No. 18-

IN THE

Supreme Court of the United States

STEVEN MATESKI,

Petitioner,

v.

RAYTHEON COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is an action brought under the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), by Petitioner Steven Mateski ("Petitioner") against Respondent Raytheon Company ("Raytheon") to recover money paid by the Government to Raytheon based upon false claims submitted by Raytheon in connection with the design and building of the VIIRS sensor used for the collection of data in orbiting weather and defense satellites. The Court of Appeals for the Ninth Circuit in a four-page Memorandum summarily affirmed the District Court's dismissal of the case on the grounds that the Fifth Amended Complaint ("Complaint" herein) did not meet the specificity required by Fed. R. Civ. P. Rule 9(b) and, therefore, it could not be determined whether Raytheon's non-compliance with the VIIRS subcontract was material to the Government. This was error. The Complaint alleged three types of false claims: (a) *factually false claims*; and (b) *expressly and impliedly false certified claims* that it had performed all the material terms of the VIIRS subcontract without disclosing its failure to do so. As admitted by the Government, the claims were material because they "'went to the very essence of the bargain'" between Raytheon and the Government.

Two questions are presented:

1. Did the Complaint give Raytheon sufficient notice of the particular misconduct alleged to constitute fraud, so that it was error to dismiss this case pursuant to Rule 9(b)?

2. Were the false claims alleged by Petitioner material to the Government's decision to pay Raytheon?

LIST OF PARTIES

The parties below are listed in the caption.

RULE 29.6 STATEMENT

Petitioner is not a nongovernmental corporation and has no parent corporation or shares held by a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit below.

OPINIONS BELOW

The Memorandum opinion by the United States Court of Appeals for the Ninth Circuit (Judges Graber, McKeown and Christen) is set forth in Appendix A, 1a-4a. It affirmed the August 3, 2017 dismissal by the United States District Court for the Central District of California, Hon. Otis D. Wright, set forth at Appendix B, 5a-26a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit's Memorandum opinion was rendered on December 11, 2018. Petitioner's Petition for Panel Rehearing or for Hearing En Banc was denied on January 16, 2019. Appendix C, 27a-28a.

STATUTORY PROVISIONS INVOLVED

False Claims Act — Title 31 U.S.C. §§ 3729 and 3730 set forth in Appendix D, 29a-46a.

Federal Acquisition Regulation (FAR) § 32.905 — Payment Documentation and Process — 48 CFR § 32.905 set forth in Appendix E, 47a-51a.

STATEMENT OF THE CASE

Facts

Petitioner has more than thirty (30) years' experience in the aerospace and defense industry. From 1987 to 1995, he was a Manufacturing Engineer/Planner for Northrop Grumman Corporation ("Northrop"). From 1996 to 2002, he was a Manufacturing Engineer/Planner at Hughes Electronics/Boeing Corporation; and from 2002 to 2006, he was employed by Raytheon as a Manufacturing Planner Engineer on the Visible Infrared Imaging Radiometer Suite ("VIIRS") sensor [Compl., ¶ 3, ER 20].

In August 2002, Northrop was selected as the prime contractor to develop the National Polar-orbiting Operational Environmental Satellite System ("NPOESS"), the satellite system used for collecting meteorological, oceanographic, environmental, climatic data and imagery as well as collecting defense-related information and data. At that time Northrop awarded the contract to Raytheon to design, manufacture and assemble the VIIRS sensor for NPOESS. The VIIRS sensor was created to collect visible/infrared imagery and radiometric data on the atmosphere, clouds, earth radiation budget which measures whether there is global warming or global cooling, clear-air land/water surfaces, sea surface temperature, ocean color, and low-light visible imagery [Compl., ¶ 4, ER 20]. The VIIRS sensor also collected defense-related information and data.

Raytheon developed and built the VIIRS sensor from 2002 to 2010. Raytheon was required to build the VIIRS sensor and its component parts in conformance with the specifications and requirements of the VIIRS subcontract and the NPOESS General Instrument

Interface Document ("NGIID") [Compl., ¶¶ 5 and 6, ER 21]. The VIIRS sensor consists of thirty-two (32) "100 level subsystem units." Each "100 level subsystem unit" is a specialized data or signal or digital or analog processor comprised of high-reliability electronic component parts which are used for the collection and transmission of data by the VIIRS sensor. Failure of these units causes the loss of low-light visible imagery thereby blinding or impairing the NPOESS telescope and interfering with the collection and transmission of data [Compl., ¶ 5, ER 21].

During the time that Petitioner worked on the VIIRS sensor, he observed and became aware that Raytheon, *inter alia*, (a) failed to build and assemble the VIIRS sensor and its component parts in conformance with the specifications and requirements of the VIIRS subcontract and the NGIID, (b) substituted prohibited and substandard components and materials for the components and materials specified in the VIIRS subcontract and the NGIID, and (c) concealed its violations of the VIIRS subcontract and the NGIID by falsifying the build and testing records [Compl., ¶ 9, ER 22-24]. As the result, the thirty-two (32) "100 level subsystem units" of the VIIRS sensor failed [Compl., ¶ 6, ER 21, and ¶ 10, ER 24].

Many of the requirements and specifications of the NGIID were designated as mandatory, which must be complied with unless two United States Government Contracting Officers expressly waived such compliance. Section 1.5a of the NGIID provides:

> "**Shall** designates the most important weighting level; that is, mandatory. Any deviations from these contractually imposed mandatory requirements require the approval of the SSPR

> [Single Source Procurement Reform Office] contracting officer, as well as the NPP [NPOESS Preparatory Project Office] contracting officer if the change affects interfaces for instruments being provided to NPP."

[Compl., ¶ 7, ER 21-22].

The VIIRS subcontract allowed Raytheon to request waivers from contract requirements and specifications. It provided that Raytheon and Northrop could waive minor deviations. However, deviations from mandatory requirements of the NGIID, designated as "major" deviations, required the approval of the contracting officers of the two Government agencies designated in Section 1.5a of the NGIID [Compl., ¶ 8, ER 22].

Raytheon, in the performance of the VIIRS subcontract, knowingly did not conform and comply with the mandatory requirements and specifications of the VIIRS subcontract set forth in the NGIID, including obtaining the requisite approvals for major deviations from the NGIID. The Complaint alleged the following fourteen categories of non-performance of and non-compliance with the VIIRS subcontract and NGIID [Compl., ¶ 9, ER 22-24]. *Each category was supported by a citation to the specific section(s) of the NGIID*:

(a) Raytheon failed to perform complete tests and retests of component parts and of assembled hardware in violation of NGIID § 4.1.1.1.5 and § 4.2.7;

(b) Raytheon failed to perform qualification and up-screening tests on electronic components in violation of NGIID § 4.1.1.1.5 and § 4.2.7;

(c) Raytheon (i) forged planning operation sign-offs weeks after operations were performed in violation of NGIID § 4.1.1.1.2 which mandates true and accurate records of tests, and (ii) did not stop work to perform required inspections in violation of NGIID § 4.1.1.1.5 and § 4.2.7;

(d) Raytheon forged serial numbers on inspection status tags and signed-off on test operations where test procedures were not "Baseline Released" in violation of NGIID § 4.1.1.1.2 which mandates true and accurate records of tests;

(e) Raytheon substituted materials prohibited by the NGIID, *e.g.*, electro-deposited nickel plating, hot plastics capable of static discharges, pure tin, tungsten and debris shedding fasteners in violation of § 3.2.4.6 and § 3.3.1.3 of the NGIID;

(f) Raytheon failed to design and build VIIRS sensors to a pre-approved electrical grounding scheme to protect component parts and assemblies from electrostatic discharge exposures ("ESD") in violation of § 3.2.4.6 and § 3.3.15.1.3 of the NGIID;

(g) Raytheon performed reduced Acceptance testing on disassembled and reassembled units when full Acceptance testing was required in violation of NGIID § 4.1.1.1.5 and § 4.2.7;

(h) Raytheon failed to obtain ESD preapproval of designs and assembly areas and test equipment by the ESD site coordinator and used non-approved test equipment in violation of NGIID § 3.3.14 and § 4.4;

(i) Raytheon failed to write test event failure reports upon failures of units in Acceptance testing in violation of §§§ 4.1.1, 4.1.1.1.1 and 4.1.1.1.2 of the NGIID;

(j) Raytheon failed to design a primary and redundant power supply in violation of NGIID § 3.2.4.3.2.3;

(k) Raytheon failed to package, handle, transport and store materials to protect against ESD exposures in violation of NGIID § 3.5.3;

(l) Raytheon failed to perform and conduct required Acceptance tests prior to delivery of the VIIRS sensor to NORTHROP for satellite level integration of the sensor onto the spacecraft in violation of NGIID § 4.2.7;

(m) Raytheon falsified and failed to keep and maintain accurate records documenting all relevant testing, all build and assembly of the VIIRS sensor, all rework and modifications of the VIIRS sensor in order to ensure compliance with the required manufacturing and assembly processes and controls in violation of NGIID § 4.1.1.1.2; and

(n) Raytheon created unauthorized venting by use of an unsealed power connector prohibited by NGIID § 3.3.12.11, which caused contamination in one or more of the 32 "100 level subsystem units."

As the result of these deviations from the VIIRS subcontract and the NGIID, the VIIRS sensor failed to operate as designed. Weeks after launch the performance of the VIIRS sensor began to degrade and an emergency shutdown was ordered turning off all systems, except

those necessary to keep the satellite in orbit. Engineering analysis discovered the light collecting mirrors were darkening as a result of use by Raytheon of prohibited materials and components. In addition, the VIIRS sensor was not collecting and transmitting data, thereby leaving a critical coverage gap in the meteorological, oceanographic, environmental, climatic and space environmental data and information for military, commercial, scientific and public use [Compl., ¶ 10, ER 24].

