No. 23-

IN THE

Supreme Court of the United States

REGIE SALGADO, EX REL. UNITED STATES OF AMERICA; AND MELINDA ZAMBRANO, EX REL. UNITED STATES OF AMERICA,

Petitioners,

v.

TRUCONNECT, NATHAN JOHNSON, AND MATTHEW JOHNSON,

Respondents.

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

Whether a party's own testimony can create a fact issue to defeat summary judgment when the testimony is uncorroborated and self-serving.

PARTIES

The parties to this proceeding are set out in the caption.

STATEMENT OF RELATED CASES

Salgado, et al. v. TruConnect, et al., No. CV16-03767, U.S. District Court for the Central District of California. Judgment entered June 21, 2022.

Salgado, et al. v. TruConnect, et al., No. CV16-03767, U.S. Court of Appeals for the Ninth Circuit. Judgment entered December 22, 2023.

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STATUTES

PETITION FOR WRIT OF CERTIORARI

Regie Salgado and Melinda Zambrano petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unofficially reported at 2023 WL 8866563 (9th Cir. December 22, 2023). App. 1. The order denying rehearing en banc is available at 821 Fed. Appx. 311. App. 60. The order granting a motion for summary judgment by the District Court for the Central District of California is unofficially reported at 2022 WL 3009130 (C.D.Cal. June 21, 22). App. 11.

JURISDICTION

The decision of the Court of Appeals was entered on December 22, 2023. App. 1. A timely petition for rehearing en banc was denied on January 30, 2024. App. 60. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The relevant statutes are the federal and California False Claims Act and the California Labor Code that prohibit retaliation for reporting concerns of government fraud. The federal False Claims Act provides in relevant part:

> 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 U.S.C. § 3730(h)(1).

The California False Claims Act provides:

> 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 that employee's, contractor's, or agent's 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 one or more violations of this article.

Cal. Gov't Code § 12653(a).

The California Labor Code provides:

> An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

Cal. Lab. Code § 1102.5(b).

The relevant rules are Rule 56 of the Federal Rules of Civil Procedure and Rule 602 of the Federal Rules of Evidence:

> FED. R. CIV. P. 56(c)(4)
>
> *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and

> show that the affiant or declarant is competent to testify on the matters stated.

FED. R. EVID. 602

> A witness can only testify to a matter if there is evidence that the witness has personal knowledge of the matter. This rule does not apply to expert testimony.

STATEMENT OF THE CASE

Nathan and Matthew Johnson are co-chief executive officers of TruConnect. App. 13. The company terminated the employment of Salgado and Zambrano two days after they reported concerns of TruConnect defrauding the United States and California governments. 2-ER-88. Salgado and Zambrano reported the fraud concerns to several persons, including Todd Wallace. 3-ER-344, 349. Nathan Johnson says that department heads could make the decision to recommend persons to be eliminated from the company. App. 29. Nathan Johnson asserts that Eric Milhizer was Salgado and Zambrano's department head. App. 28. Salgado and Zambrano testify that Todd Wallace, not Eric Milhizer, was their department head at the time of the termination. 3-ER-343, 349.

REASONS FOR GRANTING THE PETITION

The majority affirmed the District Court's decision to grant the summary judgment, disallowing "uncorroborated and self-serving declarations" that a manager alleged to have made the decision to terminate plaintiffs was not their manager at the time. App. 6, 9. A dispute over the

actual manager at the time is material. An employee will have direct knowledge of the identity of the employee's manager. Denying that evidence is improper.

The Ninth Circuit has established a rule, particularly applied in employment cases, that "uncorroborated and self-serving declarations" by the plaintiff are insufficient to create a genuine dispute of material fact. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). A similar stance is suggested by a case from the District of Columbia, where it was indicated that self-serving testimony does not create genuine issues of material fact, especially where corroborating evidence should be readily available. *Ward v. D.C.*, 950 F. Supp. 2d 9, 17 (D.D.C. 2013).

Other circuits have held that a non-conclusory affidavit can create genuine issues of material fact that preclude summary judgment, even if the affidavit is self-serving and uncorroborated. *Lester v. Wells Fargo Bank, N.A.*, 805 Fed. Appx. 288, 291 (5th Cir. 2020). "[T]he self-serving and/or uncorroborated nature of an affidavit cannot prevent it from creating an issue of material fact." *United States v. Stein*, 881 F.3d 853, 859 (11th Cir. 2018) (en banc). *See also Nnadozie v. Genesis HealthCare Corp.,* 730 Fed. Appx. 151, 160 (4th Cir. 2018) (that "allegations lack extensive corroborating evidence is of little import"); *Payne v. Pauley*, 337 F.3d 767, 772–73 (7th Cir. 2003); *United States v. Stein*, 881 F.3d 853, 859 (11th Cir. 2018) (en banc) (J. Pryor, concurring) (explaining that finding "self-serving" evidence insufficient to create a material dispute not only "ha[s] no basis in law ... [b] ut ... also flout[s] the history of the right to a jury trial in civil cases.").

Summary judgments, denying a plaintiff a trial, are no longer rare in employment cases. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1025 (11th Cir. 2000). The overuse of summary judgment in employment cases needs to be addressed.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REGIE SALGADO, ex rel. United States of America; MELINDA ZAMBRANO, ex rel. United States of America, Plaintiffs-Appellants, and STATE OF CALIFORNIA; UNITED STATES OF AMERICA, Plaintiffs, v. TRUCONNECT, Defendant-Appellee, and NATHAN JOHNSON; MATTHEW JOHNSON, Defendants.	No. 22-55721 D.C. No. 2:16-cv-03767-PSG-SK MEMORANDUM* (Filed Dec. 22, 2023)

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, Chief District Judge, Presiding

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

Argued and Submitted October 19, 2023
Pasadena, California

Before: CLIFTON and SANCHEZ, Circuit Judges, and KORMAN,** District Judge.

Dissent by Judge CLIFTON.

This is a *qui tam* False Claims Act ("FCA") and whistleblower retaliation case. Plaintiffs-Appellants Regie Salgado and Melinda Zambrano are former employees of Defendant-Appellee TruConnect Communications, Inc. ("TruConnect"). TruConnect is a cellphone network operator that participates in the Lifeline Program, a program by which the Federal Communications Commission ("FCC") and state governments subsidize phone service for low-income Americans. *See* 47 U.S.C. § 254(b)(1), (b)(3); 47 C.F.R. § 54.401(a). Salgado and Zambrano allege that TruConnect engaged in two central schemes to defraud the government. After Salgado and Zambrano discovered and protested TruConnect's fraudulent conduct, they allege, TruConnect retaliated by terminating them.

The District Court granted TruConnect's motion to dismiss relators' FCA fraud and related state law claims. The District Court later granted summary judgment as to the remaining FCA retaliation and related state law claims. This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1291. Reviewing both rulings *de novo*, we affirm. *See United States ex*

** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

rel. Campie v. Gilead Scis., Inc., 862 F.3d 890, 898 (9th Cir. 2017); *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1060 (9th Cir. 2011).

1. Relators' *qui tam* fraud claims do not meet the heightened pleading standard of Rule 9(b). *Bly–Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). To survive this heightened standard, Relators must identify either "representative examples of false claims" or allege "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998–99 (9th Cir. 2010). The Complaint fails to do either.

2. Relators' allegation that TruConnect uses third-party vendors called "street teams" to sign up subscribers without confirming their eligibility fails for two reasons. First, as a matter of law, TruConnect is not responsible for determining initial subscriber eligibility. *See* Resol. T-17366 – Modifications to the Cal. Lifeline Program Rules – Gen. Ord. 153 – in Compliance with the Fed. Commc'ns Comm'n's Lifeline/Link-Up Reform Ord. (FCC 12-11), 2012 WL 2945692 (Cal. Pub. Util. Comm'n July 12, 2012). Second, the Complaint lacks any well-pled allegation that TruConnect failed to receive proper documentation for any subscriber for which TruConnect actually submitted a claim for reimbursement. *See* 47 C.F.R. §§ 54.410(b)(2)(i)-(ii), (c)(2)(i)-(ii).[1] We do not relax Rule 9(b)'s particularity

[1] We reference the 2015 version of the regulations, which were in force at the time of TruConnect's alleged misconduct.

requirement simply because Relators allege that the fraudulent billing is within the defendant's exclusive possession. *See Ebeid*, 616 F.3d at 999. At bottom, Relators cannot, as they repeatedly purport to do here, describe a fraudulent scheme but then "allege simply and without any stated reason that claims requesting illegal payments must have been submitted." *Cafasso*, 637 F.3d at 1058 (citations omitted and cleaned up).

3. Relators' allegation that TruConnect knowingly submitted fraudulent usage minutes from robo-calls and wrong-number calls to circumvent the FCC's usage requirements does not meet the requirements of Rule 9(b). Although Relators allege that Regie Salgado analyzed TruConnect's subscriber data and found a low amount of subscriber usage, they do not explain how billing the government for low usage violates FCC regulations or otherwise constitutes fraud. Relators' further allegations that TruConnect essentially manipulates robo-calls and then submits fraudulent usage data are vague and fatally unsupported. The Complaint does not explain with particularity who at TruConnect was behind "pushing" the robo-calls, or how or when they went about doing so. "This type of allegation, which identifies a general sort of fraudulent conduct but specifies no particular circumstances of any discrete fraudulent statement, is precisely what Rule 9(b) aims to preclude." *Cafasso*, 637 F.3d at 1057.

