UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel. ERIN HAYES LUPO,

Plaintiff,

v.

QUALITY ASSURANCE SERVICES, INC., an entity; GLENN RUSSELL DEACON II, an individual; GLENN RUSSELL DEACON, an individual; SUSAN DEACON, an individual; and SHELLY BECKER, an individual,

Defendants.

Case No.: 16cv737 JM (JMA)

ORDER (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFF/RELATOR'S SECOND AMENDED COMPLAINT; (2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STRIKE PORTIONS OF THE SECOND AMENDED COMPLAINT

Defendants Quality Assurance Services, Inc. ("QAS"), Glenn Russell Deacon II, Glenn Russell Deacon, Susan Deacon, and Shelly Becker (collectively, "Defendants") move the court to dismiss the second amended complaint ("SAC") of Relator Erin Hayes Lupo for failure to state a claim. (Doc. No. 29.) In addition, Defendants move to strike portions of the SAC. (Doc. No. 30.) Relator opposes both motions. (Doc. Nos. 31, 32.) The court finds the matters suitable for decision without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the following reasons, the court grants both motions in part and denies both motions in part.

BACKGROUND

QAS is a California corporation that contracts to perform inspections and diagnostic testing on medical equipment for hospitals and other health care providers. (Doc. No. 25 ¶¶ 6, 17.) The individual defendants are all shareholders of QAS. (Id. ¶¶ 7–10.) Relator worked at QAS for approximately eight years, including as office manager. (Id. ¶¶ 5, 20.)

In September 2016, Relator filed a first amended complaint, alleging six counts: (I) substantive violations of the False Claims Act ("FCA"), 31 U.S.C. § 3729(a)(1); (II) conspiracy to violate the FCA, id. § 3729(a)(3); (III) retaliation in violation of the FCA, id. § 3730(h); (IV) retaliation in violation of California Labor Code section 1102.5 ("section 1102.5"); (V) retaliation in violation of California Labor Code section 232.5 ("section 232.5"); and (VI) wrongful termination in violation of California public policy. (See generally Doc. No. 13.) All six counts stemmed from allegations that Defendants falsified medical device inspection reports, which caused the submission of false claims to the government, and that QAS terminated Relator for exposing that activity.

In February 2017, Defendants filed a motion to dismiss the first amended complaint, (Doc. No. 18), which the court granted in part and denied in part, (Doc. No. 22). Specifically, the court: granted Defendants' motion to dismiss Count I with leave to amend as to Glenn Russell Deacon, Susan Deacon, and Shelly Becker, but denied it as to QAS and Glenn Russell Deacon II; granted Defendants' motion to dismiss Count II with partial leave to amend; granted Defendants' motion to dismiss Count III without leave to amend as to the individual defendants, but denied it as to QAS; granted Defendants' motion to dismiss Count IV without leave to amend as to the individual defendants, but denied it as to QAS; granted Defendants' motion to dismiss Count V with leave to amend; granted Defendants' motion to dismiss Count VI without leave to amend as to the individual defendants, but denied it as to QAS; and granted Defendants' motion to dismiss Relator's prayer for punitive damages, with leave to amend as to Counts IV, V, and VI.

On April 5, 2017, Relator filed the SAC. (Doc. No. 25.)[1] The SAC omits Relator's previous claim for conspiracy to violate the FCA, but maintains the other counts, adding allegations in a number of places. The crux of the SAC continues to be Defendants' alleged falsification of medical device inspection reports, the submission of false claims to the government, and Relator's termination. Relator now lays out the counts as follows: (I) substantive violations of the FCA, against all defendants; (II) retaliation in violation of the FCA, against QAS; (III) retaliation in violation of section 1102.5, against QAS; (IV) retaliation in violation of section 232.5, against all defendants; and (V) wrongful termination in violation of California public policy, against QAS. Relator again seeks punitive damages, on what are now labeled as Counts III, IV, and V. (See id.)

After an extension of time to respond to the SAC, Defendants filed the instant motions on May 22, 2017.

DISCUSSION

The court will first address Defendants' motion to dismiss before turning to their motion to strike.

I. MOTION TO DISMISS

Defendant moves to dismiss each count in the SAC, as well as Relator's request for punitive damages.