Raytheon has effectively admitted that it knowingly did not perform the mandatory requirements and specifications of the VIIRS subcontract and the NGIID by requesting waivers of said deviations from Northrop for the purpose of concealing Raytheon's non-compliance and non-conformance. Raytheon prepared the waivers to be signed by representatives of Northrop with knowledge that Northrop lacked authority under the NGIID and VIIRS subcontract to approve violations of mandatory requirements and specifications [Compl., ¶ 11, ER 24].

Between 2002 and 2010, Raytheon submitted to Northrop two types of requests for payment in connection with the VIIRS subcontract, which Raytheon intended to have paid and knew would be paid by the United States Government:

(a) Monthly invoices and accompanying documentation for labor and materials, which Northrop submitted to the United States Government for payment; and

(b) Semiannual invoices and accompanying documentation for award fees which Northrop submitted to the United States Government for payment [Compl., ¶ 12, ER 25].

Based on Petitioner's more than thirty (30) years' experience in the aerospace and defense industry, Petitioner has personal knowledge that when a contractor submits to the United States Government a request for payment on a defense industry contract, the contractor represents that the performance of the contract is in conformity with the requirements and specifications of the contract for which payment is requested [Compl., ¶ 13, ER 25].

Section 32.905 of the Federal Acquisition Regulations ("FAR") 48 CFR § 32.905, governing all contracts for goods and services with the United States Government, provides in relevant part that every contractor submitting invoices and bills requesting payment by the United States Government represents and/or certifies that the contractor is in conformity with the requirements and the specifications of the contract [Compl., ¶ 14, ER 25].

Petitioner did not have copies of Raytheon's requests for payment because they were in the exclusive possession, custody and control of Raytheon. On February 13, 2017, before Petitioner filed the Complaint, Petitioner's counsel requested Raytheon's counsel to produce the requests for payment. On February 20, 2017 Raytheon's counsel refused to do so [Compl., ¶ 15, ER 25-26]. On March 7, 2017 Petitioner filed the Complaint [ER 19-28].

Based on the above facts, Petitioner alleged on information and belief that from 2002 to 2010, Raytheon submitted requests for payment knowing that they falsely certified that Raytheon had performed the VIIRS subcontract in conformity with the requirements and specifications of the VIIRS subcontract and the NGIID

and knowing that the requests for payment failed to disclose that Raytheon had not obtained the requisite approvals from two United States Contracting Officers for major deviations from the mandatory requirements and specifications of the NGIID. In reliance on these false certifications, the Government reimbursed Northrop for the work being billed and invoiced by Raytheon on the VIIRS subcontract. The Government would not have paid Raytheon's requests for payment if the Government knew that (i) Raytheon had not performed the VIIRS subcontract in conformity with the requirements and specifications of the NGIID, and (ii) Raytheon had not obtained approvals of major deviations as required by the NGIID. As a result of the Government's paying the false requests for payment, the Government suffered at least one billion dollars in damages [Compl., ¶ 16, ER 26-27].

Procedural History of the Case

Petitioner filed this *qui tam* action on June 6, 2006. The case was sealed pursuant to 31 U.S.C. § 3730(b)(3) until July 2012 at which time the Government declined to intervene. In September 2012, Petitioner filed the Fourth Amended Complaint. In November 2012, Raytheon filed a motion to dismiss for lack of subject matter jurisdiction based upon public disclosure (31 U.S.C. § 3730(e)(4)(A)) and a motion to dismiss under Rules 8, 9, 10, 12(b)(6) and 12(f). On February 26, 2013, the District Court granted the motion based on public disclosure whereupon the District Court ruled that the motion to dismiss on other grounds became moot.

Petitioner appealed the dismissal. It was reversed by the Ninth Circuit. *United States of America ex rel. Steven*

Mateski v. Raytheon Co., 816 F.3d 565 (9th Cir. 2016). In its opinion the Court stated that the Fourth Amended Complaint contained numerous specific allegations of fraud:

> "…Mateski alleges numerous particular false waivers of VIIRS specifications and requirements. He also describes false and inappropriate signoffs and certifications in violation of the Program Quality Requirements, including 'obvious forged signoffs' by Raytheon VIIRS operators. Mateski further details Raytheon's alleged substitution of 'reduced Special Test Requirements…in lieu of specified testing,' which he claims 'compromise[d] the NPOESS/VIIRS Unit/System integrity and mission assurance.'" *Ibid.* at 578.
>
> "With respect to materials used in the VIIRS project, Mateski alleges the 'use of Prohibited Materials (pure Tin), use of Prohibited Metallic materials known to cause corrosion…when used together, use of Debris shedding locking fasteners (locking Heli-Coils), [and] use of Prohibited Materials and processes selected (Electro-deposited Nickel plating).' Mateski draws particular attention to problems with the J7 Power Connector, which he claims '[wa]s wired with forbidden ('D & E') materials of pure Tin plated wire.' He further alleges that 'Raytheon…falsely stated…that the pure Tin plated wire would be acceptable for flight use despite the failure to pot the J7 Power Connector.' *Ibid.* at 578.

> "Mateski also alleges numerous problems related to electrostatic discharge ('ESD'), asserting, for example, that Raytheon failed to maintain ESD protection of VIIRS flight hardware; and that certain cables were constructed using 'hot plastics,' which are 'ESD unapproved materials…capable of building and storing excessive electrical charges.'" *Ibid.* at 579.

Finally, the Ninth Circuit noted that "if his allegations prove to be true, Mateski will undoubtedly have been one of those 'whistle-blowing insiders with genuinely valuable information….'" *Ibid.* at 580.

Upon remand, Raytheon on July 19, 2016 refiled its motion to dismiss under Fed. R. Civ. P. 8, 9, 10, and 12(b)(6). On August 16, 2016, the Government filed a Statement of Interest affirming that Raytheon's false claims "'went to the very essence of the bargain'" between Raytheon and the Government [ER 201-202]. The District Court granted the motion on February 10, 2017 on the grounds that Petitioner had not alleged a specific representation regarding the goods and services rendered and that the 134-page complaint was incomprehensible. The District Court granted Petitioner leave to file a fifth amended complaint. Since Raytheon had refused to provide copies of Raytheon's requests for payment, Petitioner alleged on information and belief in the Complaint that Raytheon falsely represented in its requests for payment that it had performed the VIIRS subcontract in compliance with the contract specifications and requirements and the NGIID [Compl., ¶ 16, ER 26-27]. On March 7, 2017, Petitioner filed the Complaint [ER 19-28].

On April 10, 2017 Raytheon filed a motion to dismiss based on Fed. R. Civ. P. 8, 9 and 12(b)(6) [Motion, ER 29-53]. In a second Statement of Interest filed on July 25, 2017, the Government explained that the question of materiality requires consideration, *inter alia*, of "whether the violation went to the essence of the Government program or contract." [ER 201-202][1] On August 3, 2017 the District Court granted the motion without leave to amend on the grounds that Petitioner had not alleged either that Raytheon submitted a false claim or that Raytheon's allegedly false representations were material to the Government's decision to pay Raytheon's bills [Decision, ER 2]. On August 3, 2017 the District Court entered judgment against Petitioner [ER 17]. On December 11, 2018 the Ninth Circuit panel affirmed the dismissal (Appendix A) and on January 16, 2019 denied Petitioner's Petition for Rehearing and for a Hearing en Banc (Appendix C).

REASONS FOR GRANTING THE PETITION

1. The Memorandum opinion of the Ninth Circuit panel conflicts with decisions of other Courts of Appeals, including even other decisions of the Ninth Circuit, that dismissal pursuant to Fed. R. Civ. P. 9(b) is inappropriate where the allegations of false claims in the complaint give to the defendant notice of the particular wrongdoing alleged to constitute the fraud so that the defendant can adequately defend against the allegations. In *United*

1. This Statement of Interest was filed pursuant to the District Court's invitation to the Government on July 19, 2017 to submit a brief regarding the effect of *United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890 (9th Cir. 2017) [Minute Order, ER 195].

States ex rel. Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009), the Fifth Circuit Court held that "Rule 9(b) supplements but does not supplant Rule 8(a)'s notice pleading" and further held that "Rule 9(b) does not 'reflect a subscription to fact pleading' and requires only 'simple, concise, and direct' allegations of the 'circumstances constituting fraud….'" (*Ibid.* at 186). Citing *Grubbs v. Kanneganti, supra*, the Tenth Circuit also held that "defendants received adequate notice in a False Claims Act case where the complaint alleged a scheme to submit false claims and enough details that the defendants — who 'will be in possession of the most relevant records…' — could adequately investigate and defend the claims." *Acosta v. Jani-King of Oklahoma, Inc.*, 905 F.3d 1156, 1161 (10th Cir. 2018). Ninth Circuit decisions follow the same standard for pleading fraud pursuant to Fed. R. Civ. P. 9(b). In *Swartz v. KPMG LLP*, 476 F.3d 756 (9th Cir. 2007), the Ninth Circuit held that "'[t]o comply with Rule 9(b), allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" (*Ibid.* at 764). In *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161 (9th Cir. 2016), the Ninth Circuit held that "'[p]erhaps the most basic consideration for a federal court in making a judgment as to the sufficiency of a pleading for purposes of Rule 9(b)… is the determination of how much detail is necessary to give adequate notice to an adverse party and enable that party to prepare a responsive pleading.'" (*Ibid.* at 1180). There, the Ninth Circuit further noted that "[b]ecause this standard 'does not require absolute particularity or a recital of evidence…, a complaint need not allege 'a precise time frame,' 'describe in detail a single specific

transaction' or identify the 'precise method' used to carry out the fraud.'" (*Ibid.* at 1180). The Memorandum opinion of the Ninth Circuit panel rejects this pleading standard for Rule 9(b) and instead requires detailed fact pleading to survive a motion to dismiss.

