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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA, *ex rel*
Michael Durkin,

Plaintiff,

v.

COUNTY OF SAN DIEGO,

Defendant.

Case No.: 15cv2674-MMA (WVG)

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS**

[Doc. No. 20]

Plaintiff Michael Durkin filed this action under the *qui tam* provisions of the False Claims Act (“FCA”), 31 U.S.C. § 3729 *et seq.*, on behalf of the United States of America and against Defendant County of San Diego. *See* Doc. Nos. 1, 17. The United States declined to intervene in this action. *See* Doc. No. 7. Defendant now moves to dismiss the First Amended Complaint (“FAC”) pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. *See* Doc. No. 20. The Court found the matter suitable for determination on the papers and without oral argument pursuant to Civil Local Rule 7.1.d.1. For the reasons set forth below, the Court **GRANTS** Defendant’s motion.

1 **BACKGROUND**¹

2 By way of background, Plaintiff² alleges that in 2014, he was involved in a lawsuit
3 in which the owners of two properties located near the McClellan-Palomar Airport sued
4 the County of San Diego for inverse condemnation. The FAC states that Plaintiff was the
5 manager of the two entities that owned those properties. In the course of that litigation,
6 Plaintiff alleges he uncovered the information underlying this action. In the instant case,
7 Plaintiff asserts twelve claims against Defendant County of San Diego under the FCA,
8 and requests damages and civil penalties. Plaintiff alleges Defendant made false
9 statements to the Federal Aviation Administration (“FAA”) in applying for grants for the
10 maintenance and development of the Palomar-McClellan Airport located in Carlsbad,
11 County of San Diego, California.

12 Plaintiff alleges the FAA makes funding “available to improve American airports,”
13 and provides funds to recipients in order to “among other things, ensure the safety of
14 airports, the surrounding areas, and the people in or around the airports.” *See* Doc. No.
15 17, FAC, ¶ 9. In order to obtain federal funds through the FAA, Plaintiff alleges
16 applicants must “make statements and promises, and give assurances regarding, inter alia,
17 how the land surrounding the airport is being controlled by the applicant so as to protect
18 airport operations from hazards on the ground, and people and property on the ground
19 from hazards inherent to airport operations.” *See* FAC, ¶ 9. Further, the FAC states that
20 “[u]pon approving a grant, the FAA requires the applicant to include in the grant
21 agreement [similar] statements . . . regarding how the airport and surrounding areas will
22 be operated, maintained, improved, or acquired” for safety purposes. *See* FAC, ¶ 10.
23 Then, Plaintiff alleges, “a grantee is required to file claims for payment to the FAA in the
24 form of invoices,” which “impliedly or expressly recertify all the promises, assurances,
25

26 ¹ Because this matter is before the Court on a motion to dismiss, the Court must accept as true the
27 allegations set forth in the complaint. *See Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 740
(1976).

28 ² For convenience, “Plaintiff” hereinafter refers to *Qui Tam* Plaintiff Durkin, as opposed to the United States.

1 and statements previously made in the grant applications and agreements.” *See* FAC, ¶
2 11.

3 In particular, Plaintiff alleges Defendant applied for, was approved for, and
4 obtained funding for use in relation to the McClellan-Palomar Airport. Plaintiff contends
5 that, in 1995, Defendant knew that certain undeveloped properties were in the Runway
6 Protection Zone (“RPZ”), and obtained federal funds from the FAA in order to acquire
7 those properties. Plaintiff alleges that instead of clearing the RPZ, Defendant “decided
8 the properties were too expensive, gave other projects priority, and reallocated the
9 funds.” *See* FAC, ¶ 14. The FAC asserts that the County knew that it was required under
10 “federal regulations” to “acquire sufficient interest in the RPZ to prevent incompatible
11 land uses.” *See* FAC, ¶ 14. Plaintiff alleges Defendant never did so, “resulting in the
12 development of an office building in the RPZ,” which “constitutes a place of public
13 assembly in violation of FAA standards, circulars and requirements which the County
14 promised it would comply with.” *See* FAC, ¶ 14. Plaintiff alleges this safety hazard
15 continues to the present time, despite Defendant’s assertions otherwise in its grant
16 applications.

17 Specifically, Plaintiff alleges Defendant, on multiple occasions between 2005 and
18 2015, made misrepresentations to the FAA in applying for, entering into agreements for,
19 or making claims for federal funds. Plaintiff alleges that, in each grant application, “the
20 County certified, represented, and assured that it would be guided in the acquisition of
21 real property by 49 CFR Part 24, subpart B, and that it had complied and would comply
22 with Advisory Circular³ 150/5300-13, Changes 1 through 5.” *See* FAC, ¶¶ 19, 31, 53, 65,
23 77, 89, 100, 111, 122, 134, 146, 158. Also, Plaintiff alleges that in some of the
24 applications, Defendant stated that “it had taken the step of causing the adoption of the
25 ‘Palomar Airport Comprehensive Land Use Plan.’” *See* FAC, ¶¶ 19, 65, 77, 89, 134,

26
27 ³ According to the record, an “Advisory Circular” is a document issued by the United States Department
28 of Transportation, Federal Aviation Administration, delineating guidelines and standards pertaining to
aviation. *See, e.g.*, Doc. No. 20, Exh. 31.

1 146, 158. Moreover, in some grant agreements, Plaintiff alleges Defendant promised “to
2 acquire an interest in Runway Protection Zone Properties not then under it’s [sic] control,
3 and to use interest acquired to prevent erection or creation of places of public assembly,
4 meaning office and industrial buildings, and to clear or discontinue any such uses as
5 already existed.” See FAC, ¶¶ 23, 35, 57, 126. In those same agreements, Plaintiff
6 alleges Defendant promised to “abide by the Uniform Relocation Assistance and Real
7 Property Acquisition Policies Act, 42 U.S.C. 4601, et seq.” See FAC, ¶¶ 23, 35, 57, 126.
8 In all cases, Plaintiff contends that Defendant’s assertions were false, and were made in
9 order to induce the FAA to grant it funds, and that Defendant “never intended to
10 perform” on its promises, and “took no steps whatsoever to perform its’ promises and
11 assurances.” See FAC, ¶¶ 27, 39, 49, 60, 72, 84, 96, 107, 118, 129, 141, 153, 165.