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[1] The SAC is actually an unsigned, redlined version of the first amended complaint. (See Doc. No. 25.) And although the SAC continues to reference exhibits that were attached to the first amended complaint, those exhibits are not attached to the SAC. While Defendants did not object to the form of the SAC, the court would prefer, for clarity's sake, to have a signed, clean version on the docket. Accordingly, Relator is directed to file, within ten days of this order, a signed, clean version of the SAC, with exhibits attached. (If Defendants object to Relator attaching the exhibits anew, they may file an ex parte motion to strike the exhibits explaining their position.) The SAC will continue to be operative as of the original filing date (April 5, 2017). The Clerk of Court shall docket the corrected SAC as a new entry.

A. Legal Standards

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges the legal sufficiency of the pleadings. Generally, to overcome such a motion, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Facts merely consistent with a defendant's liability are insufficient to survive a motion to dismiss because they establish only that the allegations are possible rather than plausible. Id. at 678–79. The court must accept as true the facts alleged in a well-pleaded complaint, but mere legal conclusions are not entitled to an assumption of truth. Id. The court must construe the pleading in the light most favorable to the non-moving party. Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995).

A heightened pleading standard governs FCA claims, however. United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 (9th Cir. 2011). That heightened standard, provided by Federal Rule of Civil Procedure 9(b), requires that the complaint "state with particularity the circumstances constituting fraud or mistake," although "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." "Rule 9(b) demands that, when averments of fraud are made, the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal ellipsis omitted). To satisfy Rule 9(b), "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." Id. (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)).

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B. Analysis

1. Count I: Substantive Violations of the FCA

a. Relevant Law

The FCA prohibits the submission of false or fraudulent claims to the United States. Subsection (A) of 31 U.S.C. § 3729(a)(1) imposes liability upon any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval[.]" 31 U.S.C. § 3729(a)(1)(A). Subsection (B) imposes liability upon any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim[.]" Id. § 3729(a)(1)(B). The difference between subsections (A) and (B), then, "is that the former imposes liability for presenting a false claim, while the latter imposes liability for using a false record or statement to get a false claim paid." Jana, Inc. v. United States, 34 Fed. Cl. 447, 449 (1995).

To state a claim under subsection (A), Relator must show: "(1) a false or fraudulent claim (2) that was material to the decision-making process (3) which defendant presented, or caused to be presented, to the United States for payment or approval (4) with knowledge that the claim was false or fraudulent." Hooper v. Lockheed Martin Corp., 688 F.3d 1037, 1047 (9th Cir. 2012). To state a claim under subsection (B), Relator must show that Defendants "knowingly made, used, or caused to be made or used, a false record or statement material to a false or fraudulent claim." Id. Given the "causes to be" language in both subsections, the "FCA reaches 'any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.' Thus, a person need not be the one who actually submitted the claim forms in order to be liable." United States v. Mackby, 261 F.3d 821, 827 (9th Cir. 2001) (quoting United States ex rel. Marcus v. Hess, 317 U.S. 537, 544–45 (1943)).

b. Defendants' Previous Arguments on this Issue, and the Court's Ruling

In moving to dismiss the first amended complaint, Defendants focused on

Relator's failure to identify any actual claims made to the government. In denying the motion, the court noted that concrete evidence of claims was not required at this stage. Rather, as the Ninth Circuit has held, "it is sufficient to allege particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993, 998–99 (9th Cir. 2010) (internal quotations omitted). Given that standard, the court found that the first amended complaint, "even if not artfully drafted," met Ebeid's requirements.

> First, Relator alleges particular details of a scheme: rather than properly test medical equipment, Defendants produced reports on the performance of medical equipment using falsified data and provided those reports to various health care providers, including government-run institutions. Second, there is convincing reason to infer that this alleged scheme caused claims to be submitted to the government: the various health care providers used the equipment to treat patients and sought reimbursement for that treatment via claims to the government for Medicare and Medicaid funds; but the government would not have made those payments had it known the treatment was rendered on improperly tested and uncertified medical equipment. Through this process, false claims for payment were submitted.

(Doc. No. 22 at 5.)

In addition, the court ruled that Relator had satisfied Rule 9(b) by giving QAS and Glenn Russell Deacon II "notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong." Vess, 317 F.3d at 1106.

c. Defendants' Current Arguments on this Issue

Now, in moving to dismiss the SAC, Defendants advance a different theory. In a nutshell, Defendants argue that Relator brings her claims under a "false certification theory" of FCA liability, but fails to plead essential elements of either an "express" or "implied" false certification claim.