2. The Memorandum opinion of the Ninth Circuit panel is contrary to the decision of the Supreme Court in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016) on the question of what is a "material" false claim. The FCA, 31 U.S.C. § 3729(b)(4), defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property," which the Supreme Court held that both under its statutory and common law meaning "'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentations.'" (*Ibid.* at 2002). The Government filed two Statements of Interest in support of Petitioner that the false claims alleged by Petitioner were "material" to the Government because the false claims "'went to the very essence of the bargain'" [ER 201-202 and ER 341-342] and also "went to the very essence of the Government program or contract" [ER 201-202] between Raytheon and the Government. More significantly, Raytheon understood that its false claims were material to the Government's decision to pay its bills and invoices because Raytheon falsified documents and records to conceal its non-compliance with the VIIRS subcontract and the NGIID. In *United States ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174 (4th Cir. 2017), the Fourth Circuit found that the defendant's "own elaborate cover-up suggested that the contractor realized the materiality of the…requirement." (*Ibid.* at 176 and 179). The Complaint pleaded Raytheon's cover-up of non-

compliance by falsifying records [Compl., ¶ 9(c),(d),(i),(m) and ¶ 11, ER 22-24]. The Ninth Circuit panel erroneously held in effect that Petitioner offered no non-conclusory facts of materiality (Appendix A, 3a-4a). When considering materiality under the FCA, the courts need the Supreme Court's guidance in determining what evidence would be sufficient to establish the materiality of false claims submitted to the Government for payment.

I. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT PANEL ERRONEOUSLY HELD THAT THE COMPLAINT DID NOT SATISFY THE PARTICULARITY REQUIREMENTS OF FED. R. CIV. P. RULE 9(b) WITH RESPECT TO THE FALSE CLAIMS ALLEGED IN THE COMPLAINT.

A. Petitioner's Complaint Specifically Alleges Three Types of False Claims Sufficient to Give Notice to Raytheon of the Charges Against It.

(1) Factually False Claims.

Raytheon billed for work it knowingly did not perform and for work which Raytheon knowingly used materials prohibited by the contract. This is fraud.

A claim is factually false when the claimant misrepresents what goods and services it provided to the Government. *United States ex rel. Campie v. Gilead Sciences, Inc., supra*, 862 F.3d at 900; *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 305 (3rd Cir. 2011). In a factually false claim, the request for payment itself is necessarily a false statement when

it bills for goods and products different from what the Government contracted for. If the Government contracts for product X and the defendant substitutes product Y, the relator has adequately pleaded a false claim without any other misrepresentation or certification.

A factually false claim arises when the claimant makes a request for reimbursement for materials or services never provided. *United States ex rel. Connor v. Salina Regional Health Center, Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008); *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1031 (D.C. Cir. 2017). Similarly, a worthless services claim is factually false because it seeks reimbursement for a service not provided. *Mikes v. Straus*, 274 F.3d 687, 703 (2nd Cir. 2001). In *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) the court explained:

> "The archetypal *qui tam* FCA action is filed by an insider at a private company who discovered his employer has overcharged under a government contract…* * * However, FCA actions have also been sustained under theories of supplying substandard products or services…."

A certification is not necessary for a factually false claim. In *U.S. ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1172 (9th Cir. 2006), the court stated:

> "So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake, False Claim liability can attach."

In *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1053 (9th Cir. 2001), the court held:

> "Neither false certification nor a showing of government reliance on false certification for payment need be proven if the fraud claim asserts fraud in the provisions of goods and services."

The Complaint alleges that Raytheon (1) did not perform numerous mandatory provisions and requirements of the VIIRS subcontract, (2) substituted materials which were prohibited by the subcontract, and (3) forged documents and test results [Compl., ¶ 9(a)-(n), ER 22-24]. Billing for such non-performance and non-compliance constitutes a factually false claim. The District Court did not address this issue (nor did the Ninth Circuit panel) other than to state that under the factually false theory Petitioner was required to "identify an overtly false representation in the claim for payment" [Decision, ER 9]. This was error because the cases cited above involving factually false claims make clear that a representation or certification is **NOT** required to allege a factually false claim. *Hendow, supra,* 461 F.3d at 1172; *Lee, supra*, 245 F.3d at 1053. A request for payment for work not done or using prohibited materials is false without more.[2]

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2. In *United States ex rel. Campie v. Gilead Sciences, Inc.*, *supra*, the Court noted the following hypothetical involving the Government's contracting for FDA approved medicines: "If a reimbursement request was submitted for 10 pills of Atripla but [the defendant] actually provided 10 pills of Tylenol, *that request for payment would be undeniably false.* Even though Tylenol is FDA approved, *it is not what the government paid for.*" 862 F.3d at 909, n.8, emphasis added.

The Ninth Circuit panel agreed. In its Memorandum opinion the court stated that to establish an FCA claim Petitioner was required to show a "(1) *false statement*… (2) that is material to the government's decision to pay" (Appendix A, 3a). The Complaint unequivocally alleges a "false statement" and a "fraudulent course of conduct", *e.g.* billing for work not done. But, inexplicably the District Court and the Ninth Circuit panel failed to rule that a false claim had been alleged. Therefore, dismissing the case pursuant to Rule 8 and/or 9(b) and/or 12(b)(6) was error because the Complaint alleged a short and plain statement showing false claims upon which relief can be granted.

(2) False Express Certification.

The Complaint alleged: "Raytheon submitted… Requests for Payment and supporting documents with knowledge that they falsely represented that Raytheon had performed the VIIRS Contract in conformity with requirements and specifications of the VIIRS Contract…." [Compl., ¶ 16, ER 26]. Raytheon falsely certified compliance with the applicable provisions of the contract. This allegation constitutes a false express certification because Raytheon did NOT perform the contract according to its terms. Raytheon knew (a) it had not performed the work, (b) that it had used prohibited materials, and (c) it had falsified records to conceal its knowing non-compliance. [ER 21-24 and 26-27.] The express false certification theory applies when a Government payee falsely certifies compliance with a particular statute, regulation, a *contractual* term, where compliance is a prerequisite to payment. *U.S. ex rel. Connor v. Salina Regional Health Ctr., supra*, 543 F.3d at 1217 and *United States ex rel. Wilkins v. United Health Grp., Inc., supra*, 659 F.3d at

305. Such an express certification is required by § 32.905 (Payment documentation and process) of the Federal Acquisition Regulations, 48 CFR § 32.905 (Appendix E, 47a-51a). § 32.905(a) provides: "Payment will be based on receipt of a proper invoice and satisfactory contract performance." § 32.905(b)(1) provides: "A proper invoice must include" *inter alia* "[d]escription of…supplies delivered or services performed." § 32.905(b)(1)(iv). Raytheon's express certification of "satisfactory contract performance" in its invoices and other requests for payment on the VIIRS subcontract was necessarily false because of Raytheon's material violations of its contractual obligations and the NGIID. Both the District Court and the Ninth Circuit panel failed to address this issue and to acknowledge that the Complaint sufficiently alleged a claim for false express certification.

(3) Implied False Certification.

In *Universal Health Services, Inc. v. United States ex rel. Escobar, supra*, 136 S. Ct. 1989, the Supreme Court held that a false claim under the implied certification theory can be a basis for a liability at least where two conditions are satisfied: First, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose non-compliance with material statutory, regulatory or contractual requirements makes those representations misleading half-truths. *Escobar, supra,* 136 S. Ct. at 2001. In *United States ex rel. Rose v. Stephens Institute*, 909 F.3d 1012, 1018 (9th Cir. 2018), *cert. denied*, ___S. Ct. ___ (2019), the Ninth Circuit held that the two conditions recited by *Escobar* must be satisfied to state a false claim based upon false implied certification. There is

a conflict in the Circuits on this issue. See, *United States ex rel. Badr v. Triple Canopy, Inc.*, *supra*, 857 F.3d at 178, fn.3; *Marsteller v. Tilton*, 880 F.3d 1302, (11th Cir. 2018) at 1308 and 1312, and *United States v. Science Applications International Corp.,* 626 F.3d 1257, 1269 (D.C. Cir. 2010) where the Fourth, Eleventh and D.C. Circuits respectively held that the simple omission of a material fact is all that is necessary to impose implied certification liability under the FCA without any other affirmative misrepresentation in the request for payment. However, even if an affirmative misrepresentation is required in a contractor's invoice or other request for payment to impose liability on the contractor for false implied certification, § 32.905 (Payment documentation and process) of the Federal Acquisition Regulations, 48 CFR § 32.905 (Appendix E, 47a-51a) would necessarily require such an affirmative misrepresentation to be included in the contractor's invoices or other requests for payment. For obvious reasons, Raytheon refused to produce its invoices and requests for payment on the VIIRS subcontract in order to escape liability for false implied certification [Compl., ¶ 15, ER 25-26].[3]

3. At the pleading stage Petitioner may be excused for not pleading the exact language of Raytheon's Requests for Payment. Petitioner alleged that he did not have copies of Raytheon's Requests which were in the exclusive possession, custody and control of Raytheon. On February 13, 2017, Petitioner's counsel asked Raytheon's counsel to produce the Requests. On February 20, 2017 Raytheon's counsel refused. [Compl., ¶ 15, ER 25-26]. Petitioner alleged these facts in the Complaint filed on March 7, 2017. In opposition to the motion to dismiss Petitioner argued that because Raytheon refused to produce the Requests an adverse inference should have been drawn that the Requests contained specific misrepresentations that give rise to liability under the FCA. The District Court rejected this argument. (Appendix B,

B. The Complaint Satisfied the Particularity Requirements of Rule 9(b) for Each Type of False Claim Alleged.

The District Court, relying on the traditional "who, what, when, where and how" approach, ruled that the Complaint failed to meet the particularity requirements of Rule 9(b). (Appendix B, 12a and 23a-24a). The Ninth Circuit panel, *without discussion or analysis*, agreed (Appendix A, 3a). Both courts erred.