4. Relators have also failed to adduce sufficient evidence to support their claims for retaliation. Relators do not dispute that co-CEOs Nathan and Matthew Johnson made the ultimate decision to eliminate

Relators' positions. Relators have not presented any evidence that the Johnson brothers acted with a discriminatory or retaliatory motive. Relators are thus left to survive summary judgment with a "cat's paw theory" of liability, which requires establishing that one of the Johnsons' subordinates, in response to Relators' whistleblowing, "set in motion" the Johnsons' decision to eliminate Relators' jobs. *Cafasso*, 637 F.3d at 1060–61 (alterations adopted and citations omitted).

Relators identify three TruConnect employees potentially involved in their firing: Todd Wallace, Earl Peck, and Rick Burgar. But Relators fail to present non-speculative evidence from which a reasonable jury could conclude that any of those three individuals were aware of Relators' whistleblowing and were involved in the decision to eliminate their jobs.

While the parties dispute whether Todd Wallace was the head of Relators' department, there is no evidence in the record that Wallace was aware of Relators' whistleblowing activity. Relators identify a single July 13, 2015 email from Salgado to Wallace in which Salgado analyzed usage data from a third-party vendor and "found evidence to examine the sales techniques of [the vendor]." Relators present no evidence that Wallace ever responded to Salgado's email, ever communicated with the Johnson brothers or anyone else about Salgado's work, or was aware from this email that Relators believed TruConnect was defrauding the government. Only by way of speculation could a reasonable jury conclude that Wallace, or any other subordinate, set in motion the Johnsons' decision to

eliminate Relators' jobs specifically in response to Salgado's investigation of a third-party vendor. We have found summary judgment appropriate in these circumstances. *See Cafasso*, 637 F.3d at 1060–61 (affirming grant of summary judgment on an FCA retaliation claim where relator merely speculated that other officials who knew about her conduct may have influenced the decision-maker).

5. We decline TruConnect's request for fees under 31 U.S.C. § 3730(d)(4) because Relators' claims are not frivolous, and there is no evidence that they acted with an improper motive. *See id.* at 1062 (noting a concern about granting fee awards under § 3730(d)(4) because "awarding fees against a qui tam claimant may chill prospective relators from exposing frauds on the government").

AFFIRMED.

No. 22-55721, *Salgado v. TruConnect*

CLIFTON, Circuit Judge, dissenting:

I respectfully dissent. This case primarily presents claims under the False Claims Act of fraud upon the government. In my view, the allegations in the complaint are not so insufficiently specific or implausible as to support dismissal at the pleading stage, even under the heightened pleading standard of Fed. R. Civ. P. 9(b). As employees at TruConnect, Plaintiffs were personally acquainted with TruConnect's actions and well

positioned to identify potential fraud. Their complaint alleges more than enough to survive a motion to dismiss.

TruConnect's counsel acknowledged at oral argument that billing the government through the Lifeline program or other similar program was "the only business of Tru Connect." It is not an insubstantial business. The complaint alleges that TruConnect was paid over $5 million each month by the federal government and the state of California.

Plaintiffs observed and alleged details of a scheme to maximize payments to the company under the Lifeline program. Under the program, TruConnect would only be reimbursed for phones that had at least some call or text activity, presumably by the low-income person to whom the phone had been given. Plaintiffs' complaint alleged that in two months of 2015, the federal government paid TruConnect $651,597 for phones with zero to one minute of usage. It alleged that TruConnect sought to maximize reimbursements by treating as "active" phones that were broken and in the possession of the company and phones that had not yet been placed in the hands of program beneficiaries. It also alleged that TruConnect sought to generate usage artificially in order to qualify for reimbursements under Lifeline regulations. For example, it was asserted that "TruConnect circumvents the Lifeline requirements by pushing robo-calls to Lifeline accounts." It contended that "70,433 phones between June and July 2015 had less than one minute of usage" and no texts. It also asserted that "4,800 phones received text messages, but

no calls, for over a year," and that "many of the incoming text messages on these phones were random pictures of office interiors or car engines, appearing to be illegitimate." That pattern of usage was alleged to be inconsistent with actual usage by customers in the experience of a Plaintiff who had worked in the industry for many years. The complaint also contended that TruConnect officers discussed developing an Auto-Dialer App that would be preloaded onto each phone to allow the company itself to generate usage in order to manufacture qualification for reimbursement even if the customer never used the phone.

TruConnect argues that Plaintiffs did not identify any specific examples of false claims submitted by TruConnect under the Lifeline program. That appears to be true but is not surprising because that was not information to which Plaintiffs had access. It cannot be the case that a fraudster can escape accountability by hiding certain specific details about the actual execution of the fraud. The complaint does include an allegation that a TruConnect vice president confirmed that the company did bill the Lifeline program for users with one minute of usage. More broadly, the allegations in the complaint "lead to a strong inference that [false] claims were actually submitted." *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998-99 (9th Cir. 2010). The district court's dismissal of the FCA claim rested on a finding by the court that Plaintiffs "failed to allege TruConnect fraudulently billed the government." We cannot reasonably assume that a company that went to elaborate efforts to generate one minute of usage for

phones never actually sought reimbursement for any of those phones, especially if an officer confirmed that the program was billed for phones with one minute of usage. That reimbursement was not actually sought by TruConnect is not a reasonable inference, let alone a compelling one.

Plaintiffs' claims may not be true, or they might be exaggerated, but they have not been disproven. They should not be assumed to be false. The allegations are not so unspecific or implausible to terminate this action at the pleading stage.

Similarly, in my view, Plaintiffs have raised genuine issues of material fact regarding their whistleblower retaliation claim, which the district court discarded by granting TruConnect's motion for summary judgment. The error in awarding summary judgment may be best illustrated by the court's explanation of why it accepted TruConnect's contention that a TruConnect officer named Todd Wallace was not involved in the decision to terminate Plaintiffs. Beneath that conclusion was a dispute over Wallace's relationship with Plaintiffs, in particular whether Wallace was the head of Plaintiffs' department. The district court explained its conclusion as follows:

> For support, Relators point to their declarations, in which they each declare that Wallace was their department head at the time of their termination. *Zambrano Decl.* ¶¶ 21–22; *Salgado Decl.* ¶ 22. However, "uncorroborated and self-serving declarations" are insufficient to create a genuine dispute of material fact.

> *King v. United Parcel Serv.*, 152 Cal. App. 4th 426, 433 (2007); *see also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). Relators' uncorroborated and self-serving statements do not create a genuine dispute as to whether Wallace, rather than Milhizer, was Relators' department head.

That reasoning is wrong. The individual Plaintiffs were competent to testify as to who was the head of their department. Those declarations did not need further corroboration to create a genuine issue of material fact under Fed. R. Civ. P. 56(a). That testimony by a witness, even a party, might serve that person's interest is not reason by itself to disregard it. Parties regularly testify, and that testimony, if competent, must be considered. Indeed, most testimony is intended to serve a party's interest; otherwise it would be irrelevant.

The orders granting the motion to dismiss and the motion for summary judgment should be vacated and the case remanded for further proceedings.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES—GENERAL

(Filed Jun. 21, 2022)

Case No.	CV 16-3767 PSG (SKx)	Date	June 21, 2022
Title	United States of America et al. v. TruConnect, et al.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): The Court GRANTS Defendant's motion for summary judgment.

Before the Court is a motion for summary judgment filed by Defendant TruConnect Communications, Inc. ("Defendant"). *See generally* Dkt. # 130-1 ("*Mot.*").[1] Relators Melinda Zambrano ("Zambrano") and Regie Salgado ("Salgado") (collectively with Zambrano, "Relators") opposed. *See generally* Dkt. # 142 ("*Opp.*").

[1] The Court cites Defendant's memorandum in support of its motion because it contains Defendant's substantive arguments. Defendant's motion itself is Docket Entry # 130.

Defendant replied. *See generally* Dkt. # 148 ("*Reply*"). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the moving, opposing, and reply papers, the Court **GRANTS** Defendant's motion.

I. Background

This is a qui tam whistleblower retaliation case. Defendant is a mobile virtual network operator and provider of wireless services via Lifeline Programs, through which the federal and state governments subsidize cellular services for low-income families. *Defendant's Statement of Uncontroverted Facts*, Dkt. # 130-2 ("*DSUF*"), ¶¶ 1–2.[2]

In March 2015, Zambrano was hired as Vice President—Products. *See DSUF* ¶ 12; *Relators' Statement of Genuine Disputes*, Dkt. # 142-1 ("*RSGD*"), ¶ 12; Dkt. # 142-3, Ex. 1. The next month, Salgado was hired as Director of Inventory Operations. *See DSUF* ¶ 14; *RSGD* ¶ 14; Dkt. # 142-4, Ex. 4. Although the parties dispute whether Relators were employed by Defendant or by third party Sage Telecom, Inc. ("Sage"), both of whom do business under the name "TruConnect," this dispute does not affect the outcome of the instant motion, as described below. *See DSUF* ¶¶ 10–12, 14, 16–18, 24–30; *RSGD* ¶¶ 11–12, 14, 16–18, 24–30. Brothers Nathan Johnson ("Nathan") and Matthew Johnson

[2] As discussed further below, the Court treats as undisputed the facts proffered by Defendant to which Relators supply no response.

("Matthew") are co-chief executive officers of both Defendant and Sage. *See DSUF* ¶ 5; *see also Declaration of Nathan Johnson*, Dkt. # 130-6 ("*N. Johnson Decl.*"), ¶¶ 8,14.