As an initial matter, the court questions whether this portion of Defendants' motion is appropriate and timely with respect to QAS and Glenn Russell Deacon II. As discussed, the court already ruled on Defendants' motion to dismiss Relator's claim that QAS and Glenn Russell Deacon II violated the FCA. That claim was part of Count I in the first amended complaint and it remains a nearly identical part of Count I in the SAC. Defendants could have made their false certification argument in their first motion to dismiss; they did not. The court considered the arguments they did make and denied that portion of the motion. Consequently, this portion of Defendants' motion to dismiss has the air of a motion for reconsideration. See Amaretto Ranch Breedables, LLC v. Ozimals, Inc., No. C 10-05696 CRB, 2011 WL 2690437, at *1–2 (N.D. Cal. July 8, 2011) (summarily denying defendant's motion to dismiss plaintiff's statutory unfair competition claim because order on previous complaint had already addressed it).

And indeed, Federal Rule of Civil Procedure 12(g) generally prohibits successive motions to dismiss that raise arguments that could have been made in the prior motion. See Fed. R. Civ. P. 12(g)(2) ("Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion."). But one of the exceptions referenced in Rule 12(g) and found in Rule 12(h) is a motion for judgment on the pleadings under Rule 12(c). Thus, if the court did not consider Defendants arguments now, they could simply answer the SAC and make these same arguments in a Rule 12(c) motion. Rather than face that possibility, the court, in order "to secure the just, speedy, and inexpensive determination of this case," Fed. R. Civ. P. 1, will rule on Defendants' arguments at this time. See Nat'l City Bank, N.A. v. Prime Lending, Inc., No. CV-10-034-EFS, 2010 WL 2854247, at *2 (E.D. Wash. July 19, 2010) (reaching same decision).

d. Allegations Against QAS and Glenn Russell Deacon II

Turning to the merits of Defendants' argument, the court again declines to dismiss Count I as to QAS and Glenn Russell Deacon II. In the court's view, Defendants

misunderstand Relator's allegations. Relator does not merely allege that Defendants violated the FCA because they "falsely certifie[d] compliance with a statute or regulation as a condition to government payment," as was discussed in United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1171 (9th Cir. 2006). Rather, the allegations, in essence, are that Defendants "knowingly made, used, or caused to be made or used, a false record or statement material to a false or fraudulent claim"—precisely what the Ninth Circuit requires in order to state a claim under 31 U.S.C. § 3729 (a)(1)(B). See Hooper, 688 F.3d at 1047. As the Ninth Circuit has put it, "[i]n an appropriate case, knowingly billing for worthless services or recklessly doing so with deliberate ignorance may be actionable under § 3729, regardless of any false certification conduct." United States ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1053 (9th Cir. 2001).

Put differently, Relator does not have to resort to a false certification theory, because she does premise Count I on explicitly false records—specifically, medical device inspection reports. That makes this case unlike United States v. Todd Spencer M.D. Med. Grp., No. 1:11-CV-1776-LJO-SMS, 2016 WL 7229135 (E.D. Cal. Dec. 14, 2016), which Defendants cite extensively, and in which the relator's claims were "not premised on an assertion that Defendants' claims for payment were 'explicitly and/or independently false'" and thus "only viable under two doctrines: (1) false certification (either express or implied); and (2) promissory fraud." See id. at *4 (citing Hendrow, 461 F.3d at 1171).

Here, Relator specifically alleges that "Defendant Glenn Russell Deacon II has, on numerous occasions, created false, fraudulent reports, and submitted them to the California State Government for payment, as well as hospitals and other medical care providers in return for payment, which payment is funded, in part, by the government through Medicare, Medicaid, MediCal, and Tri-Care." (Doc. No. 25 at 6, ¶ 21.) And to demonstrate this fraudulent conduct, Relator alleges that Defendants have created identical reports on different equipment, something she claims is "statistically impossible," (id. at 7, ¶ 22), which the court presumes to be true for the purposes of this

motion.

Moreover, the "causes to be" language in 31 U.S.C. § 3729 (a)(1)(B) means that Relator need not plead Defendants themselves submitted the claims. Rather, at this stage it is enough that Defendants "knowingly assisted in causing the government to pay claims which were grounded in fraud." Mackby, 261 F.3d at 827. In claiming that Defendants submitted fraudulent reports that hospitals relied on to make (false, as a result of Defendants' conduct) claims to the government for reimbursement in the form of Medicare, Medicaid, Medi-Cal, or Tri-Care funds, Relator has done just that. See Lee, 245 F.3d at 1053 ("If, for sake of analysis, we assume that a party to a government contract knowingly or with deliberate ignorance charged the government for worthless services, then there would be fraud on the government that may be pursued under the FCA.").