The Complaint satisfied the particularity requirements as to each of the three types of false claims alleged in the Complaint. For each type of false claim (factually false claim, false express certification and false implied certification) the "who" was Raytheon; the "what" were the requests for payment for the false claims; the "when" was monthly and semiannually when Raytheon submitted the false claims for payment; the "where" was at Raytheon's offices in Goleta, CA and El Segundo, CA; the "how" was by submitting invoices and requests for payment to the Government through the NPOESS general contractor, Northrop.

19a-20a). In its briefs filed below Petitioner argued that Raytheon's not producing the Requests compelled the inference that they were fraudulent. (USCA Dkt. 11 (Opening Brief) filed 10-27-17 pp. 36-42; USCA Dkt. 22 (Reply) filed 1-22-18 p. 14). And yet, in Raytheon's motion to dismiss and its Opposition Brief (Dkt. 19) filed below, Raytheon faulted Petitioner for failing to identify a single false representation in any invoice *which Raytheon refused to produce*. (Motion to Dismiss, ER 30, 43-44, 47 and 50; Raytheon Oppos. Brief, Dkt. 19, pp. 1, 13, 19 and 31). The Ninth Circuit panel did not address this issue or Raytheon's gamesmanship.

Neither the District Court nor the Ninth Circuit panel below considered or even mentioned that each failure to comply with the contractually mandated requirements and specifications for the design and building of the VIIRS sensor alleged in Paragraph 9 of the Complaint was accompanied by reference to specific sections of the NGIID which sets forth the mandated specifications and requirements for the VIIRS sensor. These were facts specific enough to give Raytheon notice of the particular misconduct constituting the fraud against which it must defend.

Each court complained about a particular failure: (1) the District Court referred to Raytheon's failure to write test event reports [Compl., ¶ 9(i), ER 23] and asked "what 'event failure(s)'" (Appendix B, 23a); the Ninth Circuit panel echoing the approach of the District Court, referred to the failure to perform tests [Compl., ¶ 9(a), ER 22] and asked "which tests." (Appendix A, 3a). **The answers appeared on the face of the Complaint, namely, the specific NGIID sections alleged in Paragraphs 9(a) through 9(n)**, respectively, a fact ignored by both courts. These allegations were not conclusory as both courts stated. They were allegations of *facts* sufficient to give Raytheon notice of the particular misconduct constituting the fraud against which it must defend and to allow the court to draw the reasonable inference that Raytheon is liable for the misconduct alleged.

Moreover, the particularity demanded by Rule 9(b) is relaxed within the opposing party's knowledge. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304 (5th Cir. 1999) ["We have held that when the facts relating to the alleged fraud are peculiarly within

the perpetrator's knowledge, the Rule 9(b) standard is relaxed, and fraud may be pled on information and belief…." *Ibid.* at 308]; *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2nd Cir. 2010). Even in the Ninth Circuit, the Rule 9(b) standard is "relaxed with respect to matters within the opposing party's knowledge." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993).

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT PANEL ERRONEOUSLY HELD THAT IT COULD NOT BE DETERMINED FROM THE FALSE CLAIMS ALLEGED IN THE COMPLAINT WHETHER OR NOT RAYTHEON'S VIOLATION OF THE MANDATORY SPECIFICATIONS AND REQUIREMENTS OF THE VIIRS SUBCONTRACT WERE MATERIAL TO THE GOVERNMENT.

A. The Ninth Circuit Panel Did Not Follow the Supreme Court's Decision in *Escobar* Concerning Materiality.

The Ninth Circuit panel ruled that "we cannot assess whether non-compliance [by Raytheon with the mandatory specifications and requirements of the VIIRS subcontract] was material or minor." (Appendix A, 4a). This ruling is contrary to the decision of the Supreme Court in *Universal Health Services, Inc. v. United States ex rel. Escobar, supra*, 136 S. Ct. 1989 on the question of what is a "material" false claim. The FCA, 31 U.S.C. § 3729(b)(4), defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property," which the Supreme Court held that both under its statutory and common law meaning

"'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentations.'" (*Ibid.* at 2002). The Ninth Circuit panel ruling was made despite the fact that the Government filed two Statements of Interest in support of Petitioner that the false claims alleged by Petitioner "'went to the very essence of the bargain'" [ER 201-202 and ER 341-342] and also "went to the very essence of the Government program or contract" [ER 201-202] between Raytheon and the Government. The Complaint alleges Raytheon submitted Requests for Payment that falsely represented it had performed and complied with the mandatory specifications and requirements of the contract and that it had not used prohibited materials. In addition, the Complaint alleges Raytheon failed to disclose its major deviations from the contract. These misrepresentations and failures to disclose were material — no other conclusion is possible or rational. They were not conclusory as the District Court and the Ninth Circuit panel observed. (Appendix B, 22a-23a; Appendix A, 4a). The single allegation that Raytheon substituted materials PROHIBITED BY THE NGIID is sufficient alone to raise the inference of materiality. The inference becomes stronger when joined with 14 other categories of specific non-performance and non-compliance [Compl., ¶ 9, ER 22-24].

The Complaint alleges that the deviations from the specifications and requirements of the contract caused the failure of the VIIRS sensor so that —

> Weeks after launch, the performance of the VIIRS sensor began to degrade and an emergency shutdown was ordered turning off all systems, except those necessary to keep the satellite in orbit. Engineering analysis

> discovered the light collecting mirrors were darkening as a result of previous exposures by RAYTHEON to prohibited materials during RAYTHEON's acceptance testing on the ground. In addition, the VIIRS sensor was not collecting and transmitting data, thereby leaving a critical coverage gap in the meteorological, oceanographic, environmental, climatic and space environmental data and information for military, commercial, scientific and public use.

[Compl., ¶10, ER 24].

These failures related to the *core and essence of the VIIRS contract*, namely the VIIRS sensor. Neither the District Court nor the Ninth Circuit panel addressed this fundamental issue. According to *Escobar* and the Government in its SOIs filed on August 16, 2016 and July 25, 2017 [ER 338-342 and ER 198-202] this was a material fact. And yet, the District Court ignored it as did the Ninth Circuit panel which devoted a single paragraph (five lines) to the materiality issue. (Appendix A, 4a).

Even more compelling evidence of materiality is Raytheon's falsification of the test results and build records of the VIIRS sensor. Raytheon was obviously aware that its false claims were material to the Government's decision to pay. Otherwise, Raytheon would not have undertaken to conceal its non-compliance with and violations of the VIIRS subcontract and NGIID. The Fourth Circuit held in *United States ex rel. Badr v.. Triple Canopy, Inc.*, *supra*, 857 F.3d 174 that a defendant contractor's "own elaborate cover-up suggested that the contractor realized the materiality of the…requirement." (*Ibid.* at 176). Both Courts erred by failing to place Raytheon's false

representations in the context of the effect of Raytheon's non-performance, namely, the failure of the VIIRS sensor. These were not conclusory allegations. The District Court was compelled, as was the Ninth Circuit panel, to liberally construe these allegations in favor of Petitioner. Had they done so the inference of materiality would be immediately apparent as sufficient to render dismissal pursuant to Raytheon's motion erroneous as a matter of law. The Ninth Circuit panel completely ignored all this compelling evidence of materiality and ruled that it could not determine whether Raytheon's false claims were or were not material to the Government.

B. The Government Admitted that the False Claims Alleged by Petitioner Were Material to the Government.

The decision of the Ninth Circuit panel that it "cannot assess" whether or not Raytheon's violations of the mandatory design and build requirements and specifications of the VIIRS subcontract and the NGIID were "material or minor" to the Government makes absolutely no sense when the Government filed two Statements of Interest in this case admitting that the false claims alleged by Petitioner "'went to the very essence of the bargain'" [ER 201-202 and ER 341-342] and also "went to the very essence of the Government program or contract" [ER 201-202] between Raytheon and the Government. In addition, Petitioner observed Raytheon employees falsifying required test records and documentation for submission to the Government in order to conceal Raytheon's violations of the mandatory design and build specifications of the VIIRS subcontract and NGIID [Compl., ¶¶ 6, 9(c),(d),(i) and (m), ER 21-23]. In *United States ex rel. Badr v. Triple Canopy, Inc., supra*,

857 F.3d at 176, the Fourth Circuit held that a defendant's "elaborate coverup" of its contractual obligations was evidence that the defendant knew that such contractual obligations were material to the Government.