12 LEGAL STANDARD

13 **A. Federal Rules of Civil Procedure 8 and 12(b)(6)**

14 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro*
15 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain “a short and plain
16 statement of the claim showing that the pleader is entitled to relief. . . .” Fed. R. Civ. P.
17 8(a)(2). However, plaintiffs must also plead “enough facts to state a claim to relief that is
18 plausible on its face.” Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
19 570 (2007). The plausibility standard thus demands more than “a formulaic recitation of
20 the elements of a cause of action,” or “naked assertions devoid of further factual
21 enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted).
22 Instead, the complaint “must contain allegations of underlying facts sufficient to give fair
23 notice and to enable the opposing party to defend itself effectively.” *Starr v. Baca*, 652
24 F.3d 1202, 1216 (9th Cir. 2011).

25 In reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth
26 of all factual allegations and must construe them in the light most favorable to the
27 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996).
28 The court need not take legal conclusions as true merely because they are cast in the form

1 of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).
2 Similarly, “conclusory allegations of law and unwarranted inferences are not sufficient to
3 defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

4 In determining the propriety of a Rule 12(b)(6) dismissal, courts generally may not
5 look beyond the complaint for additional facts. *United States v. Ritchie*, 342 F.3d 903,
6 908 (9th Cir. 2003). “A court may, however, consider certain materials—documents
7 attached to the complaint, documents incorporated by reference in the complaint, or
8 matters of judicial notice—without converting the motion to dismiss into a motion for
9 summary judgment.” *Id.*; see also Fed. R. Evid. 201; see also *Lee v. City of Los Angeles*,
10 250 F.3d 668, 688 (9th Cir. 2001) *overruled on other grounds by Galbraith v. Cnty. Of*
11 *Santa Clara*, 307 F.3d 1119, 1125–26 (9th Cir. 2002).

12 Where dismissal is appropriate, a court should grant leave to amend unless the
13 plaintiff could not possibly cure the defects in the pleading. *Knappenberger v. City of*
14 *Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009).

15 **B. Federal Rule of Civil Procedure 9(b)⁴**

16 Under Rule 9(b), when the complaint includes allegations of fraud, a party must
17 “state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). “In
18 other words, the complaint must set forth what is false or misleading about a statement,
19 and why it is false.” *Rubke v. Capitol Bancorp Ltd*, 551 F.3d 1156, 1161 (9th Cir. 2009)
20 (internal quotation marks omitted). The plaintiff’s allegations of fraud must be “specific
21 enough to give defendants notice of the particular misconduct . . . so that they can defend
22 against the charge and not just deny that they have done anything wrong.” *Vess v. Ciba-*
23 *Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). Further, the plaintiff must
24 describe “the who, what, when, where, and how” of the fraudulent misconduct charged.
25 *Id.* at 1106–07. In other words, the plaintiff must specify the time, place, and content of
26 the alleged fraudulent or mistaken misconduct. *See id.* However, “malice, intent,
27

28 ⁴ Both parties acknowledge that Rule 9(b)’s heightened pleading standard applies to Plaintiff’s claims.

1 knowledge, and other conditions of a person’s mind may be alleged generally.” Fed. R.
2 Civ. P. 9(b). Failure to satisfy this heightened pleading requirement can result in
3 dismissal of the claims. *Vess*, 317 F.3d at 1107.

4 DISCUSSION

5 **A. Requests for Judicial Notice and Incorporation by Reference**

6 As an initial matter, both parties request the Court incorporate by reference some
7 documents into the FAC, as well as request judicial notice of certain documents or facts.
8 In deciding a motion to dismiss under Rule 12(b)(6), a court is generally limited to the
9 four corners of the complaint. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.
10 2003). However, a court may consider “documents attached to the complaint, documents
11 incorporated by reference in the complaint, or matters of judicial notice.” *Id.*; *see also*
12 *Lee*, 250 F.3d at 688. The Court addresses the propriety of those requests below.

13 **i. Incorporation by Reference**

14 Defendant requests the Court consider multiple documents as incorporated by
15 reference in the FAC. A document “may be incorporated by reference into a complaint if
16 the plaintiff refers extensively to the document or the document forms the basis of the
17 plaintiff’s claim.” *Ritchie*, 342 F.3d at 908 (internal citations omitted). In other words,
18 “[a] court may consider a writing referenced in a complaint but not explicitly
19 incorporated therein if the complaint necessarily relies on the document and its
20 authenticity is unquestioned.” *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998),
21 superseded by statute on other grounds in *Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th
22 Cir. 2006); *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007); *Kneivel v. ESPN*,
23 393 F.3d 1068, 1077 (9th Cir. 2005).

24 Here, Defendant specifically requests the Court incorporate by reference copies of
25 multiple grant applications and grant agreements underlying Plaintiff’s claims, Airport
26 Sponsor Assurances forms, the Federal Aviation Administration Advisory Circular
27 referenced in the FAC, as well as copies of “Outlay Reports and Requests for
28 Reimbursement for Construction Programs” and “Echo Payment Drawdowns.” *See Doc.*

1 No. 20, Exhs. 1–39. Plaintiff does not oppose this request nor dispute the authenticity of
2 the documents, and Defendant is correct that Plaintiff’s claims necessarily rely on these
3 documents and some statements included therein. In fact, Plaintiff cites to and relies on
4 Defendant’s submissions—particularly the grant applications and agreements which
5 include the contested statements—in Plaintiff’s opposition brief. Thus, the Court
6 **GRANTS** Defendant’s requests.

7 Plaintiff also requests incorporation by reference of several documents. Plaintiff
8 submits a copy of a grant application and grant agreement from 1995 “and attached
9 documents,” as well as copies of a March 28, 1996 letter to the FAA from the County of
10 San Diego “with attachments.” *See* Doc. No. 23, Exhs. 1, 2. However, unlike the
11 documents that Defendant provides for incorporation, the FAC appears to merely
12 mention the contents of those documents. The FAC does not refer “extensively to the
13 document[s]” nor do the documents “form the basis” of any of Plaintiff’s claims. *See*
14 *Ritchie*, 342 F.3d at 908. Thus, the Court **DENIES** Plaintiff’s request. Despite that the
15 Court declines to incorporate Plaintiff’s documents, Plaintiff will have the opportunity to
16 amend the FAC, as discussed below, and may add allegations relating to these
17 documents, or incorporate these documents into an amended pleading if he so wishes.