In June 2015, Salgado noticed that some broken phones he was fixing continued to receive phone calls and text messages, which he found "odd" and led him to investigate further. *See DSUF* ¶¶ 44–47; *Excerpts of the Deposition of Regie Salgado*, Dkt. # 130-4, Ex. 1 ("*Salgado Depo. Excerpts*"), 153:10–158:24. On July 6, Salgado e-mailed Sage's Vice President of Revenue Rick Burgar ("Burgar") to request data on minutes of usage for June 2015 and stating that he "would love to do analytics on TOP as I think they are doing something odd." *See DSUF* ¶ 46; Dkt. # 130-4, Ex. 5 at 4. TOP was a third-party vendor that distributed cell phones to Lifeline subscribers in California. *DSUF* ¶ 47. In response, Burgar sent Salgado a spreadsheet with subscriber call data for June and early July. *Id.* ¶ 50. Salgado testified that the call data "didn't look right" because he saw a high number of subscribers whose only usage was a single short duration call. *See id.* ¶ 52; *Salgado Depo. Excerpts* 46:25–47:20, 109:15–111:4.

On July 11, Salgado e-mailed Burgar, copying Zambrano and Jennifer Carter ("Carter"), describing his review of the subscriber call data and "encourag[ing] investigation into TOP." *See DSUF* ¶ 51; Dkt. # 130-4, Ex. 5 at 2. On July 13, Salgado e-mailed Sage's Chief Operating Officer Todd Wallace ("Wallace"), copying Zambrano, describing his concerns and

recommending further investigation. *See DSUF* ¶ 56; Dkt. # 130-4, Ex. 5 at 1–2. The same day, Salgado sent several e-mails to Earl Peck ("Peck") regarding his concerns. *See DSUF* ¶¶ 57, 60–61; Dkt. # 130-4, Ex. 5 at 1.

On July 22, Zambrano and Salgado met with Burgar to discuss their concerns about the call usage data. *See DSUF* ¶¶ 67–68. Relators both testified that they asked Burgar about the "one-second calls" and Zambrano says she asked Burgar if they were "ripping off the Government." *Id.* ¶¶ 69–70; *Salgado Depo. Excerpts* 193:18-194:5; *Excerpts from the Deposition of Melinda Zambrano*, Dkt. # 130-5, Ex. 2 ("*Zambrano Depo. Excerpts*"), 96:23–97:3. Salgado testified that Burgar responded, "Melinda, what are you talking about? We work hard for those one-second calls" and that such calls "happen all the time" because "people want to save minutes." *Salgado Depo. Excerpts* 194:5–10, 215:17–216:9. Salgado told Burgar he was "just trying to make sure the government is being billed correctly," *id.* 201:7–22, and Zambrano said she did not want to have anything to do with ripping off the government, *Zambrano Depo. Excerpts* 96:2–3. According to Zambrano, Burgar responded, "[k]eep your mouth shut, quit asking questions, I need this job." *Id.* 17:23–24.

Also in June 2015, Sage experienced significant market contractions and decided to implement reductions in force "in order to stay afloat." DSUF ¶¶ 34–37. On July 24, Relators were informed that their positions would be eliminated. *Id.* ¶ 109. Matthew and Nathan declare that (1) they made the decision to

eliminate Relators' positions, (2) Sage's Chief Marketing Officer Eric Milhizer ("Milhizer") identified Relators as potential candidates for the reduction in force, and (3) they did not discuss their decision to eliminate Relators' positions with anyone except Milhizer, including Burgar, Wallace, or Peck. *N. Johnson Decl.* ¶¶ 20, 47, 51; *Declaration of Matthew Johnson*, Dkt. # 130-5 ("*M. Johnson Decl.*"), ¶ 7. They also declare that, prior to making the decision, they were not aware of any of Relators' complaints, reports, or concerns. *M. Johnson Decl.* ¶¶ 9–11, 16; *N. Johnson Decl.* ¶¶ 54–55, 59. Salgado also testified that he did not speak to Matthew, Nathan, or Milhizer regarding his concerns and was not aware that anyone he spoke about his concerns with relayed those concerns to Matthew, Nathan, or Milhizer. *See DSUF* ¶¶ 85, 87–88; *Salgado Depo. Excerpts* 191:4–8, 233:18–24, 234:6–13. Zambrano did not raise her or Salgado's concerns to any C-level executives of Sage or Defendant's. *See DSUF* ¶¶ 89, 91.

In 2016, Relators filed suit in this Court against Matthew, Nathan, and "TruConnect." *See generally* Dkt. # 1. After the United States and the People of the State of California declined to intervene in Relators' case, *see generally* Dkts. # 54, 58, the case was unsealed, *see generally* Dkt. # 59. In February 2021, Matthew, Nathan, and Defendant moved to dismiss the operative third amended complaint. *See generally* Dkt. # 82. The Court granted in part and denied in part the motion, dismissing several of Relators' claims for violations of the False Claims Act ("FCA") and the

California False Claims Act ("CFCA"). *See generally* Dkt. # 87. Three causes of action remain:

> Fifth Cause of Action: Retaliation under the FCA in violation of 31 U.S.C. § 3730(h). *Third Amended Complaint*, Dkt. # 79 ("*TAC*"), ¶¶ 218–24.
>
> Sixth Cause of Action: Retaliation [under the CFCA] in violation of Cal. Gov't Code § 12653. *TAC* ¶¶ 225–31.
>
> Seventh Cause of Action: Wrongful termination, consistent with Cal. Labor Code § 1102.5 and *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980). *TAC* ¶¶ 232–43.

In March 2022, the parties stipulated to dismiss Matthew and Nathan. *See generally* Dkt. # 123. Defendant now moves for summary judgment on each claim. *See generally Mot.*

II. Legal Standard

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings

and discovery responses that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the nonmoving party will have the burden of proof at trial, the movant can prevail by pointing out that there is an absence of evidence to support the nonmoving party's case. *See id.* If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all reasonable inferences in the light most favorable to the nonmoving party. *See T. W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass 'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). The evidence presented by the parties must be capable of being presented at trial in a form that would be admissible in evidence. *See* Fed. R. Civ. P. 56(c)(2). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

III. Evidentiary Objections

Defendant asserts several evidentiary objections along with its reply brief. *See generally* Dkts. # 148-1–148-3. Among other objections, Defendant objects to

Relators' Exhibits 2 and 16 as improperly authenticated. *See* Dkt. # 148-1 at 1-5, 11–13.

Authentication is a "condition precedent to admissibility," and this condition is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). The Ninth Circuit has repeatedly held that courts cannot consider unauthenticated documents in a motion for summary judgment. *See*, *e.g.*, *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002). A document may be authenticated through personal knowledge "by a witness who wrote it, signed it, used it, or saw others do so." *Id.* at 773-74 & n.8 (citing 31 Wright & Gold, Fed. Prac. & Proc.: Evid. § 7106, 43 (2000)).

Relators' counsel declares that "Exhibit 2 is an organizational chart prepared as a demonstrative aid from prior counsel created from the testimony of the parties and document production" and that "Exhibit 16 is an organizational chart of companies owned by Matthew and Nathan Johnson obtained by prior counsel from a website." *See Declaration of Brian Sanford*, Dkt. # 146-1, ¶ 2. Although he purports to have "personal knowledge of the matters set forth herein," *id.* ¶ 1, Plaintiffs' counsel does not declare that he created Exhibit 2 or retrieved Exhibit 16, witnessed their creation or retrieval, or otherwise show a basis for personal knowledge as to the origin or contents of either "organizational chart." Instead, he declares that unspecified "prior counsel" created the chart in Exhibit 2 based on united testimony and document production and that Exhibit 16 was retrieved by unspecified "prior counsel"

from an unspecified website on an unspecified date. *See id.* ¶ 2. Because Relators have not laid sufficient foundation for their counsel's personal knowledge of the creation or contents of these documents, or proffered another method to authenticate them, the Court **SUSTAINS** Defendant's objections to Exhibits 2 and 16 and excludes these documents. *See Orr*, 285 F.3d at 773–74; *United States v. Real Property Located at 475 Martin Lane, Beverly Hills Cal.*, 298 F. App'x 545, 551 (9th Cir. 2008) (affirming exclusion of exhibits where declarant "did not state that he created or even reviewed the summary exhibits" and thus an insufficient foundation was laid as to his personal knowledge of the exhibits' creation).[3]

Otherwise, to the extent that the Court relies on objected-to evidence, it relies on only admissible evidence and, therefore, **OVERRULES** the objections. *See Godinez v. Alta-Dena Certified Dairy LLC*, No. CV 15-01652 RSWL (SSx), 2016 WL 6915509, at *3 (C.D. Cal. Jan. 29, 2016).

IV. Requests for Judicial Notice

Defendant requests that the Court take judicial notice of copies of (1) the answer filed by Relators in a

[3] The Court also notes that Exhibit 16 is barely legible and contains none of the indicia of authenticity that courts typically rely on to find screenshots of websites properly authenticated. *Cf. Ciampi v. City of Palo Alto*, 790 F. Supp. 2d 1077, 1091–92 (N.D. Cal. 2011); *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, No. SACV 06-0827 AG (RNBx), 2008 WL 1913163, at *6 (C.D. Cal. Mar. 27, 2008).

suit in Texas state court and (2) three documents from the California Secretary of State website. *See generally* Dkt. # 130-3. Similarly, Relators ask that the Court take judicial notice of copies of several documents and business organizations inquiry results from the Texas Secretary of State website. *See generally* Dkt. # 142-2. The parties do not oppose each other's requests. Although many of these items are likely proper subjects for judicial notice, the Court does not find them necessary for deciding the instant motion and therefore need not take judicial notice of them.