Petitioner has offered compelling evidence of materiality. Thus, the Ninth Circuit panel opinion conflicts with the decisions of the Supreme Court that dismissal is inappropriate if the complaint, viewed in the light most favorable to plaintiff, alleges enough facts accepted as true to state a claim for relief that is plausible on its face and to allow the trial court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). That standard was met by Petitioner both with respect to the false claims alleged and materiality.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 11, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-56320

D.C. No. 2:06-cv-03614-ODW-KS

UNITED STATES OF AMERICA
ex rel. STEVEN MATESKI,

Plaintiff,

and

STEVEN MATESKI,

Plaintiff-Relator-Appellant,

v.

RAYTHEON COMPANY,

Defendant-Appellee.

December 5, 2018, Argued and Submitted,
Seattle, Washington
December 11, 2018, Filed

Appendix A

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding.

Before: GRABER, McKEOWN, and CHRISTEN, Circuit Judges.

MEMORANDUM*

Relator Steven Mateski worked for Defendant Raytheon Company from 2002 to 2006. Thereafter, he filed this action under the False Claims Act ("FCA"), alleging that Raytheon received payments from the United States through a scheme of falsely claiming compliance with applicable contracts related to a sensor for a satellite system and covering up Raytheon's non-compliance. The United States investigated Relator's claims for several years but decided not to intervene. After a remand from this court, *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565 (9th Cir. 2016), which rejected the ground on which the district court had dismissed the 134-page fourth amended complaint, the district court again dismissed that complaint, without prejudice, but on different grounds: failure to allege falsity and lack of a coherent and concise pleading. Relator filed a nine-page fifth amended complaint, which the district court dismissed with prejudice for failure to plead falsity and failure to plead materiality. Relator timely appeals. Reviewing *de novo*, *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1205 (9th Cir. 2016), we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

Under Federal Rule of Civil Procedure 8(a), the factual allegations in a complaint, accepted as true, must state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). In addition, for allegations of fraud, including FCA claims, Federal Rule of Civil Procedure 9(b) requires that the allegations be pleaded with particularity. *Ebeid ex rel. United States v. Lungwitz,* 616 F.3d 993, 996 (9th Cir. 2010). "Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks omitted). Among the elements that a relator must show to establish an FCA claim are (1) a false statement or fraudulent course of conduct (2) that is material to the government's decision to pay. *United States ex rel. Rose v. Stephens Inst.,* No. 17-15111, 2018 U.S. App. LEXIS 33176, 2018 WL 6165627, at *4 (9th Cir. Nov. 26, 2018).

Under that standard, the fifth amended complaint fails to satisfy the particularity requirement with respect, at least, to the "what," "when," and "how" of the allegedly false claims. As one example, in paragraph 9(a) Relator alleges that Raytheon "failed to perform complete tests and retests of component parts and of assembled hardware in violation of" two contractual requirements. Which tests? Which component parts? Were no tests done, or were they done incompletely? The allegations cover the period 2002 to 2010; without knowing which tests and approximately when they were performed, Raytheon does not have enough information to defend against the claims.

Similarly, with respect to materiality, the fifth amended complaint is wanting under the "demanding" standard established by the Supreme Court. *Universal Health Servs., Inc. v. United States ex rel. Escobar,* 136 S. Ct. 1989, 2002-03, 195 L. Ed. 2d 348 (2016). Without more particularity regarding the false claims, we cannot assess whether noncompliance was material or minor.

Accordingly, we hold that the fifth amended complaint does not meet the demands of Rule 9(b). Relator has not sought, either in the district court or here, leave to file a sixth amended complaint. In view of our disposition of the case, we need not address Relator's request for reassignment to a different judge.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 3, 2017

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:06-cv-03614-0DW(KSx)

UNITED STATES OF AMERICA *ex rel.*
STEVEN MATESKI,

Plaintiff,

v.

RAYTHEON COMPANY,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [184]

I. INTRODUCTION

This action arises under the False Claims Act (FCA). In 2002, Defendant Raytheon Company contracted with Northrop Grumman Corporation to design and manufacture a weather sensor for a Government-funded satellite system. The contract documents contained extensive specifications and requirements for the sensor. Plaintiff-Relator Steven Mateski alleges that Raytheon knowingly deviated from these specifications

but nonetheless certified that it complied with those specifications when requesting payment from Northrop. And because Northrop ultimately passed Raytheon's invoices to the Government for payment, Mateski alleges that Raytheon effectively defrauded the Government.

Raytheon now moves to dismiss Mateski's Fifth Amended Complaint, arguing that: (1) he has not identified any specific representations in Raytheon's requests for payment; (2) he has not demonstrated how any such representations, if they exist, are false or misleading; (3) any such (mis)representations were in any event immaterial to the Government 's decision to pay Raytheon; and (4) liability cannot attach to any pre-2009 misconduct because Raytheon sought payment from Northrop and not directly from the Government. (ECF No. 184.)

The Court concludes that Mateski has not adequately alleged either that Raytheon submitted a false claim or that Raytheon's allegedly false representations were material to the Government 's payment decisions. Thus, the Court **GRANTS** Raytheon's Motion without leave to amend.[1]

II. BACKGROUND

A. Factual Background

In 2002, the United States Government awarded Northrop the prime contract for designing and developing

1. After considering the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

the National Polar-Orbiting Operational Environmental Satellite System (NPOESS), a satellite that collects meteorological, oceanographic, environmental, and climatic data. (Fifth Am. Compl. ("5AC") ¶ 4, ECF No. 182.) Northrop, in turn, subcontracted with Raytheon to develop a weather sensor for the NPOESS called the Visible Infrared Imaging Radiometer Suite (VIIRS). *(Id.)* Two main contract documents governed Raytheon's work on the VIIRS: the VIIRS Contract and the NPOESS General Instrument Interface Document (NGIID). *(Id.* ¶ 6.) The NGIID contained extensive specifications and requirements regarding the design and manufacturing process for the VIIRS, some of which it designated as "mandatory." *(See id.* ¶¶ 7, 9.) Any deviation from a mandatory requirement was considered a "major" deviation that needed a waiver approved by two Government contracting officers. *(Id.* ¶¶ 7-8.) "Minor" deviations, on the other hand, could be waived by either Raytheon or Northrop. *(Id.* ¶ 8.)

Mateski, an engineer and a former Raytheon employee, worked on the VIIRS from 2002 to 2006. *(Id.* ¶¶ 3, 6.) According to Mateski, Raytheon failed to comply with numerous mandatory specifications and failed to obtain properly-executed major deviation waivers. *(Id.* ¶ 9.) Mateski identifies 14 specifications in the NGIID that Raytheon failed to comply with, such as: failing to perform "complete tests and retests of component parts and of assembled hardware"; failing to perform "qualification and up-screening tests on electronic components"; "forg[ing] planning operation sign-offs" and not performing required inspections; "forg[ing] serial numbers on inspection status

tags"; "substitut[ing] materials prohibited by the NGIID"; "falsif[ying] and fail[ing] to keep and maintain accurate records"; and others. *(Id.* ¶¶ 9(a)-(n).)

Between 2002 and 2010, Raytheon submitted two types of requests for payment to Northrop: monthly invoices for labor and materials, and semi-annual invoices for award fees. *(Id.* ¶ 12.) Northrop, in turn, submitted Raytheon's requests to the Government for payment. *(Id.)* Mateski alleges on information and belief that:

> Raytheon submitted to Northrop Requests for Payment and supporting documents with knowledge that they falsely represented that Raytheon had performed the VIIRS Contract in conformity with the requirements and specifications of the VIIRS Contract, including but not limited to the NGIID, and with knowledge that the Requests for Payment failed to disclose that Raytheon had not obtained the requisite approvals for major deviations from the mandatory requirement of the NGIID and all other NPOESS program documents.

(Id. ¶ 16.)

Mateski identifies three bases for this belief. First, based on his thirty years of experience in the aerospace and defense industry, Mateski states that he has "personal knowledge that when a contractor submits to the United States Government a Request for Payment on an aerospace and defense industry contract, the contractor

represents that the performance of the contract is in conformity with the requirements and specifications of the contract for which payment is requested." *(Id.* ¶ 13.) Second, under sections 52.232-32 and 32.905 of the Federal Acquisition Regulations, "every contractor submitting invoices and bills requesting payment by the United States Government represents and/or certifies that the contractor is in conformity with the requirements and the specifications of the contract." *(Id.* ¶ 14.) Third, because Raytheon refused to produce its requests for payments in this case either as part of its initial disclosures or in response to Mateski's counsel's informal demand, Mateski infers that the requests must contain misrepresentations or misleading half-truths that give rise to FCA liability. *(Id.* ¶ 15.)

Finally, Mateski alleges that the Government "would not have paid Raytheon's Requests for Payment if [it] had known" that Raytheon had neither complied with the mandatory contract requirements nor obtained major deviation waivers. *(Id.* ¶ 16.) Mateski asserts that the Government has suffered at least $1 billion in damages as a result of Raytheon's misrepresentations. *(Id.)*

B. Procedural History

In June 2006, Mateski filed this case on behalf of the United States. (ECF No. 1.) After investigating Mateski's claims for six years, the United States declined to intervene in the action. (ECF No. 78.) Raytheon subsequently moved to dismiss what was by then Mateski's Fourth Amended Complaint for lack of subject matter jurisdiction, arguing

that public knowledge of the problems with the VIIRS sensor were fatal to Mateski's claim under the FCA's public disclosure bar. (ECF No. 96.) The Court agreed and dismissed the action. *United States ex rel. Mateski v. Raytheon Co.,* No. 2:06-CV-3614-ODW, 2013 WL 692798, at * 1 (C.D. Cal. Feb. 26, 2013). Mateski appealed. (ECF No. 128.) In March 2016, the Ninth Circuit reversed, reasoning that the public disclosure bar did not apply because Mateski's allegations "differ in both degree and kind from the very general previously disclosed information about problems with VIIRS." *United States ex rel. Mateski v. Raytheon Co.,* 816 F.3d 565, 580 (9th Cir. 2016).