18 **ii. Judicial Notice**

19 Both parties also request judicial notice of several matters. A court may take
20 judicial notice of matters submitted as part of a complaint, or those that are not but whose
21 authenticity is not contested and where the plaintiff’s complaint relies on them. *Lee*, 250
22 F.3d at 688 (9th Cir. 2001). However, “judicial notice is inappropriate where the facts to
23 be noticed are not relevant to the disposition of the issues before the court.” *Kuzmenko v.*
24 *Lynch*, 606 F. App’x 399 (9th Cir. 2015) (citing *Ruiz v. City of Santa Maria*, 160 F.3d
25 543, 548 n.13 (9th Cir. 1998)).

26 Defendant requests judicial notice of certain allegations that Plaintiff made in a
27 previous case, as well as portions of the FAA Airport Compliance Manual. However,
28 these allegations are not relevant to the issues pending before the Court. The Court

1 accordingly **DENIES** Defendant’s request.

2 In addition, Defendant requests judicial notice of the following fact: “Relator
3 Michael Durkin manages, is a member of, and has an ownership interest in, ‘Durkin
4 CAC, Lot 24 LLC’ which is the plaintiff that sued County of San Diego for inverse
5 condemnation of that limited liability company’s office building located within the
6 runway protection zone of McClellan Palomar Airport.” *See* Doc. No. 22. However,
7 again, Plaintiff’s prior litigation has no relevance to the Court’s disposition of
8 Defendant’s current motion to dismiss. Thus, the Court **DENIES** Defendant’s request.

9 Turning to Plaintiff’s requests, Plaintiff moves for judicial notice of Federal
10 Aviation Advisory Circular 150/5300-13A, updated as of February 2014. However, it is
11 unclear why Defendant’s copy of Circular 150/5300 is insufficient for the Court’s
12 purposes, particularly where Plaintiff does not oppose its incorporation by reference or
13 provide any reasoning in support of his request for judicial notice of this copy. Absent
14 any reasoning as to why the Court should take judicial notice of this version, the Court
15 **DENIES** Plaintiff’s request.

16 Plaintiff also requests judicial notice of the following: an FAA publication entitled
17 “What is AIP?,” a law review article regarding implied certification claims under the
18 FCA, a congressional record, a document regarding fraud statistics, a document entitled
19 Airport Layout Plan, the Merriam-Webster dictionary definition of “assure,” and FAA
20 Advisory Circular 15/5100-17. However, it is unclear for what purposes Plaintiff wishes
21 the Court to take judicial notice of these documents, which span more than 500 pages.
22 Accordingly, because the Court need not take judicial notice of these matters for the
23 purposes of the motion to dismiss, the Court **DENIES** Plaintiff’s requests.

24 **B. Motion to Dismiss**

25 Defendant moves to dismiss Plaintiff’s claims on various grounds. First,
26 Defendant argues Plaintiff does not allege a single objectively false statement that could
27 serve as the basis for a FCA claim. Second, Defendant argues many of Plaintiff’s causes
28 of action are barred by the statute of limitations. Third, Defendant argues none of

1 Plaintiff's claims are pleaded with the specificity required by Federal Rules of Civil
2 Procedure 8 and 9. Plaintiff opposes dismissal of any claims. Also, the United States has
3 filed a statement of interest in response to the County's motion to dismiss, despite that the
4 United States has declined to intervene in this action. The United States requests only
5 that if the Court decides to dismiss any claims in response to the County's motion, the
6 Court dismiss such claims without prejudice as to the United States. Otherwise, the
7 United States asserts that it takes no position as to the merits of the pending motion to
8 dismiss. For the reasons set forth below, the Court **GRANTS** Defendant's motion to
9 dismiss.

10 **i. The False Claims Act**

11 "The False Claims Act makes liable anyone who 'knowingly presents, or causes to
12 be presented, a false or fraudulent claim for [government] payment or approval,' or
13 'knowingly makes, uses, or causes to be made or used, a false record or statement
14 material to a false or fraudulent claim'" for government payment. *See United States ex*
15 *rel. Campie v. Gilead Scis., Inc.*, --- F.3d ----, No. 15-16380, 2017 WL 2884047, at *4
16 (9th Cir. July 7, 2017) (quoting 31 U.S.C. § 3729(a)(1)(A), (B)). While, "[i]n an
17 archetypal *qui tam* False Claims action, such as where a private company overcharges
18 under a government contract, the claim for payment is itself literally false or fraudulent,"
19 liability under the FCA "is not limited to such facially false or fraudulent claims for
20 payment." *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006).
21 Rather, "the scope of false or fraudulent claims should be broadly construed." *Id.*
22 Relevant here, "[t]he principles embodied in this broad construction of a 'false or
23 fraudulent claim' have given rise to two doctrines that attach potential False Claims Act
24 liability to claims for payment that are not explicitly and/or independently false: (1) false
25 certification (either express or implied); and (2) promissory fraud." *Id.* at 1171.

26 In false certification cases, "parties avail themselves of benefits of some type, such
27 as loan guarantees or agricultural supports, through false statements which create
28 eligibility that otherwise would not exist." *See U.S. ex rel. Hopper v. Anton*, 91 F.3d

1 1261, 1266 (9th Cir. 1996) (John T. Boese, *Civil False Claims and Qui Tam Actions* 1–
2 29 to 1–30 (1995)). Mere regulatory violations do not create liability. *Id.* Rather, “[i]t is
3 the false *certification* of compliance which creates liability when certification is a
4 prerequisite to obtaining a government benefit.” *Id.* Similarly, under an implied false
5 certification theory, “when a defendant submits a claim, it impliedly certifies compliance
6 with all conditions of payment,” and “if the claim fails to disclose the defendant’s
7 violation of a material statutory, regulatory, or contractual requirement . . . the defendant
8 has made a misrepresentation that renders the claim ‘false or fraudulent’ under §
9 3729(a)(1)(A).” *Campie*, 2017 WL 2884047, at *6.