V. Discussion

The Court begins by addressing (A) Relators' violations of the Court's Standing Order, before turning to (B) the merits of Relators' claims.

A. Violations of the Standing Order

The Court begins by addressing some of Defendant's challenges to the format and content of the materials supporting Relators' opposition. *See Reply* 2:7–4:8.

The Court's Standing Order states that the separate statement of undisputed facts supporting a motion for summary judgment should be submitted in the following format:

> The separate statement of undisputed facts shall be prepared in a two-column format. The left hand column sets forth the allegedly undisputed fact. The right hand column sets

> forth the evidence that supports the factual statement. The factual statements should be set forth in sequentially numbered paragraphs. Each paragraph should contain a narrowly focused statement of fact. Each numbered paragraph should address a single subject as concisely as possible.

See Standing Order Regarding Newly Assigned Cases, Dkt. # 6 ("*Standing Order*"), § 6.c. 1. In opposing a summary judgment motion:

> [t]he opposing party's statement of genuine issues must be in two columns and *track the movant's separate statement exactly as prepared.* The left hand column must restate the allegedly undisputed fact, and *the right hand column must state either that it is undisputed or disputed. . . . The court will not wade through a document to determine whether a fact really is in dispute.* To demonstrate that a fact is disputed, the opposing party must briefly state why it disputes the moving party's asserted fact, cite to the relevant exhibit or other piece of evidence, and describe what it is in that exhibit or evidence that refutes the asserted fact.
>
> The opposing party may submit additional material facts that bear on or relate to the issues raised by the movant, *which shall follow the format described above for the moving party 's separate statement. These additional facts shall continue in sequentially numbered paragraphs and shall set forth in the right*

> *hand column the evidence that supports that statement.*

Id. (emphases added). Additionally,

> No party shall submit evidence other than the specific items of evidence or testimony necessary to support or controvert a proposed statement of undisputed fact. For example, *entire deposition transcripts, entire sets of interrogatory responses*, and documents that do not specifically support or controvert material in the separate statement *shall not be submitted in support of opposition to a motion for summary judgment.*

Id. § 6.c.2 (emphases added).

Relators' separate statement of genuine disputes and the evidence submitted in opposition to Defendant's motion contain numerous violations of the Court's Standing Order. First, Relators' statement of genuine disputes includes just a fraction of Defendant's uncontroverted facts, failing to respond to 72 of 120 facts. *See generally RSGD*; *DSUF.* The Court may treat the facts to which Relators supply no response as undisputed. *See* Fed. R. Civ. P. 56(e) ("If a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . (2) consider the fact undisputed for purposes of the motion."); L.R. 56-3 (in deciding a motion for summary judgment, "the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the

'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion"); *Castlepoint Nat'l Ins. Co. v. Weather Masters Waterproofing, Inc.*, No. CV 13-06137 MMM (FFMx), 2014 WL 12567166, at *2 n.8 (C.D. Cal. June 2, 2014) (deeming proposed uncontroverted facts to which opposing party did not respond undisputed). Moreover, by prefacing their partial list of disputed facts with the statement "Defendant lists several 'uncontroverted material facts' that are indeed controverted," *RSGD* 4:6, Relators seem to suggest that they do not dispute the remaining facts proffered by Defendant. Accordingly, the Court treats the remaining 72 facts as undisputed.

Second, before responding to Defendant's uncontroverted facts, Relators' separate statement includes a two-page preamble titled "Statements of Genuine Disputes." *See RSGD* 2:5–4:4. To the extent this is an attempt to submit additional material facts in support of Relators' opposition, it fails to comply with the Court's Standing Order. The Standing Order requires an opposing party's additional material facts to follow the format described for the moving party's separate statement of uncontroverted facts—i.e., "in a two-column format" listing the allegedly undisputed fact in the left-hand column and the evidence in support of the proffered fact in the right-hand column. *Standing Order* § 6.c.1. Each proffered fact "should be set forth in sequentially numbered paragraphs," and the Standing Order reiterates that any additional material facts submitted by the opposing party "shall continue in

sequentially numbered paragraphs" in the two-column format. *See id.* Relators' "Statement of Genuine Disputes" does not list proffered facts and their supporting evidence in a two-column format nor set forth the facts in sequentially numbered paragraphs. *See RSGD* 2:5–4:4. Not only does this violate the Standing Order, but it leaves no practical manner for Defendant to respond to each proffered fact or for the Court or Defendant to cite to such facts. As a result, the Court declines to consider the information listed in Relators' "Statement of Genuine Disputes," *RSGD* 2:5–4:4, as additional material facts.

Third, much of Relators' supporting evidence fails to comply with the Standing Order. In violation of the specific examples in the Standing Order, Relators submit "entire deposition transcripts" and "entire sets of interrogatory responses." *See Standing Order* § 6.c.2; *see generally Deposition of Melinda Zambrano*, Dkt. # 142-3, Ex. 3 ("*Zambrano Depo.*"); *Deposition of Regie Salgado*, Dkt. # 142-4, Ex. 5 ("*Salgado Depo. I*"); *Deposition of Regie Salgado [continued]*, 142-5, Ex. 5 ("*Salgado Depo. II*"); *Deposition of Nathan Johnson*, Dkt. # 142-6, Ex. 6 ("*Johnson Depo.*"); *Defendants' Responses to Plaintiff's Interrogatories, Set One*, Dkt. # 142-6, Ex. 14. As stated in the Standing Order, "[t]he court will not wade through a document to determine whether a fact really is in dispute." *Standing Order* § 6.c. 1. However, to the extent Relators cite to specific portions of this evidence, such as page and line numbers of deposition testimony, the Court will consider it. *See id.* § 6.c.2 (directing parties to submit only "the

specific items of evidence or testimony necessary to support or controvert a proposed statement of undisputed fact"); *cf. Orr*, 285 F.3d at 775 ("[W]hen a party relies on deposition testimony in a summary judgment motion without citing to page and line numbers, the trial court may in its discretion exclude the evidence.").

Fourth, Relators' statement of genuine disputes repeatedly cites to their entire declarations as evidence to controvert Defendant's proposed uncontroverted facts, rather than specific paragraphs of each declaration. *See generally RSGD* (citing *Declaration of Melinda Zambrano*, Dkt. # 142-6, Ex. 7 ("*Zambrano Decl.*"); *Declaration of Regie Salgado*, Dkt. # 1426, Ex. 8 ("*Saldago Decl.*")). Although the Court has discretion not to consider declarations a party relies on "without citing to paragraph numbers," *see Orr*, 258 F.3d at 775 n.14, the Court will consider Relators' declarations to the extent it is able to discern which portion of the declarations purportedly support Relators' positions.

B. Merits of Relators' Claims

Relators' remaining claims assert retaliation in violation of (1) the FCA and (2) the CFCA and (3) wrongful termination "consistent with California Labor Code § 1102.5 and *Tameny*." *TAC* ¶¶ 218–43. As an initial matter, the parties extensively dispute whether Relators were in an employment or agency relationship with Defendant rather than Sage. *See Mot.* 15:2–17:7;

Opp. 12:1–13:27; *Reply* 7:24–10:7.[4] However, the Court need not reach this issue because, even assuming that Relators were Defendant's employees, contractors, or agents, their claims nonetheless fail on the merits. The Court addresses in turn Relators' (i) FCA and CFCA retaliation claims and (ii) wrongful termination claim.

i. Retaliation Claims

To establish an FCA retaliation claim under 31 U.S.C. § 3730(h), a plaintiff must prove that (1) he or she was "engaging in conduct protected under the Act," (2) the defendant "employer kn[ew] that the [plaintiff] was engaging in such conduct," and (3) the defendant discriminated against the plaintiff because of his or her protected conduct. *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1060 (9th Cir. 2011) (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996)). A CFCA

[4] The FCA and CFCA both prohibit retaliation against an "employee, contractor, or agent" for whistleblowing activity. *See* 31 U.S.C. § 3730(h)(1); Cal. Gov't Code § 12653(a). California Labor Code § 1102.5 similarly prohibits retaliation "against an employee for disclosing information . . . to a government or law enforcement agency,' among other protected activities. *See United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 336 (9th Cir. 2017) (quoting Cal. Lab. Code § 1102.5(b)). A claim for wrongful termination in violation of public policy under *Tameny* requires proof of "an employer-employee relationship." *See Yau v. Santa Margarita Ford, Inc.*, 229 Cal. App. 4th 144, 154–55 (2014) (listing elements of a wrongful discharge in violation of public policy claim); *Kelly*, 846 F.3d at 336 n.6 ("A claim for wrongful termination in violation of public policy is a California common-law claim created by *Tameny* [].").

retaliation claim under Cal. Gov't Code § 12653 requires proof of the same elements. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

The parties dispute whether Relators can prove all three elements of their FCA and CFCA retaliation claims. *See Mot.* 18:14-24:17; *Opp.* 5:4–11:8. Because the Court agrees with Defendant that Relators cannot raise a genuine dispute as to the second element of their claims—knowledge of any protected conduct—the Court does not reach the parties' arguments as to the remaining elements.