Shortly after remand, the Supreme Court issued its opinion in *Universal Health Servs., Inc. v. United States ex rel. Escobar,* 136 S. Ct. 1989 (2016), which addressed FCA liability under a theory of implied false certification. Raytheon subsequently moved to dismiss the Fourth Amended Complaint based on *Escobar* and on several other grounds. (ECF No. 154.) The Court granted Raytheon's motion, holding that a relator relying on a theory of implied false certification must identify the "specific representation" in the claim for payment that constitutes the misleading half-truth. *United States ex rel. Mateski v. Raytheon Co.,* No. 206CV03614ODWKSX, 2017 WL 1954942, at *5 (C.D. Cal. Feb. 10, 2017) (citing *United States ex rel. Kelly v. Serco, Inc.,* 846 F.3d 325, 332 (9th Cir. 2017)). The Court also held that Mateski's Fourth Amended Complaint was excessively prolix and did not comply with basic pleading requirements. *Id.* at *6-7. The Court granted Mateski leave to amend to cure

both deficiencies. *Id.* at *7. Mateski subsequently filed a Fifth Amended Complaint, and Raytheon now moves once again to dismiss Mateski's complaint. (ECF Nos. 182, 184.) Mateski has opposed Raytheon's motion, and the Government has filed a Statement of Interest urging the Court to reconsider its prior holding regarding the pleading requirements under an implied false certification theory. (ECF Nos. 185, 188, 198.) Raytheon's motion is now before the Court for decision.

III. LEGAL STANDARD

A complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). The determination whether a complaint satisfies the plausibility standard is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. A court is generally limited to the pleadings and must construe all "factual allegations set forth in the complaint ... as true and ... in the light most favorable" to the plaintiff. *Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir. 2001). But a court need not blindly accept conclusory allegations, unwarranted deductions of fact, and unreasonable inferences. *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir. 2001). The court must dismiss a complaint that does not assert a cognizable legal theory or fails to plead sufficient facts to support an otherwise cognizable legal theory. Fed. R. Civ. P. 12(b)(6); *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990).

In addition, where, as here, the plaintiff's claim sounds in fraud, the complaint must comply with Federal Rule of Civil Procedure 9(b)'s heightened pleading standard. *Mendiondo v. Centinela Hosp. Med. Ctr.,* 521 F.3d 1097, 1103 (9th Cir. 2008); *Bly-Magee v. California,* 236 F.3d 1014, 1018 (9th Cir. 2001). Rule 9(b) requires the party alleging fraud to "state with particularity the circumstances constituting fraud," Fed. R. Civ. P. 9(b), including "the who, what, when, where, and how of the misconduct charged." *Ebeid ex rel. United States v. Lungwitz,* 616 F.3d 993, 998 (9th Cir. 2010) (internal quotation marks omitted); *Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1106 (9th Cir. 2003). "In addition, the plaintiff must set forth what is false or misleading about a statement [in the defendant's claim for payment], and why it is false." *Ebeid,* 616 F.3d at 998 (citations, brackets, and internal quotation marks omitted). "Rule 9(b) serves to give defendants adequate notice to allow them to defend against the charge and to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect professionals from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis." *In re Stac Elecs. Sec. Litig.,* 89 F.3d 1399, 1405 (9th Cir. 1996) (citations, brackets, and internal quotation marks omitted).

IV. DISCUSSION

Under the FCA, "any person who knowingly presents, or causes to be presented, a false or fraudulent claim for

payment or approval" to the United States Government is liable for civil penalties and treble damages. 31 U.S.C. § 3729(a)(l)(A). The essential elements of an FCA claim are: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due. *United States ex rel. Swoben v. United Healthcare Ins. Co.,* 848 F.3d 1161, 1173 (9th Cir. 2016); *Ebeid,* 616 F.3d at 997; *United States ex rel. Hendow v. Univ. of Phoenix,* 461 F.3d 1166, 1174 (9th Cir. 2006).

Raytheon argues that Mateski has not adequately alleged either a false statement or materiality. The Court addresses each in turn.

A. False Statement

1. Legal Standard

The submission of a false claim is the *sine qua non* of FCA liability; "[v]iolations of laws, rules, or regulations alone do not create a cause of action under the FCA." *United States ex rel. Hopper v. Anton,* 91 F.3d 1261, 1266 (9th Cir. 1996); s*ee also United States ex rel. Campie v. Gilead Scis., Inc.,* _F.3d_, 2017 WL 2884047, at *7 (9th Cir. 2017). A claim for payment can be "false" in at least three ways. *Hendow,* 461 F.3d at 1171. First, it can be factually false, such as where "the claimant misrepresents what goods or services that it provided to the Government." *United States ex rel. Wilkins v. United Health Grp., Inc.,* 659 F.3d 295, 305 (3d Cir. 2011); *see also Swoben,* 848 F.3d at 1172-73; *Hendow,* 461 F.3d at 1171. Second, it

can *expressly* certify compliance with material conditions of payment that the claimant did not in fact comply with ("express false certification"). *Swoben,* 848 F.3d at 1172-73. Third, it can *impliedly* certify compliance with material conditions of payment that the claimant did not in fact comply with ("implied false certification"). *See Escobar,* 136 S. Ct. at 1995; *Kelly,* 846 F.3d at 331-32.[2]

In ruling on Raytheon's previous motion to dismiss, this Court held that a relator relying on a theory of implied false certification must identify a specific representation the defendant made that implicitly certified its compliance with the material conditions of payment. *Mateski,* 2017 WL 1954942, at *5. The Court reasoned that even though the Ninth Circuit's *pre-Escobar* case law—namely, *Ebeid,* 616 F.3d 993—did not require such, and even though *Escobar* at first glance did not appear to abrogate or undermine *Ebeid,* the Ninth Circuit's post-*Escobar* precedent—namely, *Kelly,* 846 F.3d 325—appeared to interpret *Escobar* as imposing such a requirement. *Mateski,* 2017 WL 1954942, at *3-5.

The Government urges the Court to revisit this conclusion. The Government argues that "[a]lthough some of the language in the *Kelly* decision appears to be

2. "According to this theory, when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant 's violation of a material statutory, regulatory, or contractual requirement, so the theory goes, the defendant has made a misrepresentation that renders the claim 'false or fraudulent' under § 3729(a)(1)(A)." *Escobar,* 136 S. Ct. at 1995.

inconsistent with the holding in *Ebeid,"* the court in *Kelly* did not overrule *Ebeid* for the simple reason that a three-judge panel *cannot* overrule its own precedent absent intervening and contrary Supreme Court authority—which *Escobar* is not. (Stmt. of Interest at 3, ECF No. 188.) As an original matter, the Court agrees that *Escobar* did not abrogate or undermine *Ebeid. Mateski,* 2017 WL 1954942, at *5. However, as the Court previously noted—and as the Government even seems to agree—the most reasonable reading of *Kelly* is that an FCA claim under an implied false certification theory cannot survive if the relator does not identify any specific representations in the claims for payment. *Id.* Further, *Kelly* cited *Escobar* for this proposition, an authority superior to (and later in time than) *Ebeid.* The only way to reconcile *Kelly* and *Ebeid* is to conclude either that *Kelly* implicitly recognized that *Escobar* abrogated *Ebeid,* or that *Ebeid* never actually posited a lower standard than *Kelly*—neither of which helps Mateski or the Government.[3] But what the Court cannot do, as the Government appears to suggest, is ignore *Kelly* as an inconsistent blip in the Ninth Circuit's FCA jurisprudence.[4] Unless and until the Ninth Circuit

3. The Government does not suggest any way that this Court can read *Kelly* in harmony with *Ebeid,* and the Court sees none. *Mateski,* 2017 WL 1954942, at *5.

4. The Court notes that *Campie,* which is the Ninth Circuit's most recently FCA case, included a rather clear-cut statement of law supporting the Court's prior conclusion: "To succeed on [an implied false certification theory], pursuant to ... *Escobar,* [the relator] *must* not merely request payment, but also make specific representations about the goods or services provided," 2017 WL 2884047, at *7 (emphasis added). Even if this statement is dicta, as

clarifies its jurisprudence in this area—which might come sooner rather than later, *see Rose v. Stephens Institute,* No. 17-15111 (9th Cir. 2017)—the Court sees no reasonable alternative interpretation of *Ebeid, Escobar,* and *Kelly.*

2. Analysis

Mateski alleges—on information and belief—that Raytheon "falsely represented that [it] had performed the VIIRS Contract in conformity with the requirements and specifications of the VIIRS Contract," and that it "failed to disclose that Raytheon had not obtained the requisite approvals for major deviations from the mandatory requirement." (5AC ¶ 16.) Mateski infers that Raytheon's claims include such representations and omissions based on: (1) his general experience as an aviation engineer, (2) two Federal Acquisition Regulations, and (3) Raytheon's refusal to produce the requests for payment to Mateski's counsel. Mateski argues that these allegations suffice under all three theories of FCA liability. The Court disagrees.