10 The theory of promissory fraud is closely related to false certification, and dictates
11 “that liability will attach to each claim submitted to the government under a contract,
12 when the contract or extension of government benefit was originally obtained through
13 false statements or fraudulent conduct.” *Hendow*, 461 F.3d at 1173. Promissory fraud
14 “sometimes differs from the false certification theory only in a temporal sense.” *U.S. ex*
15 *rel. New Mexico v. Deming Hosp. Corp.*, 992 F. Supp. 2d 1137, 1154 (D.N.M. 2013).
16 For example, “[w]hile the false certification theory alleges that a contractor certified that
17 it *did* comply with a statute, regulation, or contractual term when it knew at the time that
18 it did not do so, the promissory fraud theory may allege that a contractor originally
19 certified that it *would* comply with a law, regulation, or term when it knew at the time
20 that it would not do so.” *Id.*

21 Under either a false certification or promissory fraud theory, “the essential
22 elements of False Claims Act liability remain the same: (1) a false statement or fraudulent
23 course of conduct, (2) made with scienter, (3) that was material, causing (4) the
24 government to pay out money or forfeit moneys due.” *Hendow*, 461 F.3d at 1174. In
25 considering a claim of false certification, there are “two major considerations: ‘(1)
26 whether the false statement is the cause of the Government’s providing the benefit; and
27 (2) whether any relation exists between the subject matter of the false statement and the
28 event triggering Government’s [sic] loss.’” *Id.* at 1171 (quoting *Hopper*, 91 F.3d at

1 1266). Under either theory, a false claim or promise must be the “sine qua non of receipt
2 of state funding.” *See Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th
3 Cir. 2010). Further, “for promissory fraud to be actionable under the False Claims Act,
4 ‘the promise must be false when made.’” *Hendow*, 461 F.3d at 1174. “Innocent
5 mistakes, mere negligent misrepresentations and differences in interpretations are not
6 false certifications under the Act.” *Hopper*, 91 F.3d at 1267.

7 **ii. Defendant’s Statements**

8 Although the FAC does not quote any statements from the grant applications or
9 grant agreements that give rise to Plaintiff’s claims, Defendant provides copies of the
10 grant applications and agreements, which are incorporated by reference into the FAC.
11 Plaintiff does not oppose their incorporation, and relies on the quoted statements in
12 opposing Defendant’s motion to dismiss. Accordingly, in analyzing the propriety of
13 Defendant’s motion to dismiss, the Court relies on the specific statements that the parties
14 discuss in their briefing, as opposed to the broad summaries in the FAC.

15 Here, Plaintiff’s claims arise out of multiple allegedly false statements. First,
16 several grant agreements include the following assurance, or one essentially identical:

17
18 **RUNWAY PROTECTION ZONES:** The Sponsor agrees to
19 take the following actions to maintain and/or acquire a property
20 interest satisfactory to the FAA, in the Runway Protection
21 Zones:

22 **i. Existing Fee Title Interest in the Runway Protection**

23 **Zone:** The Sponsor agrees to prevent the erection or creation of
24 any structure or place of public assembly in the Runway
25 Protection Zone, except for NAVAIDS that are fixed by their
26 functional purposes or any other structure approved by the
27 FAA. Any existing structures or uses within the Runway
28 Protection Zone will be cleared or discontinued unless
approved by the FAA.

ii. Existing Easement Interest in the Runway Protection

Zone: The Sponsor agrees to take any and all steps necessary to
ensure that the owner of the land within the designated Runway
Protection Zone will not build *any* structure in the Runway

1 Protection Zone that is a hazard to air navigation or which
2 might create glare or misleading lights or lead to the
3 construction of residences, fuel handling and storage facilities,
4 smoke generating activities, or places of public assembly, such
5 as churches, schools, office buildings, shopping centers, and
6 stadiums.

7 **iii. Future Interest in the Runway Protection Zone:** The
8 Sponsor agrees that it will acquire fee title or less-than-fee
9 interest in the Runway Protection Zones for runways that
10 presently are not under its control within 10⁵ years of this Grant
11 Agreement. Said interest shall provide the protection noted in
12 above Subparagraphs a and b [sic].

13 *See* Doc. No. 23; *see also, e.g.*, Doc. No. 20, Exh. 8, ¶ 11.

14 Second, the parties discuss how, in response to the portion of grant applications
15 requiring applicants to state what actions have been taken to “assure compatible usage of
16 land adjacent to or in the vicinity of the airport,” the County representative responded
17 “Palomar Airport Comprehensive Land Use Plan.” *See* Doc. Nos. 20, 23; *see also, e.g.*,
18 Doc. No. 20, Exh. 1.

19 Third, Plaintiff alleges “every grant agreement” included, in pertinent part,
20 statements identical or substantially identical to the following:

21 **21. Compatible Land Use.** It will take appropriate action, to
22 the extent reasonable, including the adoption of zoning laws, to
23 restrict the use of land adjacent to or in the immediate vicinity
24 of the airport to activities and purposes compatible with normal
25 airport operations, including landing and takeoff of aircraft.

26 **34. Policies, Standards, and Specifications.** It will carry out
27 the project in accordance with policies, standards, and
28 specifications approved by the Secretary including but not
limited to the advisory circulars listed in the Current FAA
Advisory Circulars for AIP⁶ projects . . . and in accordance with
applicable state policies, standards, and specifications approved

⁵ Some grant agreements provide for twenty years, as opposed to ten.

⁶ AIP refers to “Airport Improvement Program.” *See* Doc. No. 20, Exh. 31.

1 by the Secretary.

2 *See* Doc. No. 23; *see also, e.g.*, Doc. No. 20, Exh. 8, ¶ 11.

3 Fourth, in light of paragraph 34’s reference to advisory circulars, Plaintiff’s
4 opposition also cites to paragraph 212 of FAA Circular 150/5300, which states, in
5 pertinent part:

6
7 **212. RUNWAY PROTECTION ZONE (RPZ).** The RPZ’s
8 function is to enhance the protection of people and property on
9 the ground. This is achieved through airport owner control over
10 RPZs. Such control includes clearing RPZ areas (and
11 maintaining them clear) of incompatible objects and activities.
12 Control is preferably exercised through the acquisition of
13 sufficient property interest in the RPZ.

14 . . .

15 (b) Land uses prohibited from the RPZ are residences and
16 places of public assembly. (Churches, schools, hospitals, office
17 buildings, shopping centers, and other uses with similar
18 concentrations of persons typify places of public assembly.)
19 Fuel storage facilities may not be located in the RPZ.

20 . . .

21 **b. Recommendations.** Where it is determined to be
22 impracticable for the airport owner to acquire and plan the land
23 uses within the entire RPZ, the RPZ land use standards have
24 recommendation status for that portion of the RPZ not
25 controlled by the airport owner.

26 *See* Doc. No. 23; Doc. No. 20, Exh. 31, p. 331.