In short, now, as before, the court finds that in alleging this activity the SAC:

> satisfies the stated purposes of Rule 9(b)—giving [QAS and Glenn Russell Deacon II] 'notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong.' Vess, 317 F.3d at 1106. Relator claims that on numerous occasions, but at minimum on January 15, 2016 (when), Glenn Russell Deacon II, through his employment at QAS (who and where), generated fraudulent reports that were not based on actual testing done (what), which were provided to health care providers, which were then used to garner improper government payments (how). This recitation makes clear what wrongs Relator believes Glenn Russell Deacon II (and QAS) committed, and the manner in which those wrongs were committed. At this point in the case, the specific manner in which reports were delivered to the health care providers and then incorporated into false claims is less important.

(Doc. No. 22 at 5–6.)

Consequently, though Relator must undoubtedly offer more in the ensuing stages of this case, the court finds that, at least with regard to QAS and Glenn Russell Deacon II,

she has satisfied her burden at the pleading stage.

e. Allegations Against the Other Defendants

In the first go-round on Count I, the court ruled that Relator's allegations against the other defendants—that they "were aware of Glenn Russell Deacon II's fraudulent practices"—was "not sufficient to put each individual defendant on notice of their alleged role in a fraudulent scheme as required by the particularity requirements of the FCA." Accordingly, the court granted Defendants' motion, with leave to amend, as to Glenn Russell Deacon, Susan Deacon, and Shelly Becker.

Relator has now returned with new allegations against Russell Deacon, Susan Deacon, and Shelly Becker. Much of what she adds to the SAC is plainly conclusory (the terms "fraudulent" and "fraudulently" play starring roles). Looking to the actual facts[2] alleged, though, the court finds that—though it is extremely close and the SAC still leaves much to be desired—Relator has satisfied Rule 9(b) against Glenn Russell Deacon and Shelly Becker. Her allegations against Susan Deacon continue to fall short, however.

On the one hand, Relator alleges that Glenn Russell Deacon provided her "with a post-it note with handwritten numbers on it, and ordered [her] to manually input those numbers into a report previously generated." (Doc. No. 25 at 8, ¶ 26.) The court can draw the reasonable inference in Relator's favor that this is an indication of fraud; presumably, if the report were authentic, it would be automatically generated and not manually altered. Likewise, Relator alleges that "with the knowledge that the reports were fraudulently created," Glenn Russell Deacon "would then create an invoice for the fraudulent report, and submit it to the institution for payment." (Id. at 9, ¶ 27; see also id. at 10, ¶ 28.) And Relator similarly alleges that Shelly Becker "routinely . . . created reports by changing the name and date of old reports that were generated for other hospitals and medical care providers." (Id. at 9, ¶ 27.) Finally, Relator alleges that

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[2] One might wonder why these facts were not alleged the first time around. Whatever the answer, the court has no choice but to accept them as true at this point.

Becker gave Glenn Russell Deacon "a list of institutions to invoice, which invoices were submitted for payment, for reports that had never actually been generated." (Id. at 10, ¶ 28.)

These allegations are sufficient to give notice of the purported misconduct so that Glenn Russell Deacon and Shelly Becker "can defend against the charge and not just deny that they have done anything wrong." Vess, 317 F.3d at 1106. Though the court is troubled by Relator's failure to attach dates to her allegations, the court understands that it may be difficult to plead, for each individual instance, the date and institution involved in conduct that "routinely" took place and involved "lists of institutions" as Relator claims. For that reason, the court will not dismiss Relator's claims against Glenn Russell Deacon and Shelly Becker for want of the "when" requirement. See id.

On the other hand, Relator's allegations that Susan Deacon told Relator to provide old reports, (Doc. No. 25 at 8, ¶ 25), told Relator to do what Glenn Russell Deacon II asked, (id. at 10–11, ¶ 30), and knew about two identical reports, (id. at 11, ¶ 31), do not combine to satisfy Rule 9(b) in stating a claim under the FCA. As Relator has had a number of chances to adequately plead this claim, the court dismisses Count I as to Susan Deacon without leave to amend.