Relators contend that they engaged in protected activity by investigating potentially fraudulent activity and reporting their concerns to Burgar and others at "TruConnect." *Opp.* 5:24–6:18. They point to the following evidence to support their reporting of suspicious activity. First, Salgado sent e-mails to someone named Luke Duval ("Duval") on June 25 and 26, 2015. *See generally* Dkt. # 142-6, Ex. 12. Second, Relators point to e-mails that Salgado sent to Burgar and Carter on July 11 and e-mails Salgado sent to Wallace and Peck on July 13, in which Salgado reported results from his investigation, identified some concerns, and recommended investigation into third-party vendor TOP. *See generally* Dkt. # 142-6, Ex. 10. Third, Relators testified that they met with Burgar on July 22 and reported concerns about one-second calls and potentially "ripping off the Government" but that Burgar dismissed their concerns. *See Zambrano Depo.* 16:12–15,

17:17–19:18; *see also Salgado Depo. II* 193:5–194:23, 199:2–25.

Defendant argues that, even if Relators engaged in protected conduct and reported such conduct to Burgar and others, the individuals involved in the decision to terminate Relators were not aware of any such protected activity. *Mot.* 23:6–27. Nathan declares that Relators worked in Sage's marketing department under Milhizer, and Nathan and Matthew both declare that Milhizer identified Relators as potential candidates for the reduction in force. *N. Johnson Decl.* ¶¶ 26, 51; *M. Johnson Decl.* ¶ 7. Matthew and Nathan also declare that (1) they were the only decision-makers involved in the decision to eliminate Relators' positions and (2) they did not discuss this decision with anyone other than Milhizer, including Burgar, Wallace, Peck, or anyone else to whom Relators raised complaints. *M. Johnson Decl.* ¶¶ 5, 7; *N. Johnson Decl.* ¶¶ 46–47, 51. Matthew and Nathan also each declare that, prior to Relators' termination, they were not aware of any alleged complaints, concerns, or reports of fraud or other unlawful activity from Salgado or Zambrano. *M. Johnson Decl.* ¶¶ 9–12, 14, 16; *N. Johnson Decl.* ¶¶ 54–57, 59. Salgado also testified that he did not speak to Matthew, Nathan, or Milhizer about his concerns and was not aware whether anyone he spoke to about his concerns relayed those concerns to Matthew, Nathan, or Milhizer. *See DSUF* ¶¶ 85, 87–88; *Salgado Depo. Excerpts* 191:4–8, 233:18–24, 234:6–13. Similarly, Zambrano did not raise her or Salgado's concerns to

any C-level executives of Sage or Defendant's. *DSUF* ¶¶ 89, 91.

Nonetheless, Relators contend that Wallace was involved in the decision to terminate them. *Opp.* 7:6–8:19. Relators point to Nathan's deposition testimony that he asked each department to recommend employees for the reduction in force, but they dispute Nathan's testimony that Milhizer was the person who recommended Relators' termination. *See Johnson Depo.* 63:1–64:9. For support, Relators point to their declarations, in which they each declare that Wallace was their department head at the time of their termination. *Zambrano Decl.* ¶¶ 21–22; *Salgado Decl.* ¶ 22. However, "uncorroborated and self-serving declarations" are insufficient to create a genuine dispute of material fact. *King v. United Parcel Serv.*, 152 Cal. App. 4th 426, 433 (2007); *see also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). Relators' uncorroborated and self-serving statements do not create a genuine dispute as to whether Wallace, rather than Milhizer, was Relators' department head. *See FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact"); *Khera v. United States*, No. EDCV 17-1827 JGB (KKx), 2019 WL 2610966, at *5–6 (C.D. Cal. May 10, 2019) (finding general statements in declaration, without detailed facts or supporting evidence, insufficient to raise a genuine dispute). And even if Relators' uncorroborated declarations were enough to raise a genuine

dispute, Relators provide no evidence that Wallace made the recommendation to terminate them, was involved in the decision, or disclosed any of Relators' protected conduct to any of the decision-makers. And although Relators also provide an e-mail thread between Wallace, Matthew, and others discussing the reduction in force, the e-mail provides no indication that Wallace was involved in the decision to terminate Relators specifically. *See generally* Dkt. # 154-2, Ex. 13.

Relators also contend that "[a] reasonable jury could also determine that Peck . . . and Burgar . . . were also involved as decisionmakers." *Opp.* 8:19–22. They each declare that "[i]t is reasonable to infer that Burgar was one of the decisionmakers in my termination and that he spoke to the Johnsons about my concerns of fraud." *Zambrano Decl.* ¶ 27; *Salgado Decl.* ¶ 20. Similarly, Zambrano declares that "Burgar constantly communicated with TruConnect leadership and the Johnsons who had the power to terminate me and it was likely that [Burgar] did" communicate to others at TruConnect that Relators should be terminated. *Zambrano Decl.* ¶ 25. But "[t]o survive summary judgment, a plaintiff must set forth non-speculative evidence of specific facts, not sweeping conclusory allegations" and must do more than establish that a "set of events could conceivably have occurred." *Cafasso*, 637 F.3d at 1061. Relators' speculation is insufficient to create a genuine dispute that Burgar was involved in the decision to terminate them or communicated their concerns to Matthew, Nathan, or Milhizer. *See id.* at 1060–61 (affirming grant of summary

judgment in defendant's favor on FCA retaliation claim where the official who eliminated relator's position testified that he did not know about her allegedly protected conduct at the time of the decision and relator merely speculated that other officials who knew about her conduct may have influenced the decision-maker); *Brazill v. Cal. Northstate Coll. of Pharmacy, LLC*, 949 F. Supp. 2d 1011, 1024–25 (E.D. Cal. June 5, 2013) (granting summary judgment for defendant on FCA retaliation claim where plaintiff failed to provide any non-speculative evidence that the decision-maker knew about his protected activity and thus did not rebut the showing that the decision-maker did not know about the activity when he terminated plaintiff).

Finally, Relators provide evidence that they e-mailed some of their concerns to Peck, Duval, and Carter. *See generally* Dkt. # 142-6, Exs. 10, 12. But Relators do not provide any evidence that Peck, Duval, or Carter were involved in the decision to terminate them or shared any of Relators' concerns with any of the decision-makers.

In sum, even assuming that Relators were employees or agents of Defendant's and that they engaged in protected conduct within the meaning of the FCA and CFCA, Relators have not raised a genuine dispute that the decision-makers involved in their termination knew of any such protected conduct. As a result, they cannot establish the second element of their FCA and CFCA retaliation claims. *See Cafasso*, 637 F.3d at 1060; *Mendiondo*, 521 F.3d at 1104. Accordingly, the Court **GRANTS** Defendant's motion for summary judgment

as to Relators' fifth cause of action for retaliation under the FCA and Relators' sixth cause of action for retaliation under the CFCA.

ii. Wrongful Termination Claim

"A California wrongful termination in violation of public policy claim 'requires a showing that there has been a violation of a fundamental public policy embodied in statute." *Moreno v. UtiliQuest, LLC*, 29 F.4th 567, 575 (9th Cir. 2022) (quoting *Merrick v. Hilton Worldwide, Inc.*, 867 F.3d 1139, 1150 (9th Cir. 2017)). Here, Relators' third amended complaint appears to base their wrongful termination claim on the public policies embodied by California Labor Code § 1102.5, California Penal Code § 484(a), or California Civil Code § 1572. *See TAG* ¶¶ 232–236. As described above, Labor Code § 1102.5 prohibits retaliation against employees "for disclosing information . . . to a government or law enforcement agency,'" among other protected activities. *See Kelly*, 846 F.3d at 336 (quoting Cal. Lab. Code § 1102.5(b)). Under Penal Code § 484(a), "[e]very person who . . . shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property . . . is guilty of theft." Civil Code § 1572 "pertains [to] fraud in connection with a contract." *See Montano v. Wash. Mut. Bank, F.A.*, No. SACV 09–1242 DOC(ANx), 2010 WL 11520162, at *3 (C.D. Cal. Jan. 21, 2010) (citing Cal. Civ. Code § 1572).

Defendant argues that Relators' wrongful termination claim fails because they cannot demonstrate a protected act under Penal Code § 484 and because a violation of Civil Code § 1572 cannot support a wrongful termination in violation of public policy claim. *Mot.* 24:18–25:5 (citing *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174, 1186 (1993) (holding wrongful termination in violation of public policy claim could not be predicated on a violation of Civil Code § 1572 as such a fraud claim did not violate a "substantial policy that concerns society at large" but was rather "essentially a private dispute")). Relators fail to respond to Defendant's arguments and accordingly concede that their wrongful termination claim cannot rest on an alleged violation of Penal Code § 484 or Civil Code § 1572. *See Tapia v. Wells Fargo Bank, N.A.*, No. CV 15-03922 DDP (AJWX), 2015 WL 4650066, at *2 (C.D. Cal. Aug. 4, 2015) (arguments to which no response is supplied are deemed conceded); *Silva v. US. Bancorp*, No. 5:10-cv-01854-JHN-PJWx, 2011 WL 7096576, at *3 (C.D. Cal. Oct. 6, 2011) (same).

The only argument Relators provide as to their wrongful termination claim is that "[s]upporting claims under the [FCA] should be sufficient to support claims under California's parallel state laws: the [CFCA] and wrongful termination in violation of public polic[y]." *Opp.* 11:20–25. But, as described above, Relators' FCA and CFCA claims do not survive summary judgment. As such, to the extent Relators' wrongful termination claim is based on violations of the FCA or CFCA, it also fails. *See Kelly*, 846 F.3d at 336 (finding

determination that defendant did not violate Labor Code § 1102.5 foreclosed *Tameny* claim based on a violation of § 1102.5 as a matter of law).