27 Fifth, the FAC alleges “the County certified, represented, and assured that it would
28 be guided in the acquisition of real property by 49 CFR Part 24, subpart B, and that it had
29 complied and would comply with Advisory Circular 150/5300-13, Changes 1 through 5.”
30 *See* FAC, ¶¶ 19, 31, 53, 65, 77, 89, 100, 111, 122, 134, 146, 158. Defendant interprets
31 Plaintiff’s allegations as referring to paragraph 35 of several of the grant agreements,
32 which states:

1 **35. Relocation and Real Property Acquisition.** (1) It will be
2 guided in acquiring real property, to the greatest extent
3 practicable under State law, by the land acquisition policies in
4 Subpart B of 49 CFR Part 24 and will pay or reimburse
5 property owners for necessary expenses as specified in Subpart
6 B.

7 Doc. No. 20, Exh. 27.

8 Sixth, and finally,⁷ Plaintiff alleges Defendant promised compliance with the
9 Uniform Relocation Assistance and Real property Acquisition Policies Act. *See* FAC, ¶¶
10 23, 35, 57, 126.

11 Having laid out the particular statements underlying Plaintiff’s claims, the Court
12 addresses Defendant’s arguments in support of its motion to dismiss in turn below.

13 **iii. Objective Falsity**

14 Defendant urges the Court that Plaintiff’s claims fail as a matter of law because
15 Defendant did not make any “objectively false” statements. *See* Doc. No. 20. Regarding
16 the first statement, as quoted above, Defendant argues it cannot give rise to an FCA claim
17 because it is qualified by a statement which is not objectively false—“satisfactory to the
18 FAA.” *See* Doc. No. 20. However, Plaintiff argues Defendant “never intended to
19 acquire *any* interest, or do anything whatsoever to comply with” those provisions. *See*
20 Doc. No. 23. Further, Defendant’s argument appears to be at odds with the structure and
21 language of the assurance. Without deciding as a matter of law what was required under
22 the provisions, it appears to the Court that the provisions required sponsors to comply
23 with the subsections *in order to* “maintain and/or acquire a property interest satisfactory
24 to the FAA.” *See* Doc. No. 20. Under Defendant’s interpretation, the subsections would

25 ⁷ In Plaintiff’s opposition, Plaintiff also argues Defendant stated it would comply with FAA Circular
26 150/5100-17 and thus the Uniform Relocation Assistance and Real Property Acquisition Policies Act,
27 which Plaintiff states required Defendant to acquire an easement in order to restrict land use in the RPZ.
28 However, the Court disregards this argument because the FAC does not mention Circular 150/5100 nor
 allege that any of Defendant’s statements were false based on Defendant’s failure to obtain an easement.
 Accordingly, the FAC did not provide Defendant notice, as required under basic pleading standards, of
 this basis for Plaintiff’s claims. *See* Fed. R. Civ. P. 8.

1 be rendered either permissive, despite that the language indicates that they are mandatory
2 requirements, or superfluous. Sponsors would be left guessing what actions would be
3 “satisfactory to the FAA.” *See* Doc. No. 20. For those reasons, the Court is unconvinced
4 that one could never falsely promise compliance with those provisions.

5 With respect to the second statement delineated above, Defendant argues its
6 response—“Palomar Airport Comprehensive Land Use Plan”—cannot give rise to FCA
7 liability because that plan “is the controlling document addressing compatible land use in
8 the vicinity of the airport.” *See* Doc. No. 20. Also, Defendant contends it has no
9 authority over land use within the City of Carlsbad, which surrounds the airport. Thus,
10 Defendant argues its response cannot be objectively false because the Plan does assure
11 compatible land use “subject to the actions of the City of Carlsbad.” *See* Doc. No. 20.
12 However, “at this stage, a court does not make factual findings,” and accordingly, the
13 Court declines to determine as a matter of law the scope of Defendant’s authority over
14 land use. *See Browne v. McCain*, 612 F. Supp. 2d 1125, 1130 (C.D. Cal. 2009). In the
15 opposition brief, Plaintiff argues that in providing the responses, Defendant assured or
16 promised to make sure that land use surrounding the airport was free from incompatible
17 land uses, *i.e.*, office buildings. Plaintiff contends Defendant never intended to do so,
18 though. *See* Doc. No. 23. Based on Plaintiff’s argument, the Court is unpersuaded that
19 Defendant’s statement cannot, under any circumstances, be false.⁸

20 Regarding the third allegedly false statement, listed as paragraph 21 above,
21 Defendant argues that because it only agreed to take “appropriate action, to the extent
22 reasonable . . . to restrict the use of land” in the RPZ, Defendant cannot be liable under
23 the FCA. Defendant argues that, as an initial matter, that provision did not require
24 Defendant to prevent or remove office buildings. Defendant points the Court to the FAA
25 Airport Compliance Manual, arguing that pursuant to the manual, where an airport

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28 ⁸ However, as discussed below, the FAC itself does not allege Defendant’s statement was false for this
reason, and thus, Plaintiff fails to sufficiently plead falsity with the specificity required under Rule 9(b).

1 operator such as Defendant does not have zoning authority over adjacent property, the
2 operator need only “demonstrate a reasonable attempt to inform surrounding
3 municipalities on the need for land use compatibility zoning.” *See* Doc. No. 20.
4 However, as discussed above, the Court declines to take judicial notice of the
5 Compliance Manual, and it is premature to decide issues of fact at this stage in the
6 proceedings.

7 Further, Defendant argues one cannot objectively prove the falsity of a promise to
8 take “appropriate actions to the extent reasonably possible.” *See* Doc. No. 20. Defendant
9 argues it would be “impossible” for the County to “adopt zoning laws affecting properties
10 in Carlsbad,” where the subject office building is located. *See* Doc. No. 20. However,
11 again, the Court does not make factual findings in determining the propriety of a Rule
12 12(b)(6) motion to dismiss, and, accordingly, declines to rely on Defendant’s argument
13 that it cannot adopt such zoning laws.

14 Also, Plaintiff argues Defendant made a false statement in making the promise in
15 paragraph 21 because Defendant never intended to do anything to fulfill that promise. In
16 such circumstances, the assurance could be deemed false or fraudulent under a
17 promissory fraud theory of liability, and the Court declines to categorically exclude the
18 assurance from FCA liability. *See Hendow*, 461 F.3d at 1174 (stating that “failure to
19 honor one’s promise is (just) breach of contract, but making a promise that one *intends*
20 not to keep is fraud”).