In sum, the court denies Defendants' motion to dismiss Count I against QAS, Glenn Russell Deacon II, Glenn Russell Deacon, and Shelly Becker, but grants it, without leave to amend, as to Susan Deacon.

2. Counts II, III, and V: Retaliation in Violation of the FCA, Retaliation in Violation of Section 1102.5, and Wrongful Termination in Violation of Public Policy, Respectively

Defendants' motion to dismiss Counts II, III, and V, all of which are alleged against QAS only, presents the same problem as its motion to dismiss Count I against QAS and Glenn Russell Deacon II—the court has already ruled on the issues. (See Doc. No. 22 at 10 ("[Relator] has stated a claim that QAS retaliated against her in violation of the FCA."); id. at 11 ("Relator alleges that she disclosed Glenn Russell Deacon II's

practices to Susan Deacon (the protected activity) and was fired (the adverse employment action) two days later (the causal link). Thus, Relator has pled a prima facie case [under section 1102.5] against QAS."); id. at 14 ("Relator alleges sufficient facts to support her FCA and section 1102.5 retaliation claims. Consequently, she has alleged sufficient facts to support this [wrongful termination in violation of public policy] claim against QAS.").)

Nevertheless, Defendants move to dismiss those claims again, in the seeming hope that their new arguments on Count I will prevail and, in turn, cause the court to rethink its rulings on Counts II, III, and V. As discussed above, however, the court rejects Defendants' new arguments on Count I. Thus, the analysis on Counts II, III, and V is unchanged, and the court need not repeat its basis for previously denying Defendants' motion to dismiss those claims. So the court will keep it brief: As to Count II, Relator has adequately alleged that (1) she was engaging in conduct protected under the FCA; (2) QAS knew that she was engaging in such conduct; and (3) QAS discriminated against her because of that conduct. See United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996). As to Count III, Relator has alleged that (1) she was engaged in protected activity; (2) she was thereafter subjected to adverse employment action by QAS; and (3) there was a causal link between the two. See Soukup v. Law Offices of Herbert Hafif, 39 Cal. 4th 260, 287–88 (2006). And because Relator has alleged facts sufficient to support Counts II and III, she has alleged facts sufficient to support Count V. See Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1103 (9th Cir. 2008).

The court denies Defendants' motion to dismiss Counts II, III, and V.

3. Count IV: Violation of Section 232.5

Count IV alleges that Defendants violated section 232.5, which provides that an employer may not discharge or otherwise discriminate against an employee who discloses information about the employer's "working conditions." As discussed in the court's prior order, the Legislature did not define the phrase "working conditions" in section 232.5, and as Defendants point out, "there is scant case law on the issue." Only an unpublished California Court of Appeal case, Massey v. Thrifty Payless, Inc., 2014

WL 2901377 (Cal. Ct. App. June 27, 2014), has examined section 232.5 in any detail, but even that court could not settle on a precise definition. Thus, in previously deciding this issue, this court undertook its own evaluation of section 232.5, as well as its legislative history (as discussed in Massey), to find that Relator had not alleged a violation of the section. The court reasoned that Relator had not alleged that falsifying reports was a condition of her employment with QAS—only that she was asked to provide old reports so that others could do the falsifying. (Doc. No. 22 at 14.)

Now, in the SAC, Relator alleges that she was "ordered to manually input numbers into reports, which were submitted for payment along with invoices submitted for payment." (Doc. No. 25 at 9, ¶ 26.) Again, as mentioned above, the court can infer that manually inputting numbers into what should be automatically generated reports constitutes falsification of those reports. And Relator also now claims that she disclosed those conditions by "complain[ing] of the requirement that she participate in" this activity to Susan Deacon, only to be instructed by Susan Deacon, on several occasions, that she needed to do what her boss told her to do. According to Relator, she "understood those instructions to mean that if she did not follow . . . orders, she would be fired." (Id. at 25, ¶ 30.) To cap it off, Relator alleges that two days after showing Susan Deacon identical reports, "to demonstrate . . . the report produced by Glenn Russell Deacon was therefore fraudulent," she was fired.

Based on these allegations, accepted as true, the court finds that Relator has adequately pled that QAS violated section 232.5 by firing her for disclosing information about her working conditions.