Finally, although Relators' third amended complaint appeared to base their wrongful termination claim in part on a violation of Labor Code § 1102.5, Relators' opposition does not indicate as much. *See Opp.* 11:20-22 (merely arguing that proving their FCA claims should suffice to prove their wrongful termination claim). Moreover, under the burden-shifting framework that applies to § 1102.5 whistleblower retaliation claims, a plaintiff must first "demonstrate by a preponderance of the evidence 'that retaliation for [his or her] protected activities was a contributing factor in a contested employment action.'" *Wiele v. Del. N. Cos., Inc.*, No.: 2:21-cv-07271-SB-AS, 2022 WL 714392, at *6 (C.D. Cal. Mar. 4, 2022) (quoting *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703, 718 (2022)). To establish a prima facie case under § 1102.5, the plaintiff must show that (1) he or she engaged in a protected activity, (2) he or she was subjected to an adverse employment action, and (3) "a causal link between the two." *Moreno*, 29 F.3d at 575. "Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in protected activity." *Wittenbrock v. Sunovion Pharms. Inc.*, No. EDCV 19-342 JVS (SHKx), 2019 WL 4453719, at *5 (C.D. Cal. May 20, 2019) (quoting *Morgan v. Regents of Univ. of Cal.*, 88 Cal. App. 4th 52, 69–70 (2000)). Here, as described above, Relators provide no evidence that the individuals involved in decision to terminate them

were aware of any of their protected conduct. As such, Relators cannot show that retaliation was a contributing factor for their termination for purposes of a § 1102.5 claim or a wrongful termination claim premised on § 1102.5.

In sum, because Relators have failed to raise a genuine dispute that they were terminated in violation of a public policy based on any statutory or constitutional provision, their wrongful termination claim cannot survive summary judgment. *See Kelly*, 846 F.3d at 336. The Court therefore **GRANTS** Defendant's motion for summary judgment as to Plaintiff's seventh cause of action for wrongful termination.[5]

VI. Conclusion

For the foregoing reasons, the Court **GRANTS** Defendant's motion for summary judgment in its entirety. This order closes the case.

IT IS SO ORDERED.

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[5] Defendant also argues that Relators' CFCA and wrongful termination claims fail because California law does not apply extraterritorially to Relators, who did not live or work in California or allege that any misconduct took place in California. *Mot.* 17:8–18:13. Although Relators fail to respond to this argument, *see generally Opp.*, the Court need not reach this issue because Relators' claims otherwise do not survive summary judgment for the reasons described above.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

(Filed Mar. 30, 2021)

Case No.	CV 16-3767 PSG (FFMx) Date March 30, 2021
Title	United States of America et al. v. TruConnect, et al.

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): The Court GRANTS IN PART and DENIES IN PART the motion to dismiss

Before the Court is a motion to dismiss filed by Defendants TruConnect Communications, Inc. ("TruConnect"), Matthew Johnson, and Nathan Johnson, (collectively, "Defendants"). *See generally* Dkt. # 82 ("*Mot*"). Relators Regie Salgado ("Salgado") and Melinda Zambrano ("Zambrano") (collectively, "Relators") opposed. *See generally* Dkt. # 85 ("*Opp.*"). Defendants replied. *See generally* Dkt. # 86 ("*Reply*"). The Court finds the

matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving, opposing, and reply papers, the Court **GRANTS IN PART** and **DENIES IN PART** the motion to dismiss.

I. Background

This is a qui tam action based on Defendants' alleged violations of the False Claims Act ("FCA"), FCA retaliation, and related California state law claims. *See generally Third Amended Complaint*, Dkt. # 79 ("*TAC*").

Relators are former employees of TruConnect, a mobile virtual network operator and a provider of wireless voice, messaging, and data services. *Id.* ¶¶ 20–22. Before joining TruConnect, Salgado had 15 years of experience "in the prepaid, low income part of the cellphone industry." *Id.* ¶¶ 74, 115. Zambrano worked at PrimeCoPersonal Communications and Metro PCS from 1998–2006. *Id.* ¶ 70. Zambrano recruited Salgado to work at TruConnect in April 2015. *Id.* ¶ 72.

TruConnect is a "Lifeline Provider" through the Lifeline Program ("Lifeline"), a program by which the federal and state governments subsidize cellular service for low income families. *Id.* ¶ 26. Matthew and Nathan Johnson are brothers and joint CEOs of TruConnect, and they exercise comprehensive control over the company, including its billing practices. *Id.* ¶ 28. Relators allege that Defendants falsely bill the government for phones not in use and falsely represent

that TruConnect complies with the Lifeline regulations set out by the Federal Communications Commission ("FCC"). *Id.* ¶ 30.

A. The Lifeline Program

Lifeline provides pre-paid wireless services to qualified low-income families. *Id.* ¶ 32. Carriers like TruConnect receive reimbursement from the federal and state governments for providing these services. *Id.* Under 47 C.F.R. § 54.410, carriers must receive (1) notice of low income and (2) a copy of the subscriber's certificate of eligibility before the carrier can seek reimbursement.

In order for a carrier to claim reimbursement, the phone must be "used" by a subscriber within the last sixty days.[1] *TAG* ¶¶ 42–43. Under 47 C.F.R. § 54.407(c)(2), the following constitutes "using" the service: (1) completion of an outbound call, (2) purchasing minutes from the eligible communication carrier to add to the subscriber's service plan, (3) answering an incoming call from a party other than the eligible telecommunications carrier or the carrier's agent or representative, or (4) responding to direct contact from the eligible communications carrier and confirming that

[1] Although current Lifeline regulations require that subscribers use the phone within the preceding 30 days, *see* 47 C.F.R. § 54.407, the regulations in place during 2015 required usage during the previous 60 days, *see* Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund, 81 FR 33026-01 (noting the change from 60 to 30 days).

he or she wants to continue receiving the Lifeline service. *Id.* ¶ 43.

Carriers must file FCC Form 497 each month to receive reimbursement for each Lifeline subscriber they claim. *Id.* ¶ 46. Form 497 states: "I certify that my company is in compliance with all the Lifeline program rules, and, to the extent required, have obtained valid certifications for each subscriber for whom my company seeks reimbursement." *Id.* ¶ 47.

B. The Alleged Wrongdoing

Relators' FCA claims are based on Defendants' alleged violations of Lifeline regulations. *See generally id.* Specifically, Relators claim (1) Defendants hire "street teams" to hand out "live" mobile phones to acquire customers without obtaining information to determine eligibility, *id.* ¶¶ 63–68; and (2) Defendants allow "robo-calls" and illegitimate text messages to be pushed to thousands of phones that would otherwise be inactive so that the phones are "used" in the sixty days before billing the government, *id.* ¶¶ 75–97.

i. User Acquisition Through Street Teams

In order to acquire customers, TruConnect hired street teams to distribute mobile phones outside of Unemployment Insurance and Social Security offices.[2] *Id.* ¶ 63. The street teams handed out "live" phones, with

[2] The FCC has since prohibited this practice for Lifeline subscribers because of fraud. *Id.* ¶ 100.

SIM cards already activated in the phone. *Id.* ¶¶ 64, 98. TruConnect did not have a system to confirm that the phones were delivered to eligible customers. *Id.* ¶ 101. While street teams required proof of low income to receive a phone, proof of food stamps was sufficient, and street teams did not require a name, birth date, address, number of people in the household, or social security number. *Id.* ¶¶ 65–66.

TruConnect did not follow up with subscribers after phones were distributed by street teams. *Id.* ¶ 69. Monthly statements were not sent to subscribers. *Id.*

TruConnect billed the government for any phone it considered "active," *id.* ¶ 111, even if (1) the phone was not yet in the hands of a customer, *id.* ¶ 102, (2) TruConnect had not confirmed the customer's eligibility, *id.* ¶ 101, or (3) the phone was returned for repair and replacement, *id.* ¶¶ 106–09.

ii. Fraudulent Usage

Around July 2015, Salgado was examining six "broken phones" that did not belong to any subscribers. *Id.* ¶ 75. During his examination, unique robo-call numbers continued to call the phones. *Id.* Salgado confirmed with Luke Duval from Ingram Micro, a phone vender from which TruConnect purchased phones, that these phones were activated even though they did not belong to any subscribers. *Id.* ¶¶ 76–78.

Plintron, the wholesale provider to TruConnect, asked Salgado to help it build a system to properly bill

call usage to its customers including TruConnect. *Id.* ¶ 117. To help Plintron, Salgado requested and received usage data from Rick Burgar ("Burgar"), the Vice President of Revenue Assurance at TruConnect. *Id.* ¶ 79, 118–20. Salgado analyzed the data and "became concerned there was fraud because he noticed red flags in the data based on his previous experience in fraud/revenue assurance positions with a former employer." *Id.* ¶ 121.

Specifically, Salgado analyzed subscriber data of 369,081 customers over a thirty-eight-day period. *Id.* ¶¶ 80–83. Salgado discovered that 45 percent of these users were near the sixty-day non-usage cut off. *Id.* He also noticed that there was not a substantial amount of usage within the first several weeks of service, and that the usage that did exist was generally of calls lasting less than one minute. *Id.* ¶ 122. This did not comport with Salgado's experience with "this kind of customer" or with real usage data by subscribers. *Id.* ¶¶ 115, 123.