21 Fourth, Defendant argues that in light of paragraph 212(b) of FAA Circular
22 150/5300, Defendant was not required to prevent or eliminate the allegedly incompatible
23 office building. In particular, paragraph 212(b) states that “[w]here it is determined to be
24 impracticable for the airport owner to acquire and plan the land uses within the entire
25 RPZ, the RPZ land use standards have recommendation status for that portion of the RPZ
26 not controlled by the airport owner.” *See* Doc. No. 23; Doc. No. 20, Exh. 31, p. 331.
27 Defendant contends, “[t]herefore, because the City of Carlsbad has land use jurisdiction
28 over those RPZ properties, and because acquiring all properties has significant financial

1 requirements, it was and is impracticable for the County to acquire and plan all land uses
2 in the RPZ.” *See* Doc. No. 20. Accordingly, Defendant concludes that its promise to
3 comply with the Circular was not false or fraudulent. Plaintiff counters that Defendant
4 could have acquired a property interest through eminent domain, and also that it is the
5 false promise to comply, while having no intent to do so, that made Defendants’
6 statements fraudulent. As discussed, the Court declines to make findings of fact at this
7 stage. Even were it appropriate for the Court to determine the scope of Defendant’s
8 authority over land within the RPZ at this stage, or the impracticability of Defendant
9 acquiring and planning land use, the record is insufficient for the Court to make such
10 determinations.

11 Additionally, Defendant argues impracticability is subject to many variables and
12 different interpretations, and accordingly, a promise to comply with paragraph 212
13 cannot be objectively false. However, the Court is unpersuaded that there are no
14 circumstances under which an empty promise of compliance with the Circular could be
15 deemed false or fraudulent under a promissory fraud theory of liability. For the above
16 reasons, the Court is unpersuaded by Defendant’s proffered grounds for dismissal.

17 Finally, regarding the fifth and sixth assurances, Plaintiff alleges Defendant
18 promised “it would be guided in the acquisition of real property by 49 CFR Part 24,
19 subpart B, and that it had complied and would comply with Advisory Circular 150/5300-
20 13, Changes 1 through 5,” and would comply with the Uniform Relocation Assistance
21 and Real Property Acquisition Policies Act. *See* FAC, ¶¶ 19, 23, 31, 35, 53, 57, 65, 77,
22 89, 100, 111, 122, 126, 134, 146, 158. Because the Court has already addressed
23 Defendant’s promise to comply with Circular 150/5300, the Court focuses on
24 Defendant’s promises to comply with 49 CFR Part 24 and the Uniform Relocation
25 Assistance and Real Property Acquisition Policies Act. Defendant argues the FAC does
26 not describe how Defendant failed to comply with those provisions, particularly where
27 “no property was actually acquired” and no “persons were displaced as a result.” *See*
28 Doc. No. 20. The Court agrees, and relies on the same reasoning in concluding, below,

1 that Plaintiff has not satisfied the pleading requirements of 9(b) in alleging the falsity of
2 Defendant’s statements. However, the argument does not support Defendant’s
3 overarching contention that none of the statements alluded to in the FAC can ever be
4 objectively false for the purposes of FCA liability. Thus, for those purposes, the Court
5 disregards the argument, and declines to dismiss any claims on the basis that they cannot,
6 under any circumstances, be objectively false, as Defendant contends.

7 **iv. Statute of Limitations**

8 In the Ninth Circuit, a *qui tam* plaintiff must initiate a civil action under the FCA
9 “no more than (1) six years after the date on which the FCA violation is committed or (2)
10 three years after the date when facts material to the right of action are known or
11 reasonably should have been known by the *qui tam* plaintiff, whichever occurs last.”
12 *U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996); *see* 31 U.S.C. §
13 3731(b). “A suit under the Act must, in any event, be brought no more than ten years
14 after the date on which the violation occurred.” *Id.*; *see* 31 U.S.C. § 3731(b).

15 In Defendant’s motion to dismiss, Defendant argues several of Plaintiff’s causes of
16 action are barred by the statute of limitations because they allege “violations that
17 occurred more than 10 years ago.” *See* Doc. No. 20. Defendant relies on the dates of
18 grant applications and grant agreements as the dates of accrual. Plaintiff counters that the
19 limitations period begins to run at the time a claim is made, or, if the claim is paid, at the
20 time of payment. Also, Plaintiff argues that even were accrual to begin at the time a
21 claim is made, the limitations period began when the County submitted claims requesting
22 payment, not upon submission of grant applications or grant agreements. In Defendant’s
23 reply brief, Defendant admits that there is a split of authority regarding when the statute
24 of limitations begins to run on FCA claims. Defendant urges the Court to follow cases
25 that hold FCA claims accrue when a false or fraudulent claim is submitted—as opposed
26 to the date of payment—which Defendant contends is the majority rule.

27 Regarding accrual, case law on the issue is sparse, particularly within this Circuit.
28 However, absent instruction from the Ninth Circuit or the Supreme Court, the Court sides

1 with the majority of courts, and the only court in California, that have addressed the
2 issue, to the Court’s knowledge. *See U.S. ex rel. Dugan v. ADT Sec. Servs., Inc.*, No.
3 CIV.A.DKC 20033485, 2009 WL 3232080, at *4 (D. Md. Sept. 29, 2009) (“Courts in the
4 majority of the federal circuits have concluded that the statute of limitations starts to run
5 when a false claim is submitted to the government.”); *U.S. ex rel. Condie v. Bd. of*
6 *Regents of Univ. of California*, No. C89-3550-FMS, 1993 WL 740185, at *3 (N.D. Cal.
7 Sept. 7, 1993). Accordingly, the Court finds that the statute of limitations begins to run
8 on an FCA claim upon submission of a false claim.

9 However, the Court disagrees with Defendant regarding when submission of
10 allegedly false claims occurred in the context of this case. As Plaintiff states, it is the
11 submission of the claims for payment that trigger potential FCA liability here, not
12 submission of the applications for funding or execution of the grant agreements, despite
13 that those documents may have contained false or fraudulent statements and thus
14 rendered subsequent claims for payment fraudulent under a promissory fraud theory of
15 liability. *See United States v. McNinch*, 356 U.S. 595, 599 (1958) (“[T]he conception of
16 a claim against the government normally connotes a demand for money or for some
17 transfer of public property.”); *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166,
18 1174 (9th Cir. 2006) (defining a claim as “a call on the government fisc” and as involving
19 “some sort of request for the government to pay out money or forfeit moneys due”);
20 *United States v. Ueber*, 299 F.2d 310, 313 (6th Cir. 1962) (“[T]he causes of action sued
21 upon did not come into being, nor was there an actual violation of [the FCA], until the
22 first voucher seeking payment of the false claims was presented to the United States.”).