The court dismisses Count IV as to the individual defendants, however. By its plain language, section 232.5 applies to employers only. Moreover, even where statutes use the word "person," see Jones v. Lodge at Torrey Pines P'ship, 42 Cal. 4th 1158, 1162 (2008), or define employer to include "any person acting as an agent of an employer," see Reno v. Baird, 18 Cal. 4th 640, 645 (1998), the California Supreme Court has held that that no individual liability exists. Given this authority, the court finds that no individual

liability can exist under section 232.5. See Jones, 42 Cal. 4th at 1162 (contrasting "clear language" such as "[a]n employee of an entity . . . is personally liable for any harassment" that is sufficient to impose personal liability).

4. Relator's Request for Punitive Damages

Finally, Defendants seek dismissal of Relator's prayer for punitive damages on Counts III–V. Under California law, a plaintiff may recover punitive damages in connection with a non-contractual claim if she establishes by clear and convincing evidence that the defendant is guilty of fraud, oppression, or malice. Cal. Civil Code § 3294(a).

In its prior order on Relator's first amended complaint, the court dismissed the request for punitive damages, but provided leave to amend. Nothing has changed with the filing of the SAC. Relator still alleges standard violations of California statutory and common law—nothing more. Accordingly, the court grants Defendants' motion to dismiss the SAC's prayer for punitive damages, without leave to amend. See Turman v. Turning Point of Cent. California, Inc., 191 Cal. App. 4th 53, 64 (2010) (requiring facts pled in the complaint to "rise to the level of malice, oppression or fraud necessary under Civil Code section 3294 to state a claim for punitive damages").

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II. MOTION TO STRIKE

Defendants move to strike the following portions of the SAC:

> Paragraph 17, line 12: 'Medicaid, MediCal'
> Paragraph 17, line 13: 'and/or the California State'
> Paragraph 17, line 15: 'Medicaid, MediCal'
> Paragraph 18: entire paragraph
> Paragraph 19, line 23: 'California State and'
> Paragraph 19, line 7: 'State and'
> Paragraph 20, line 12: 'Medicaid, MediCal'
> Paragraph 21, line 15: 'the California State Government for payment, as well as'
> Paragraph 21, line 18: 'Medicaid, MediCal'
> Paragraph 24: entire paragraph
> Paragraph 34, line 25: 'and state governments'
> Paragraph 34, line 28: 'Medicaid, MediCal'
> Paragraph 36, line 15: 'and state'
> Paragraph 37, line 16–17: 'and the state Medicaid/MediCal programs'
> Paragraph 38, line 22: 'and the state Medical/MediCal programs'
> Paragraph 38, line 26: 'Medicaid, MediCal'
> Paragraph 39, lines 1–2: 'and the state Medicaid programs'
> Paragraph 39, line 3: 'MediCal, Medicaid'
> Paragraph 63, lines 11–15: 'A fundamental public policy is embodied in California Government Code § 12650, et. (sic) seq., prohibiting employers from retaliating against an employee for efforts to prevent false claims from being filed against the State government.'
> Paragraph 67, line 9–10: 'and governmental agencies in the State of California.'

(Doc. No. 30 at 2–3.)[3]

A. Legal Standards

Federal Rule of Civil Procedure 12(f) states that a district court "may strike from a

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[3] Defendants' motion cites different line numbers from those reflected in the SAC. But the court can decipher which portions of the SAC Defendants want to strike. And considering that the SAC is a redlined version of the first amended complaint (as discussed in footnote 1, above), the court understands the potential for confusion.

pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010) (internal quotations omitted). "'Motions to strike are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic.'" Varrasso v. Barksdale, No. 13cv1982 BAS (JLB), 2016 WL 1375594, at *1 (S.D. Cal. Apr. 5, 2016) (quoting Neilson v. Union Bank of California, N.A., 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003)). "The motion should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation. If there is any doubt the court should deny the motion." Obesity Research Inst., LLC v. Fiber Research Int'l, LLC, No. 15cv595 BAS (MDD), 2016 WL 739795, at *3 (S.D. Cal. Feb. 25, 2016) (internal quotations and alterations omitted). When deciding a Rule 12(f) motion, a court must accept the nonmoving party's allegations as true and liberally construe the pleadings in its favor. Multimedia Patent Trust v. Microsoft Corp., 525 F. Supp. 2d 1200, 1211 (S.D. Cal. 2007).

B. Analysis

Defendants argue that, because Relator has brought suit on behalf of the United States under the federal FCA, "her allegations relating to alleged fraud on the State of California are immaterial, impertinent, improper, prejudicial, and seek to confuse the issues for the jury."