Additionally, 13.67 percent of all subscribers in the data set showed zero to one minute of usage and no texting. *Id.* ¶ 83. An additional 4,800 phones received text messages, but no calls, for over a year. *Id.* ¶ 85. Many of the incoming text messages on these phones were random pictures of office interiors or car engines, appearing to be illegitimate. *Id.* ¶ 86.

Relators also allege that TruConnect discussed developing and installing an "Auto-Dialer App" feature that would automatically make the necessary

outbound calls required by the FCC's eligibility rules. *Id.* ¶ 124–25. Both Nathan and Matthew Johnson advocated for this feature. *Id.* ¶ 127–29.

Finally, Relators allege that "TruConnect knew that telephone numbers for the Lifeline program were recycled quicker than industry standards, tending to result in usage for the new customer resulting from calls intended for the former owner of that telephone number." *Id.* ¶ 132. Rather than try to stop the practice of recycling numbers too quickly, TruConnect continued to bill for the usage without determining the legitimacy of the usage data. *Id.* ¶ 133.

iii. Reporting and Retaliation

Burgar told Zambrano on several occasions that Salgado should mind his own business and focus on inventory and not billing issues. *Id.* ¶ 157.

On July 22, Relators told Burgar they had concerns about fraudulent billing to the government. *Id.* ¶ 159. Specifically, Salgado questioned the practice of billing for calls that lasted only one second and "the unusual usage." *Id.* Burgar responded, "We work hard for those one second calls. What are you trying to allege, Regie?" *Id.* Zambrano told Burgar that "she did not want to be a part of ripping off the government." *Id.* ¶ 161. Burgar told Zambrano to "back off" and that he "need[ed] this job." *Id.* ¶ 161.

Relators allege that "Burgar's attitude and demeanor changed dramatically" after these comments,

and the meeting ended. *Id.* ¶ 162. Two days later, TruConnect terminated Relators' employment, allegedly due to a reduction in the workforce. *Id.* ¶ 156. However, Relators claim that "TruConnect posted a position matching Zambrano's responsibilities within about a week of Zambrano's termination" and that the company "replaced Salgado, as well." *Id.* ¶ 165.

C. Procedural History

i. The 2015 FCC Subpoena

On December 17, 2015, the Office of the Inspector General of the FCC ("OIG") issued a subpoena to TruConnect (the "2016 Subpoena"), requesting information about TruConnect's involvement in Lifeline, among other information. *Request for Judicial Notice*, Dkt. # 82-2 ("*RJJV*"), Ex. 1.[3] TruConnect made five productions to the OIG in response to each of the requests in the 2015 Subpoena. *Id.* Exs. 2–6.

[3] Defendants request that the Court take judicial notice of (1) the 2015 Subpoena (2) TruConnect's five responses to the 2015 Subpoena, (3) a subpoena issued to TruConnect by the OIG on September 19, 2016 ("2016 Subpoena"), and (4) TruConnect's six responses to the 2016 Subpoena. *See RJN* at 2–3. Relators do not oppose the request. Courts may take judicial notice of the fact of service and response to subpoenas, but not the truth of their contents. *Klein v. Mony Life Ins. Co. of Am.*, No. CV 17-07003-RSWL-AS, 2018 WL 2472916, at *3 (C.D. Cal. May 30, 2018) ("[T]he Court takes judicial notice of the fact of service of and response to the subpoena, but not the truth of the facts recited therein"). Accordingly, the Court **GRANTS** Defendants' request for judicial notice.

ii. This Action

Relators filed their original complaint on May 31, 2016. *See* Dkt. # 1. On September 19, 2016, the OIG issued a second subpoena to TruConnect (the "2016 Subpoena"). *RJN* Ex. 7. TruConnect made six document productions in response to the requests in the 2016 Subpoena. *Id.* Exs. 8–13.

On October 8, 2019, the United States declined to intervene in Relators' case. Dkt. # 54. On May 19, 2020, the People of the State of California also declined to intervene in Relators' case, *see* Dkt. # 58, and the case was unsealed, *see* Dkt. # 59.

On June 25, Relators filed a Second Amended Complaint ("SAC"). *See generally Second Amended Complaint*, Dkt. # 60 ("*SAC*"). The Court granted Defendants' motion to dismiss the SAC in its entirety, with leave to amend. *See generally November 23, 2020 Order Granting Defendants' Motion to Dismiss*, Dkt. # 78 ("*November 2020 Order*").

Relators filed the operative Third Amended Complaint ("TAC") on January 4, 2021, alleging the following causes of action:

> First Cause of Action: Knowingly submitting false claims for payment in violation of the FCA, 31 U.S.C. § 3729(a)(1)(A). TAC ¶¶ 175–86.
>
> Second Cause of Action: Knowingly making false records material to a false claim in violation of the FCA, 31 U.S.C. § 3729(a)(1)(B). *TAC* ¶¶ 187–96.

Third Cause of Action: Knowingly submitting false claims for payment in violation of the California FCA ("CFCA"), Cal. Gov't Code § 12651(a)(1). *TAC* ¶¶ 197–208.

Fourth Cause of Action: Knowingly making false records material to a false claim in violation of the CFCA, Cal. Gov't Code § 12651(a)(2). *TAC* ¶¶ 209–17.

Fifth Cause of Action: Retaliation under the FCA in violation of 31 U.S.C. § 3730(h). TAC ¶¶ 218–24.

Sixth Cause of Action: Retaliation in violation of Cal. Gov't Code § 12653. *TAC* ¶¶ 225–31.

Seventh Cause of Action: Wrongful termination, consistent with Cal. Labor Code § 1102.5 and *Tameny v. Atl. Richfield Co.*, 27 Cal. 3d 167 (1980). *TAC* ¶¶ 232–43.

Defendants now move to dismiss the TAC. *See generally Mot.*

II. Legal Standard

A. Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), 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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the

plaintiff. *See Turner v. City & Cty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Accordingly, "for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. US. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

B. Rule 9(b)

Rule 9(b) requires a party alleging fraud to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). To plead fraud with particularity, the pleader must state the time, place, and specific content of the false representations. *See Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007). The allegations "must set forth more than neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about the statement, and why it is false." *Less v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks omitted). In essence, the defendant must be able to prepare an adequate answer to the allegations of fraud. Where multiple defendants allegedly

engaged in fraudulent activity, "Rule 9(b) does not allow a complaint to merely lump multiple defendants together." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Rather, a plaintiff must identify each defendant's role in the alleged scheme. *See id.* at 765.

III. Discussion

Defendants argue that (1) Relator's first and second causes of action under the FCA should be dismissed pursuant to Rule 12(b)(6) and for failure to meet Rule 9(b)'s heightened pleading standards, *Mot.* at 17–30, (2) nothing in the TAC cures the defects in the retaliation claim, *id.* at 30–32, and (3) the state law claims should be dismissed, *id.* at 32–33. The Court addresses each argument in turn.

A. First and Second Causes of Action Under the FCA

Defendants argue (1) Relators fail to allege with particularity (a) that TruConnect violated any Lifeline regulations and (b) that TruConnect submitted false statements in connection with any claim for payment, (2) Relators still do not allege that TruConnect *knowingly* presented false claims for payment, and (3) Relators have not pled that any false statement was *material* to the submission of a claim for payment. *Id.* at 17–30. Because the Court finds that Relators failed to allege TruConnect fraudulently billed the government, the Court does not address the arguments regarding knowledge and materiality.

i. TruConnect's Lifeline Violations and False Statements

To satisfy Rule 9(b), Relators' allegations must show the "who, what, when, where, and how of the misconduct charged." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). A relator can "identify representative examples of false claims" or "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted," so long as the allegations give "notice of the particular misconduct which is alleged to constitute the fraud charged so that [they] can defend against the charge." *See Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998–99 (9th Cir. 2010). Here, rather than identify representative examples of false claims, Relators allege two schemes to submit false claims—(1) the use of street teams to fraudulently acquire customers and (2) usage fraud.

a. Street Teams

In the November 2020 Order, the Court found the allegations in the SAC regarding street teams insufficient to satisfy Rule 9(b) because Relators failed to connect the street teams' behavior to any false claims. *November 2020 Order* at 10–11. Relators added allegations explaining that (1) street teams were incentivized to deliver phones regardless of subscriber eligibility, (2) TruConnect did not have a system to confirm a subscriber's eligibility, (3) street teams handed out phones that were already deemed active, and (4)

all active phones were billed to the government regardless of whether they were in the hands of eligible customers. *TAC* 98–113. Again, these allegations are insufficient to connect the street teams' actions to false claims for reimbursement.

Defendants contend that Relators mischaracterize 47 C.F.R. § 54.410, which addresses subscriber eligibility determination and certification. *Mot.* 14:23–15:6. Section 54.410 requires certified *states*, not carriers, to determine a subscriber's initial eligibility. *Id.* Carriers are then required to confirm a subscriber's eligibility before seeking reimbursement. *See* 47 C.F.R. §§ 54.410(b)(2)(i)–(ii), (c)(2)(i)–(ii)) (carriers "must not seek reimbursement . . . unless the carrier has received from the . . . state agency: (i) Notice that the prospective subscriber meets the income-eligibility criteria" and "(ii) a copy of the subscriber's certification").

Relators allege that "TruConnect did not have a system to confirm that the phones were delivered to eligible customers." *TAC* ¶ 101. But TruConnect is not required to have such a system because TruConnect's obligations arise when seeking reimbursement, not when delivering phones to customers.