23 Here, Plaintiff commenced this action on December 2, 2015.⁹ Thus, Plaintiff may
24 not rely on any claims for payment that Defendant filed prior to December 2, 2005 as
25 grounds for his FCA claims. Accordingly, the Court **GRANTS** Defendant’s motion to
26 _____

27 ⁹ Plaintiff states that this action was commenced on November 25, 2015, which is the date the complaint
28 was signed. However, “[a] civil action is commenced by filing a complaint with the court.” *See Fed. R.*
Civ. P. 3. Plaintiff filed the complaint on December 2, 2015. *See Doc. No. 1.*

1 dismiss only to the extent that any of Plaintiff's causes of action rely on claims for
2 payment or reimbursement dated prior to December 2, 2005. Based on the FAC as well
3 as relevant exhibits, the Court's finding partially affects Plaintiff's first and second
4 causes of action only, based on how Plaintiff has organized his claims in the FAC.
5 Specifically, it appears that Defendant submitted a claim for \$58,652.00, and another
6 claim for \$310,802.00 on October 5, 2005. *See* Doc. No. 20, Exh. 32, p. 333, Exh. 33, p.
7 340. The Court **DISMISSES** Plaintiff's causes of action with prejudice and without
8 leave to amend as to Defendant County of San Diego, to the extent that those causes of
9 action rely on the aforementioned October 2005 claims or any other claims submitted
10 prior to December 2, 2005.¹⁰

11 On another note, Defendant also argues other claims are time-barred because they
12 concern "violations that occurred more than six years ago, and no equitable tolling could
13 have occurred." *See* Doc. No. 20. The parties agree that *qui tam* Plaintiffs can take
14 advantage of equitable tolling, but Defendant contends that whether Plaintiff could have
15 known earlier of the facts underlying his claims is irrelevant because the United States
16 should have known of an "open and notorious" office building. *See* Doc. Nos. 20, 26.
17 However, it would be inappropriate and premature for the Court to dismiss any other
18 claims on the basis that the United States knew or should have known of the allegedly
19 incompatible land use. "A claim may be dismissed under Rule 12(b)(6) on the ground
20 that it is barred by the applicable statute of limitations only when 'the running of the
21 statute is apparent on the face of the complaint.'" *See Huynh v. Chase Manhattan Bank*,
22 465 F.3d 992, 997 (9th Cir. 2006). "[A] complaint cannot be dismissed unless it appears
23 beyond doubt that the plaintiff can prove no set of facts that would establish the
24 timeliness of the claim." *Id.* (quoting *Supermail Cargo, Inc. v. U.S.*, 68 F.3d 1204, 1206
25 (9th Cir. 1995)). Defendant's argument is too speculative, and is unsupported by the
26 FAC. It is not clear beyond doubt, on the face of the pleadings, that the United States

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28 ¹⁰ The Court **DISMISSES** those claims without prejudice as to the United States.

1 knew or should have known of the existence of the building, that it was in the RPZ, that it
2 was being used for an incompatible use, and that it was continually noncompliant
3 throughout the entire period of time during which Defendant submitted the claims at
4 issue. Accordingly, the Court declines to dismiss any claims on those grounds.

5 **v. Pleading Standards Under Rules 8 and 9(b)**

6 “The FCA is an anti-fraud statute,” and as such, complaints containing FCA claims
7 must be both plausible under Rule 8 and pleaded with particularity under Rule 9(b). *See*
8 *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *Campie*, 2017 WL
9 2884047, at *4; Fed. R. Civ. P. 8, 9(b). As mentioned, to plead and prove a FCA claim, a
10 plaintiff must demonstrate: “(1) a false statement or fraudulent course of conduct, (2)
11 made with scienter, (3) that was material, causing (4) the government to pay out money
12 or forfeit moneys due.” *See Hendow*, 461 F.3d at 1174. “Under Rule 9(b),
13 ‘circumstances constituting fraud or mistake’ must be stated with particularity, but
14 ‘malice, intent, knowledge, and other conditions of a person’s mind,’ including scienter,
15 can be alleged generally.” *United States v. Corinthian Colleges*, 655 F.3d 984, 996 (9th
16 Cir. 2011) (citing Fed. R. Civ. P. 9(b) and *Zucco Partners, LLC v. Digimarc Corp.*, 552
17 F.3d 981, 990 (9th Cir. 2009)). While a complaint “need not ‘identify representative
18 examples of false claims to support every allegation,’” the complaint must still allege the
19 “particular details of a scheme to submit false claims.” *See United States v. United*
20 *Healthcare Ins. Co.*, 848 F.3d 1161, 1180 (9th Cir. 2016) (internal quotations omitted).

21 Defendant argues the FAC does not satisfy pleading requirements under Rules 8
22 and 9(b). The Court agrees. Plaintiff’s allegations are insufficient to plead falsity,
23 scienter, and materiality under the applicable pleading standards.

24 Regarding falsity, the FAC summarizes several statements allegedly made by
25 Defendant, and then, lumping all of those statements together, urges that they were false.
26 This does not suffice under the particularity requirements of Rule 9(b), which requires a
27 plaintiff to describe “the who, what, when, where, and how” of the fraudulent
28 misconduct, “including what is false or misleading about a statement, and why it is

1 false.” *See Vess*, 317 F.3d at 1106–07; *United States v. United Healthcare Ins. Co.*, 848
2 F.3d 1161, 1180 (9th Cir. 2016); *U.S. ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d
3 1048, 1052 (9th Cir. 2001) (stating that a plaintiff must “assert particular details to
4 support its allegations of fraud”). Here, Plaintiff fails to sufficiently state why or how
5 Defendant’s statements were false or fraudulent. Plaintiff makes factual arguments in his
6 opposition brief to support of his contention that the subject statements could be
7 objectively false, but those facts are not present in the FAC.

8 For example, as mentioned above, based on the FAC, it is unclear how
9 Defendant’s alleged assurances “that it would be guided in the acquisition of real
10 property by 49 CFR Part 24, subpart B,” or comply with the Uniform Relocation
11 Assistance and Real Property Acquisition Policies Act, were false. Further, as perhaps
12 the most glaring example, the FAC fails to describe why Defendant’s response of
13 “Palomar Airport Comprehensive Land Use Plan” was false. To illustrate, the FAC
14 merely states that the County represented that “in order to assure compatible land use . . .
15 it had taken the step of causing the adoption” of the Plan. *See* FAC, ¶¶ 19, 65, 77, 89,
16 134, 146, 158. Without more, the FAC concludes that all of Defendant’s statements were
17 false because Defendant never intended to fulfill any promises. Thus, the FAC indicates
18 that Defendant’s statement regarding the Plan was false presumably because Defendant
19 did not adopt, or perhaps abide by, that Plan. However, in Plaintiff’s opposition brief,
20 Plaintiff does not argue that Defendant never adopted or complied with the Plan. Rather,
21 Plaintiff argues that Defendant’s statements regarding the Plan were false because they
22 constituted promises to make certain that land use surrounding the airport was free from
23 incompatible land uses, *i.e.*, office buildings, but the Plan did not actually prevent or
24 eliminate the allegedly incompatible land use. Thus, the Plan did not “assure compatible
25 usage of land.” *See* Doc. No. 23. That reason is absent from the FAC, however.