1. Relator's References to Medicaid and Medi-Cal

Defendants characterize Relator's references to Medicaid and Medi-Cal as "immaterial and impertinent." The court disagrees. As Defendants themselves acknowledge, "Medicaid is a joint federal-state program administered by the individual states that choose to participate. In California, the Medicaid program is known as Medi-Cal . . . [meaning] Medi-Cal and Medicaid are essentially the same thing in California." (Doc. No. 30-1 at 3–4 (citing information found on Medicaid.gov stating that Medicaid

"is funded jointly by states and the federal government").)[4] Given that Medicaid is funded in part by the federal government, it strikes the court as logical that fraud against Medicaid (or Medi-Cal) may be fraud against the federal government, and Defendants provide no authority to the contrary. Thus, liberally construing the SAC in Relator's favor, Multimedia Patent Trust, 525 F. Supp. 2d at 1211, and recognizing that a motion to strike "should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation," Obesity Research, 2016 WL 739795, at *3, the court declines to strike Relator's references to Medicaid and Medi-Cal, as well as to State hospitals that may provide services using Medicaid and Medi-Cal funds.

2. Relator's General References to the California State Government

By contrast, Relator's allegations concerning the State of California alone (without anything tying the State to even partially federally funded programs such as Medicaid or Medi-Cal), and specifically California's prisons, have no bearing on the litigation. Relator is not bringing a claim for fraud against the State of California, or on behalf of the State of California. And her retaliation and wrongful termination claims are all adequately supported by her allegations that she investigated and disclosed fraudulent conduct of any type. See Moore v. California Inst. of Tech. Jet Propulsion Lab., 275 F.3d 838, 845 (9th Cir. 2002) (stating, relevant to Count II here, that protected activity under the FCA is the investigation of "matters which are calculated, or reasonably could lead, to a viable FCA action"); Ferrick v. Santa Clara Univ., 231 Cal. App. 4th 1337, 1345 (2014) (stating, relevant to Count III here, that protected activity is the disclosure of, among other things, a reasonably based suspicion of a violation of a federal statute); Cal. Lab. Code § 232.5 (prohibiting discrimination for disclosure of "working conditions," which, relevant to Count IV here, the court has determined includes being required to assist in fraud); Haney v. Aramark Unif. Servs., Inc., 121 Cal. App. 4th 623, 641–42 (2004) (stating, relevant to Count V here, that the public policy motivating a wrongful

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[4] The court grants Defendants' requests for judicial notice. (Doc. Nos. 29-2, 30-2.)

termination may be laid out in statute).

Thus, striking references related to purely California entities and issues will not limit Relator's ability to litigate her case. To the contrary, striking those references may streamline the case and save time and money—especially in discovery. See Whittlestone, 618 F.3d at 973. Defendants will not have to chase down, and turn over, documents with no connection to the federal government and therefore no connection to Relator's claims. As a result, rather than serving as "a delaying tactic," Varrasso, 2016 WL 1375594, at *1, Defendants' motion to strike actually helps move this case forward more efficiently.

Accordingly, the court strikes the following portions of the SAC:

- paragraph 18, line 20: "California State Prisons and"
- paragraph 18, lines 22–23: "California Institution for Men, California Institution for Women, Valley State Prison, Richard J. Donovan Correctional Facility"
- paragraph 21, line 18: "the California State Government for payment, as well as"
- paragraph 24, line 18: "prisons and"
- paragraph 63, lines 11–15: "A fundamental public policy is embodied in California Government Code § 12650, et. (sic) seq., prohibiting employers from retaliating against an employee for efforts to prevent false claims from being filed against the State government."
- paragraph 67, line 15: "in the State of California."

CONCLUSION

For the reasons stated, the court:

- denies Defendants' motion to dismiss Count I against QAS, Glenn Russell Deacon II, Glenn Russell Deacon, and Shelly Becker, but grants it, without leave to amend, as to Susan Deacon;
- denies Defendants' motion to dismiss Counts II, III, and V;

- denies Defendants' motion to dismiss Count IV against QAS, but grants it as to the other defendants;
- grants Defendants' motion to dismiss Relator's prayer for punitive damages, without leave to amend;
- strikes the portions of the SAC described above.

Relator shall file a signed, clean version of the SAC with exhibits attached within ten days of this order, as specified in footnote 1. Defendants shall answer the SAC within fifteen days of this order.

IT IS SO ORDERED.

DATED: July 26, 2017

JEFFREY T. MILLER
United States District Judge