tenuous, the SAC under Rule 8 also meets the second pleading requirement because
21 his complaints and statements to management can be construed to include his investigation of
22 suspected false claims and certifications. *See Mendiondo*, 521 F.3d at 1104 (holding that a vague
23 reference to management that can be construed to include the suspected fraud is sufficient at the
24 pleading stage).

25 Finally, Mr. Pecanic satisfies the final pleading requirement for a retaliation claim by
26 alleging that he was retaliated against “solely because of his opposition and objections to
27 Sumitomo's unlawful practices.” (SAC ¶ 343.) Mr. Pecanic states that he was subjected to
28 ongoing retaliation including a threats of termination and a hostile work environment, and that

1 he has also since been terminated. (*Id.* ¶¶ 279, 280, 288, 289, 340.) In reply, Defendants pinpoint
2 their assault on this element, contending that Mr. Pecanic’s statements are “completely contrary
3 to the allegations in the SAC” and that “Relator consistently alleged in the SAC that he was
4 terminated because he refused to sell certain products and kept raising quality and safety issues
5 with management.” (Defs’ Reply 7-8.) However, under Rule 8's requirements, this Court is not
6 convinced that Mr. Pecanic has failed to state a claim because he included in his complaint that
7 he was both retaliated against for investigating fraudulent practices and terminated for refusing
8 to sell the products underlying these practices. “It suffices at this pleading stage” for Mr. Pecanic
9 to simply give notice that he believes Defendants retaliated against him because of his
10 “investigation into the practices [h]e specified in the complaint.” *Mendiondo*, 521 F.3d at 1104.
11 Because Mr. Pecanic has sufficiently pled all three of the requirements for an FCA retaliation
12 claim, the Court **DENIES** Defendants’ motion to dismiss Count VII.

13 **3. Leave to Amend**

14 This Court also grants Mr. Pecanic leave to amend his complaint. Rule 15(a) of the
15 Federal Rules of Civil Procedure provides that after a responsive pleading has been served, a
16 party may amend its complaint only with the opposing party’s written consent or the court’s
17 leave. FED. R. CIV. P. 15(a). “The court should freely give leave when justice so requires,” and
18 apply this policy with “extreme liberality.” *Id.*; *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183,
19 186 (9th Cir. 1987). However, leave to amend is not to be granted automatically. *Zivkovic v. S.*
20 *Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (citing *Jackson v. Bank of Hawaii*, 902
21 F.2d 1385, 1387 (9th Cir. 1990)). Granting leave to amend rests in the sound discretion of the
22 district court. *Pisciotta v. Teledyne Indus.*, 91 F.3d 1326, 1331 (9th Cir. 1996).

23 The Court considers five factors in assessing whether to grant leave to amend: (1) bad
24 faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of the amendment, and (5)
25 whether the plaintiff has previously amended the complaint. *Johnson v. Buckley*, 356 F.3d 1067,
26 1077 (9th Cir. 2004); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). The party opposing
27 amendment bears the burden of showing any of the factors above. *See DCD Programs*, 833 F.2d
28 at 186. Of these factors, prejudice to the opposing party carries the greatest weight. *Eminence*

1 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). However, absent prejudice, a
2 strong showing of the other factors may support denying leave to amend. *Id.*

3 Defendants contend that Relator’s complaint must be dismissed with prejudice because
4 “Relator has amended his complaint twice and remains unable to plead any actionable claims,”
5 and that “[t]here is no reason to suppose a third try will change this result.” That Mr. Pecanic has
6 already amended his complaint twice is insufficient to overcome the liberal standard under Rule
7 15(a). The Court does not find this factor particularly persuasive considering that one of these
8 amendments occurred prior to the case being unsealed. This Court also does not believe further
9 amendment would be futile. Mr. Pecanic can correct his SAC’s primary deficiency by clearly
10 stating each Defendants’ role in the alleged fraud with the required particularity. Specifically,
11 Relator could individualize the factual allegations regarding “Sumitomo” and instead state how
12 each SEIP and SFP submitted or caused to be submitted false claims or statements. Relator must
13 be able to accomplish this without blurring their separate corporate forms. Mr. Pecanic would at
14 the same time benefit from condensing his voluminous complaint. Consequently, Mr. Pecanic is
15 granted leave to amend his complaint. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)
16 (noting that a court should permit amendment “unless it determines that the pleading could not
17 possibly be cured by the allegation of other facts” (internal quotation marks and citation
18 omitted)).