Under either a factually false theory or an express false certification theory, Mateski must identify an overtly false representation in the claim for payment. *See Campie,* 2017 WL 2884047, at *7; *Wilkins,* 659 F.3d at 305. Mateski attempts to do so by stating that Raytheon's claims for payment "falsely represented that [it] had performed the

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the Government suggests, district courts should not take the Ninth Circuit's dicta lightly. *Cf. United States v. Augustine,* 712 F.3d 1290, 1295 (9th Cir. 2013).

VIIRS Contract in conformity with the requirements and specifications of the VIIRS Contract," but this general description amounts to little more than a legal conclusion couched as a factual allegation. The only fact in this statement that is particular to this case is Mateski's identification of the source of the conditions of payment—i.e., the VIIRS Contract and the NGIID—but this alone is not enough to pass muster under Rule 9(b). For example, Mateski alleges that Raytheon failed to perform "complete tests and retests of component parts and of assembled hardware." (5AC ¶ 9.) Yet without knowing precisely what representation Raytheon made regarding this work in its request for payment, it is impossible to discern whether that representation was false at all. All Raytheon can do with these vague allegations is to "just deny that [it] ha[s] done anything wrong" rather than actually "defend against the charge." *Swoben,* 848 F.3d at 1172.

Mateski's reliance on an implied false certification theory fares no better, and actually further highlights the problem with his generalized allegations. As the Court explained above, the distinguishing feature of this theory is that the claim for payment contains a representation that, while not overtly false, reasonably (but falsely) implies that the claimant complied with a material condition of payment (i.e., a misleading half-truth). *Escobar,* 136 S. Ct. at 2000; *Kelly,* 846 F.3d at 331-32. Yet the representation that Mateski identifies as the misleading half-truth is the very same representation that he argues is overtly false on its face: that Raytheon "represented that [it] had performed the VIIRS Contract in conformity with the requirements and specifications of the VIIRS Contract." (5AC ¶ 16.) It is at best unclear

how the same representation can be both overtly false and not overtly false, and thus underscores the challenge that such a vague allegation poses to Raytheon in attempting to defend itself in this action.

Finally, the lack of specificity as to exactly how Raytheon deviated from the contract documents significantly hinders the determination whether its claims for payment were false. Using the same example above, Raytheon allegedly failed to perform "complete tests and retests of component parts and of assembled hardware." (5AC ¶ 9.) But did Raytheon wholly fail to perform the tests and retests? Or did Raytheon simply perform incomplete tests? Which "component parts and assembled hardware" did Raytheon fail to "complete[ly]" test? Depending on exactly what representation Raytheon made in the claims for payment and exactly how much Raytheon deviated from this specification, Raytheon might not have submitted a false claim at all. *See Ebeid,* 616 F.3d at 1000 ("Ebeid simply alleges that Lungwitz 'concealed and failed to disclose that the Clinic's physicians had a financial relationship to the Home Health Care Agency and the Hospice to which the physicians referred patients.' ... These general allegations—lacking any details or facts setting out the 'who, what, when, where, and how' of the 'financial relationship' or alleged referrals—are insufficient under Rule 9(b) .... [A] global indictment of Lungwitz's business is not enough." (citations omitted)).

3. Mateski's Arguments

Mateski makes several arguments as to why his allegations are sufficient, none of which the Court finds convincing.

Appendix B

i. Pleading on Information and Belief

First, Mateski argues that the contents of Raytheon's claims for payment are "peculiarly within the defendant 's knowledge," and thus he can make generalized allegations regarding their contents based solely on information and belief. *See Neubronner v. Milken,* 6 F.3d 666, 672 (9th Cir. 1993). The cases on which Mateski relies, however, are limited to the securities fraud context; the Ninth Circuit has expressly declined to loosen Rule 9(b)'s particularity requirements based on the relator's lack of inside information. *Ebeid,* 616 F .3d at 999. And because generalized allegations of fraud based on information and belief do not otherwise satisfy Rule 9(b)'s particularity requirements, *see Moore v. Kayport Package Exp., Inc.,* 885 F.2d 531, 540 (9th Cir. 1989); *Wool v. Tandem Computers Inc.,* 818 F.2d 1433, 1439 (9th Cir. 1987), Mateski's argument fails.[5]

ii. Refusal to Produce Claims for Payment

Next, Mateski argues that the Court may infer that the claims for payment contain specific misrepresentations that give rise to liability because Raytheon refused to disclose them either as part of its initial disclosures under Rule 26(a) or in response to an informal request by Mateski's counsel. This is also not persuasive. As an

5. In light of this, the Court need not assess whether the various bases on which Mateski's belief is grounded—namely, his purported experience in the industry and the two Federal Acquisition Regulations—could reasonably give rise to Mateski's allegations regarding the contents of the claims.

initial matter, the adverse inference doctrine typically operates as an evidentiary sanction—such as where the court permits a jury to infer that a document contained information adverse to the one who destroyed or failed to produce it. *See, e.g., Akiona v. United States,* 938 F.2d 158, 161 (9th Cir. 1991); *Jackson Family Wines, Inc. v. Diageo N. Am., Inc.,* No. CV 11-5639 EMC (JSC), 2014 WL 595912, at* 1 (N.D. Cal. Feb. 14, 2014); *Nursing Home Pension Fund v. Oracle Corp.,* 254 F.R.D. 559, 564 (N.D. Cal. 2008). Mateski does not identify, and the Court cannot locate, any cases holding that such an inference can loosen pleading requirements—let alone Rule 9(b)'s stringent particularity requirements. Indeed, Mateski's argument puts the discovery cart before the pleading horse; Rule 9(b) is intended to "to *deter* the filing of complaints as a pretext for the discovery of unknown wrongs," *Stac Elecs. Sec. Litig.,* 89 F.3d at 1405 (emphasis added), and thus any rule relaxing pleading requirements based on purported discovery violations would severely undercut this purpose. At bottom, Mateski's argument is just another derivation of his argument that he should not have to comply with Rule 9(b) because he lacks access to Raytheon's claims for payment—an argument that the Ninth Circuit has rejected. *Ebeid,* 616 F.3d at 999.

iii. *Campie*

Finally, after briefing on this motion was complete, Mateski submitted a notice of supplemental authority arguing that the Ninth Circuit's most recent FCA case, *Campie,* 2017 WL 2884047, at *7, demonstrates that he has adequately pleaded his claims. This case, however,

is a far cry from *Campie.* There, the defendant (a drug manufacturer) allegedly obtained the active ingredient for three types of drugs from a Chinese source that was not registered with, or approved by, the Food and Drug Administration (FDA). *Id.* at *2. Despite this, the defendant represented to the Government that it obtained the active ingredient from a South Korean source (which was registered and approved with the FDA). *Id.* at *3. The Ninth Circuit held that the relator had adequately pleaded an FCA claim under both a factually false theory and an implied false certification theory. As to the former, the court noted that the defendant had expressly (and falsely) represented to the FDA that the active ingredient came from an approved source, and thus the defendant had sought payment for a "misbranded good[]." *Id.* at *7 (citing *United States v. Nat'l Wholesalers,* 236 F.2d 944, 950 (9th Cir. 1956)). As to the latter, the court noted that the claims for reimbursement to various Government programs (such as Medicare) identified a particular drug, and that this identification impliedly (but falsely) represented that the drug complied with FDA standards (such as using active ingredients from approved sources). *Id.*

Mateski's allegations do not come close to this level of specificity. Mateski identifies vague and broad contract standards that Raytheon allegedly did not meet over a eight-year period, but gives no details as the exact manner in which Raytheon violated those standards. Mateski also does not identify a single specific representation that Raytheon made to the Government, and thus neither Raytheon nor the Court can discern how that representation (if it even exists) was in any way false

(either overtly or impliedly). In short, *Campie* does not help Mateski at all.

B. Materiality

Raytheon argues that its alleged misrepresentations were not material to the Government's decision to pay Raytheon, as evidenced by the fact that the Government kept paying Raytheon's invoices long after Mateski informed the Government of Raytheon's allegedly false claims for payment. The Court concludes that Mateski's barebones allegations regarding materiality require dismissal even without considering the Government's knowledge.

"[A] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act." *Escobar*, 136 S. Ct. at 2002. "[T]he term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). "The materiality standard is demanding"; "[m]ateriality ... cannot be found where noncompliance is minor or insubstantial." *Escobar*, 136 S. Ct. at 2003. As with all elements of an FCA claim, the relator must plead particular facts under Rule 9(b) in support of their allegations of materiality, and the failure to plead such facts should result in dismissal. *Id.* at 2004 n.6.

Here, Mateski's complaint contains only one sentence directly addressing the materiality of Raytheon's misrepresentations: "The United States would not have

paid Raytheon's Requests for Payment if the United States Government knew (i) that Raytheon had not performed the VIIRS Contract in conformity with the requirements and specifications of the VIIRS Contract and the NGIID, and (ii) Raytheon had not obtained approvals of major deviations as required by the NGIID." (5AC ¶ 16.) This allegation, of course, is completely conclusory and thus insufficient; it does not show *how* Raytheon's misrepresentations were material. *See Ebeid,* 616 F.3d at 1000 ("Ebeid baldly asserts that had Lungwitz 'not concealed or failed to disclose information affecting the right to payment, the United States would not have paid the claims.' This conclusory allegation is insufficient under Rule 9(b).").