26 As a final note regarding falsity, Plaintiff’s vague allegations are particularly
27 problematic where Plaintiff’s claims are primarily promissory fraud claims. To
28 elaborate, under a promissory fraud theory of liability, “the promise must be false when

1 made.” *Hendow*, 461 F.3d at 1174. Accordingly, Plaintiff must add some factual support
2 for the proposition that Defendant did not intend to comply with its assurances or
3 statements at the time those assurances or statements were made. This is particularly so
4 in light of the fact that some of Defendant’s allegedly false assurances involved a promise
5 to acquire an interest in land within ten or twenty years of the assurances, meaning
6 Defendant may still have time to do so. In such circumstances, the alleged fact that
7 Defendant has not yet acquired such an interest is not very probative of falsity or
8 fraudulent intent.

9 Regarding scienter, Plaintiff need only make general allegations pursuant to Rule
10 9(b). But, Plaintiff must still plausibly allege Defendant “knew that its statements were
11 false, or that it was deliberately indifferent to or acted with reckless disregard of the truth
12 of the statements,” and knowingly presented those statements anyway. *Corinthian*
13 *Colleges*, 655 F.3d at 996; *Campie*, 2017 WL 2884047, at *9 (stating scienter requires
14 “knowledge of [] falsity and [] intent to deceive”); *United States ex rel. Hagood v.*
15 *Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). The FAC is vague
16 and conclusory regarding scienter. Again, the FAC lumps all statements together and
17 concludes that Defendant never intended to comply with its various assurances. Further,
18 the FAC states that testimony of Peter Drinkwater, the Director of Airports for the
19 County of San Diego, in a prior case, illustrates that the County “had no intent of
20 performing its grant assurance and promises made to the FAA.” *See* FAC, ¶ 15.
21 However, it is unclear whether Mr. Drinkwater actually testified as to the County’s lack
22 of intent, or if that is Plaintiff’s conclusion based on other, undisclosed, testimony.

23 Regarding materiality and causation, Plaintiff’s allegations do not satisfy 9(b) for
24 similar reasons. “The materiality standard is demanding.” *Universal Health Servs., Inc.*,
25 136 S. Ct. at 2002–03. “A misrepresentation cannot be deemed material merely because
26 the Government designates compliance with a particular statutory, regulatory, or
27 contractual requirement as a condition of payment.” *Id.* “Nor is it sufficient for a finding
28 of materiality that the Government would have the option to decline to pay if it knew of

1 the defendant’s noncompliance.” *Id.* “Materiality, in addition, cannot be found where
2 noncompliance is minor or insubstantial.” *Id.* Further, courts consider whether there is
3 any relationship between the subject matter of the false statement and the provision of the
4 benefit. *See Ebeid*, 616 F.3d at 998.

5 Here, Plaintiff merely concludes, with respect to every cause of action: “The FAA
6 would not have provided the federal funding for the project had it been aware the
7 foregoing was false.” *See* FAC, ¶¶ 20, 32, 43, 54, 66, 78, 90, 101, 112, 123, 135, 147,
8 159. This is insufficient, particularly where the materiality standard requires more than
9 the government’s designation of “compliance with a particular statutory, regulatory, or
10 contractual requirement as a condition of payment.” *See Universal Health Servs., Inc.*,
11 136 S. Ct. at 2002–03. In sum, Plaintiff fails to sufficiently allege that Defendant’s
12 assertions of compliance, or promises to remove the alleged office building in the RPZ,
13 were the “sine qua non of receipt of” the government funding received. *See Ebeid*, 616
14 F.3d at 998.

15 Lastly, at the end of the FAC, Plaintiff asserts a cause of action for “other claims,”
16 alleging that “between the years 2005 and 2015 the County applied for and received
17 grants . . . and made the same false assertions and promises as hereinabove described . . .
18 under the same or similar circumstances as those illustrated above.” *See* FAC, ¶ 167.
19 Such allegations fall short of the specificity required by Rule 9(b).

20 For the foregoing reasons, Plaintiff does not sufficiently plead causes of action
21 under the FCA. While Defendant may have been put on notice of the grounds for
22 Plaintiff’s claims, as illustrated by Defendant’s briefing and proffered exhibits, Rule 9(b)
23 also “serves ‘to deter the filing of complaints as a pretext for the discovery of unknown
24 wrongs, to protect defendants from the harm that comes from being subject to fraud
25 charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties
26 and society enormous social and economic costs absent some factual basis.’” *See United*
27 *Healthcare Ins. Co.*, 848 F.3d at 1180 (quoting *Bly–Magee*, 236 F.3d at 1018).

28 Accordingly, the Court **GRANTS** Defendant’s motion to dismiss, and **DISMISSES** this

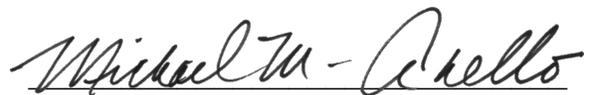
1 action in its entirety without prejudice, and with leave to amend.

2 **CONCLUSION**

3 As set forth above, the Court **GRANTS** Defendant’s motion to dismiss, and
4 **DISMISSES** all of Plaintiff’s causes of action. Within **21 days** of this Order, Plaintiff
5 may file a Second Amended Complaint that cures the deficiencies described above.
6 Pursuant to Civil Local Rule 15.1(c), if Plaintiff wishes to file a Second Amended
7 Complaint, Plaintiff must also include “a version of that pleading that shows—through
8 redlining, underlining, strikeouts, or other similarly effective typographic methods—how
9 that pleading differs from the previously dismissed pleading.” *See* Civ. LR 15.1(c).

10 **IT IS SO ORDERED.**

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12 Dated: August 2, 2017

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14 Hon. Michael M. Anello
15 United States District Judge
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