19 **B. Motion to Strike**

20 Lastly, the Court considers Defendants’ motion to strike paragraphs 182, 183, and 184
21 from the SAC. The Court agrees that these paragraphs should be stricken. Rule 12(f) provides
22 that a court “may order stricken from any pleading any insufficient defense or any redundant,
23 immaterial, impertinent, or scandalous matter.” FED. R. CIV. P. 12(f). Motions to strike are
24 generally disfavored because they are often used as delaying tactics and because of the limited
25 importance of pleadings in federal practice. *See Rosales v. Citibank*, 133 F. Supp. 2d 1177, 1180
26 (N.D. Cal. 2001); *Bureerong v. Uvawas*, 922 F.Supp. 1450, 1478 (C.D. Cal. 1996). A federal
27 court will not exercise its discretion under Rule 12(f) to strike a pleading unless the matters
28 sought to be omitted have no possible relationship to the controversy, may confuse the issues, or

1 otherwise prejudice a party. *Id.* Ordinarily a motion to strike will not be granted unless “the
2 matter to be stricken clearly could have no possible bearing on the subject of the litigation.”
3 *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F.Supp.2d 1048, 1057 (N.D. Cal. 2004). “Motions to
4 strike are rarely granted in the absence of a showing of prejudice to the moving party.” *Freeman*
5 *v. Alta Bates Summit Med. Ctr. Campus*, 2004 WL 2326369, at *2 (N.D. Cal. 2004) (citing 61
6 Am. Jur. 2d Pleading § 505 (West 1999)). Matters may be stricken to reduce trial complication
7 or if challenged allegations are so unrelated to plaintiff’s claims to be unworthy of consideration
8 as a defense and their presence in the pleading will prejudice the party seeking to strike matters.
9 *Fantasy, Inc., v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993). When considering a motion to
10 strike, the court “must view the pleading in a light most favorable to the pleading party.” *In re*
11 *2TheMart.com, Inc.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000).

12 Defendants argue that paragraphs 182, 183, and 184 of the SAC should be stricken
13 because the allegations are irrelevant, inflammatory, and prejudicial. (Defs’ Mot. Dismiss 16.)
14 The SAC in paragraphs 183 and 184 reads:

15 “A particular chilling example of the type of catastrophic failure that could result from the
16 defects described in herein is the June 1, 2009 crash of Air France flight 447 . . . Although
17 there is no evidence to date that any of Sumitomo’s STS or Crimp Splice products were
18 installed on flight 447, the type of failure the aircraft experienced is exactly the type of
19 problem that could be caused by an improperly grounded system due to a bad STS, or a
20 defective splice that had either come loose, or poked through the Kynar sleeve to contact
21 a metal surface. . .”

22 Relator responds that these allegations are relevant to the “materiality” element of Count II of
23 the SAC. (Opp’n 25.) Meaning, the statements support that the false certifications here were
24 material, or in other words capable of influencing the U.S. Government, on the basis that the
25 products would not have been purchased by the United States unless they were certified as
26 complying with required specifications. The asserted connection to these allegations is that the
27 defective products in this case would not have been acquired without a false certification
28 because of their potential to cause an airplane to crash. Relator takes this argument one step
further by including the crash of the Air France Flight 447 on June 1, 2009, which caused 228
fatalities, as a concrete example of such a product failure.

Although Relator is entitled to allege why the alleged false statements were material, the

1 Court agrees with Defendants that the example of a catastrophic commercial plane crash is
2 prejudicial to them in this case. Relator admits that “there is no evidence to date that any of
3 Sumitomo’s STS or Crimp Splice products were installed on flight 447.” (SAC ¶ 184.) There are
4 also no allegations in the SAC that Defendants sold products to Air France or that they were
5 installed on similar commercial aircraft. Additionally, these allegations have the potential
6 confuse the issues in this case. The crux of Relator’s claims is that Defendants made or caused
7 false or fraudulent claims to be presented to the United States for payment, not that Defendants
8 are civilly liable because they produced products that are so dangerously defective as to
9 potentially cause commercial airlines crashes. Therefore, the Court finds that the references to
10 Air France Flight 447 are unduly prejudicial and that the allegations are to be stricken from the
11 SAC.

12 **III. CONCLUSION**

13 For the reasons set forth above, **IT IS ORDERED:**

14 1. Defendants’ motion to dismiss for failing to plead fraud with particularity as to
15 Counts I and II is **GRANTED WITH LEAVE TO AMEND;**

16 2. Defendants’ motion to dismiss for failure to state a claim as to Counts III, IV, V,
17 and VI is **GRANTED WITH PREJUDICE;**

18 3. Defendants’ motion to dismiss for failure to state a claim as to Count VII is
19 **DENIED;**

20 4. Defendants motion to strike Section VII from the Second Amended Complaint is
21 **GRANTED;**

22 5. If Plaintiff intends to file a Third Amended Complaint in conformity with this
23 Order, he must do so on or before March 15, 2013.

24 **IT IS SO ORDERED.**

25 DATED: February 28, 2013

26 
27 M. James Lorenz
28 United States District Court Judge

28 ///

1 COPY TO:
2 HON. NITA L. STORMES
3 UNITED STATES MAGISTRATE JUDGE

4 ALL PARTIES/COUNSEL

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