Moreover, none of the facts otherwise alleged in the complaint are sufficiently specific to satisfy Rule 9(b). For example, while Mateski alleges that the Government designated compliance with various VIIRS Contract provisions as "mandatory," such designations do not automatically make misrepresentations concerning those provisions material. *Escobar,* 136 S. Ct. at 2003 ("A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment."). The descriptions of the various violations are also far too general for the Court to determine their significance to the project. For example, Raytheon allegedly "failed to write test event failure reports." (5AC ¶ 9(i).) What were these "event failure[s]"? Were each of them significant to the VIIRS's ultimate construction? If not, would the Government have

cared if Raytheon submitted a claim suggesting that it had written such a report (or obtained the requisite waiver) when in fact it had not? Without allegations that can provide answers to these types of questions, it is impossible to discern if any misrepresentations based on Raytheon's noncompliance with these provisions were *actually* material to the Government's payment decision.[6] *Cf. Escobar,* 136 S. Ct. at 2004 (rejecting the Government's argument that any statutory or regulatory violation is automatically material simply because "the Government required contractors to aver their compliance with the entire U.S. Code and Code of Federal Regulations," and noting that "[t]he False Claims Act does not adopt such an extraordinarily expansive view of liability").

C. Leave to Amend

Generally, the Court should liberally grant the plaintiff leave to amend following dismissal of the complaint. *See, e.g., Sonoma Cty. Ass'n of Retired Emps. v. Sonoma Cty.,* 708 F.3d 1109, 1117 (9th Cir. 2013). However, the Court may deny leave where there has been "repeated failure[s] to cure deficiencies by amendments previously allowed." *Id.* There is no magical number of opportunities the Court must afford the plaintiff to properly plead his

6. Mateski also points to its general allegation that Raytheon's non-compliance with the 14 different NGIID standards caused "the loss of low light visible imagery thereby blinding or impairing the NPOESS telescope and preventing or impairing the collection and transmission of data." (5AC ¶¶ 5-6.) Again, this is far too conclusory; it does not give "the who, what, when, where, and how" needed to support the inference of materiality. *Ebeid,* 616 F.3d at 998.

or her claims; it all depends on the circumstances of the case. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1053 (9th Cir. 2003) (Reinhardt, J., concurring) (courts should not "[s]imply count[] the number of times a plaintiff has filed a complaint" in determining whether to grant leave).

Here, the Court concludes that leave to amend is not warranted. The Court previously held that Mateski's claims failed because he had not identified the specific representations that Raytheon made to the Government. Mateski suggested in that round of briefing that he could not do so because he was unfamiliar with Raytheon's billing process,[7] but the Court nonetheless gave Mateski leave to amend. Perhaps unsurprisingly, Mateski's Fifth Amended Complaint did not cure the deficiency. Instead, he listed various reasons why he should be excused from identifying those representations with particularity. It is thus clear that permitting further leave to amend to plead a specific representation would be futile.

As to materiality, the Court also sees no reason to grant leave to amend. Raytheon twice challenged the sufficiency of Mateski's allegations concerning materiality before he filed his Fifth Amended Complaint, thus making clear to him that the sufficiency of those allegations were very much contested. *(See* Mot. at 15-16, ECF No. 98; Mot.

7. Opp'n at 9 ("Mateski is an engineer not involved with billing and invoices for payment. Billing is a matter particularly within the knowledge of Raytheon. Discovery must be had on the question of what Raytheon's invoices for payment consisted of or contained."), ECF No. 160.

at 12-15, ECF No. 154.) Given this, Mateski should have taken care to fully plead all allegations relating to the materiality issue. Mateski did not do so. Instead, Mateski relies on woefully conclusory allegations that do not come close to establishing materiality under Rule 9(b). The lack of detail is all the more puzzling given that numerous prior iterations of the complaint contained extensive detail—although couched in indecipherable prose. *(See generally* ECF Nos. 1, 7, 19, 53, 88.) Whatever Mateski's reason for not incorporating that detail into the Fifth Amended Complaint in a more comprehensible form, the Court sees no reason why he would do so if the Court granted him further leave to amend.

V. CONCLUSION

For the reasons discussed above, the Court **GRANTS** Raytheon's Motion to Dismiss without leave to amend. (ECF No. 184.)

IT IS SO ORDERED.

August 3, 2017

/s/ Otis D. Wright, II
OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

APPENDIX C — DENIAL OF PANEL REHEARING AND REHEARING *EN BANC* BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 16, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-56320

D.C. No. 2:06-cv-03614-ODW-KS
Central District of California, Los Angeles

UNITED STATES OF AMERICA
ex rel. STEVEN MATESKI,

Plaintiff,

and

STEVEN MATESKI,

Plaintiff-Relator-Appellant,

v.

RAYTHEON COMPANY,

Defendant-Appellee.

Before: GRABER, McKEOWN, and CHRISTEN, Circuit Judges.

Appendix C

ORDER

The panel has voted to deny Appellant's petition for panel rehearing and rehearing *en banc*.

The full court has been advised of the petition for rehearing *en banc*, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and rehearing *en banc* is DENIED.

APPENDIX D — STATUTES 31 U.S.C. § 3729 AND 31 U.S.C. § 3730

31 U.S.C. § 3729

§ 3729. False claims

(a) Liability for Certain Acts.

(1) In general—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of

property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

Appendix D

(b) Definitions—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption From Disclosure—Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986 [26 USC §§ 1 *et seq.*].

(e) [Redesignated]

Appendix D

31 U.S.C. § 3730

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General—The Attorney General diligently shall investigate a violation under section 3729 [31 USC § 3729]. If the Attorney General finds that a person has violated or is violating section 3729 [31 USC § 3729], the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons—

(1) A person may bring a civil action for a violation of section 3729 [31 USC § 3729] for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.

The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the

Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the Parties to *Qui Tam* Actions—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to *Qui Tam* Plaintiff—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to

which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less

than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 [31 USC § 3729] upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729 [31 USC § 3729], that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain Actions Barred—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily

disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(f) Government Not Liable for Certain Expenses—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and Expenses to Prevailing Defendant—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Relief from retaliatory actions—

(1) In general—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an

action under this section or other efforts to stop 1 or more violations of this subchapter [31 USC §§ 3721 *et seq*.].

(2) Relief—Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) Limitation on bringing civil action—A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

APPENDIX E — 48 CFR § 32.905—PAYMENT DOCUMENTATION AND PROCESS

48 CFR § 32.905—PAYMENT DOCUMENTATION AND PROCESS.

(a) *General.* Payment will be based on receipt of a proper invoice and satisfactory contract performance.

(b) *Content of invoices.*

(1) A proper invoice must include the following items (except for interim payments on cost reimbursement contracts for services):

(i) Name and address of the contractor.

(ii) Invoice date and invoice number. (Contractors should to date invoices as close as possible to the date of mailing or transmission.)

(iii) Contract number or other authorization for supplies delivered or services performed (including order number and line item number).

(iv) Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.

(v) Shipping and payment terms *(e.g.*, shipment number and date of shipment, discount for prompt payment terms). Bill of lading number and weight of shipment will be

shown for shipments on Government bills of lading.

(vi) Name and address of contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to notify in the event of a defective invoice.

(viii) Taxpayer Identification Number (TIN). The contractor must include its TIN on the invoice only if required by agency procedures. (See 4.9 TIN requirements.)

(ix) Electronic funds transfer (EFT) banking information.

(A) The contractor must include EFT banking information on the invoice only if required by agency procedures.

(B) If EFT banking information is not required to be on the invoice, in order for the invoice to be a proper invoice, the contractor must have submitted correct EFT banking information in accordance with the applicable solicitation provision *(e.g.,*

52.232-38, Submission of Electronic Funds Transfer-System for Award Management, or *52.232-34*, Payment by Electronic Funds Transfer-Other Than System for Award Management), or applicable agency procedures.

(C) EFT banking information is not required if the Government waived the requirement to pay by EFT.

(x) Any other information or documentation required by the contract *(e.g.*, evidence of shipment).

(2) An interim payment request under a cost-reimbursement contract for services constitutes a proper invoice for purposes of this subsection if it includes all of the information required by the contract.

(3) If the invoice does not comply with these requirements, the designated billing office must return it within 7 days after receipt (3 days on contracts for meat, meat food products, or fish; 5 days on contracts for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils), with the reasons why it is not a proper invoice. If such notice is not timely, then the designated billing office

must adjust the due date for the purpose of determining an interest penalty, if any.

(c) *Authorization to pay.* All invoice payments, with the exception of interim payments on cost-reimbursement contracts for services, must be supported by a receiving report or any other Government documentation authorizing payment *(e.g.,* Government certified voucher). The agency receiving official should forward the receiving report or other Government documentation to the designated payment office by the 5th working day after Government acceptance or approval, unless other arrangements have been made. This period of time does not extend the due dates prescribed in this section. Acceptance should be completed as expeditiously as possible. The receiving report or other Government documentation authorizing payment must, as a minimum, include the following:

(1) Contract number or other authorization for supplies delivered or services performed.

(2) Description of supplies delivered or services performed.

(3) Quantities of supplies received and accepted or services performed, if applicable.

(4) Date supplies delivered or services performed.

(5) Date that the designated Government official—

(i) Accepted the supplies or services; or

(ii) Approved the progress payment request, if the request is being made under the clause at *52.232-5*, Payments Under Fixed-Price Construction Contracts, or the clause at *52.232-10*, Payments Under Fixed-Price Architect-Engineer Contracts).

(6) Signature, printed name, title, mailing address, and telephone number of the designated Government official responsible for acceptance or approval functions.

(d) *Billing office.* The designated billing office must immediately annotate each invoice with the actual date it receives the invoice.

(e) *Payment office.* The designated payment office will annotate each invoice and receiving report with the actual date it receives the invoice.