Relators also claim that "TruConnect's billing system was unable to determine whether a phone shown as active was in a qualifying customer's hands." *TAC* ¶ 113. Again, this allegation is insufficient to connect the street teams' actions to false claims. The Lifeline regulations do not require that TruConnect's billing

system operate in any specific way—they only require that TruConnect refrain from requesting reimbursement for a subscriber if the company has not received documentation from California. Relators fail to allege that TruConnect did not receive (1) notice and (2) certification for the customers acquired by the street teams. Without such allegations, the Court cannot infer that the use of street teams led to fraudulent billing.

Relators also include various allegations that do not meet Rule 9(b)'s particularity requirements. For example, Relators allege that "TruConnect billed for subscribers before a subscriber had possession of a phone," *id.* ¶ 102, but they provide no examples or descriptions of how TruConnect conducted this practice. Relators further claim that "when TruConnect tried to send replacement phones, many were returned because of invalid addresses or addressee not at address." *Id.* ¶ 110. Relators do not assert when this allegedly occurred, who sent the phones out, and critically, whether the phones were deemed active and subsequently billed to the government. Rule 9(b) requires more specificity when alleging fraud. *Cafasso*, 637 F.3d at 1055.

Relators further claim that Lifeline phones remain active when they were "in for repair." *Id.* ¶¶ 106–09. However, Relators do not explain how keeping a phone "active" during repair violates Lifeline regulations.

Finally, Relators include quotes from Burgar and Nathan Johnson regarding the timing of "orders" and when such "orders" are complete. *Id.* ¶¶ 103–04. These allegations are insufficient because Relators do not explain what Burgar and Johnson meant when discussing "orders," and they fail to provide any context surrounding the statements or to allege when they were made.

As such, the Court cannot infer that the street teams' behavior led to fraudulent billing, and the Court **GRANTS** the motion to dismiss on this ground.

b. Usage Fraud

In the November 2020 Order, the Court found the allegations in the SAC regarding usage fraud insufficient to satisfy Rule 9(b) because (1) Relators failed to allege that TruConnect was behind robo-calls and text messages that led to fraudulent usage, (2) the data set Relators relied on to allege that TruConnect fraudulently bills the government only spans 38 days, and fraudulent billing could only occur if a phone was unused for 60 days, and (3) the phones from the data set were "used" as required by the Lifeline regulations.[4] *November 2020 Order* at 10–11.

[4] In the SAC, Relators alleged Salgado analyzed two data sets: (1) current and historical data of 60,000 Lifeline subscribers and (2) the 38-day time span data set of 369,081 subscribers. *SAC* ¶¶ 81–89. Relators claimed that 8,800 of the subscribers from the first data set showed no calls or text messages for over a year. The Court found Relators' allegations lacking because Relators failed to allege with specificity that TruConnect billed the government

To cure the allegations regarding the robo-calls, Relators allege TruConnect employees discussed developing an Auto-Dialer App that could be pre-loaded onto phones. *TAC* ¶ 124. This app "would allow TruConnect to meet the FCC's Lifeline outbound call requirement." *Id.* ¶ 127. However, Relators fail to allege that this app was ever developed and installed on any device. As such, these allegations are insufficient to support an inference that TruConnect submitted false claims for reimbursement based on fraudulent usage through this app.

Relators also allege that "TruConnect knew that telephone numbers for the Lifeline program were recycled quicker than industry standards, tending to result in usage for the new customer resulting from calls intended for the former owner of that telephone number." *Id.* ¶ 132. Rather than stop the practice of billing for these phones, TruConnect continued to submit claims for reimbursement "without determining if the usage was due to wrong number calls." *Id.* ¶ 133. But Relators fail to explain how receiving calls from wrong numbers violates the Lifeline regulations, or that TruConnect was somehow behind the recycling of these phone numbers and the wrong number calls. Accordingly, these allegations also fail to support an inference that TruConnect submitted false claims for reimbursement.

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for those phones. *November 2020 Order* at 10–11. Relators appear to have abandoned the claims regarding the first data set, as they do not appear in the TAC.

To cure the defects regarding the data set, Relators add allegations providing context as to why Salgado acquired the data and Salgado's experience in analyzing it. Specifically, Relators contend that Salgado obtained the data from Burgar in order to "help [Plintron, TruConnect's wholesale provider] build a system to properly bill its customers." *Id.* ¶¶ 117–21. Although the data set only spanned 38-days, "[i]n Salgado's experience and based on assurances from Rick Burgar, the data [Salgado] received was an adequate sample to extrapolate typical usage for these phones over a 60-day period." *TAC* ¶ 130. Salgado was qualified to notice alleged "red flags" due to his "previous experience in fraud/revenue assurance positions." *Id.* ¶¶ 121–22.

Even if these allegations were sufficient to cure the Court's concern that the data set only spans 38 days, they do not address the fact that the phones in the data set were "used" as required under 47 C.F.R. § 54.47(c)(2). Relators claim "[f]orty-five percent of subscribers were near the sixty day non-usage cut off," "[n]ineteen percent of all subscribers had zero to one minute[] of usage," and "4,800 phones received text messages, but no calls, for over a year." *TAC* ¶¶ 82–85. But none of these allegations lead to the conclusion that phones were not "used" under the regulations.

Finally, Relators point to Salgado's experience to support their allegation that "short calls do not represent normal usage but are more likely to represent wrong number calls or no conversations." *Id.* ¶ 131. These allegations are also insufficient because billing

for "wrong number calls" or "no conversations" does not violate Lifeline regulations. Further, Relators claim that "[in]substantial amount of usage within the first several weeks" amounts to a "red flag" does not suffice because Relators fail to allege that the data set included any phones that had been given to customers in recent weeks. *Id.* ¶ 122.

Accordingly, Relators have failed to allege that Defendants submitted claims for reimbursement based on fraudulent usage data, and the Court **GRANTS** the motion to dismiss on this ground as well.

ii. Leave to Amend

Whether to grant leave to amend rests in the sound discretion of the trial court. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Courts consider whether leave to amend would cause undue delay or prejudice to the opposing party, and whether granting leave to amend would be futile. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Generally, dismissal without leave to amend is improper "unless it is clear that the complaint could not be saved by any amendment." *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

Here, Relators have had the opportunity to amend their claims and they were unable to cure the defects found. Given these shortcomings, the Court believes that further attempts to amend would be futile. *See Sisseton Wahpeton Sioux Tribe*, 90 F.3d at 355. As such the Court **DENIES** leave to amend.

B. The FCA Retaliation Claim

To plead retaliation under the FCA, Relators must allege (1) they were engaged in conduct protected by the FCA, (2) Defendants knew they were engaged in protected conduct, and (3) Defendants discriminated against them because of their protected conduct. *Cafasso*, 637 F.3d at 1060.

In the November 2020 Order, the Court dismissed the retaliation claim because (1) Relators did not claim to have reported *fraudulent conduct* to Burgar, and (2) Relators did not establish the requisite employer notice. *November 2020 Order* at 13–14.

To address these issues, Relators added allegations further detailing the conversation they had with Burgar that purportedly led to their termination. During this conversation, Relators claim they (1) questioned TruConnect's practice of billing for one second calls and "the unusual usage" and (2) told Burgar that they "did not want to be a part of ripping off the government." *TAC* ¶¶ 159–61. In response, Burgar stated "We work hard for those one-second calls. What are you trying to allege, Regie?" *Id.* He also told Zambrano to "back off." *Id.* These allegations are sufficient to cure the defects in the SAC, as they show that (1) Relators reported what they thought was fraudulent conduct and that (2) Defendants were aware of Relators' protected activity.

Defendants argue Relators' conduct is not protected because Relators did not plead "an objectively

reasonable FCA violation." *Mot.* 31:9–10. The Court disagrees.

"[A]n employee engages in protected activity where (1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is possibly committing fraud against the government." *Moore v. California Inst. of Tech. Jet Propulsion Lab y*, 275 F.3d 838, 845 (9th Cir. 2002). Here, the TAC alleges both prongs. First, Relators had a good faith belief because, based on their experience in the industry, they noticed unusual usage patterns that raised red flags. Second, Defendants fail to put forth any argument that a reasonable employee would have believed differently. Their cited cases, all decided at summary judgment or later, do not necessitate a different result at this early stage. *See*, *e.g.*, *U.S. ex rel. Zemplenyi v. Grp. Health Co-op.*, No. C09-603-RSM, 2012 WL 1642213, at *3 (W.D. Wash. May 10, 2012) (finding a jury could not find that a reasonable employee suspect fraud and granting summary judgment to defendants where the relator had no "basic idea of what evidence would be necessary to support a suspicion of fraud.").[5]

Defendants also contend that the new allegations do not assert employer notice because "Relators do not

[5] Importantly, Defendants do not cite a case, and the Court found none, stating that Relators must successfully plead an FCA claim in order to succeed on their retaliation claim. This makes sense, because the standard under Rule 9(b) for pleading fraud under the FCA is higher that the standard under Rule 12(b)(6) for pleading that a reasonable employee would have suspected fraud.

allege that [billing for one-second calls and the unusual usage] violates any Lifeline regulations." *Mot.* 31:27–28. But Defendants cite no authority for the proposition that Relators had to specify which regulations were allegedly violated. *See U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996) ("Specific awareness of the FCA is not required"). Further, Burgar's alleged responses to Relators' comments—i.e. "what are you trying to allege?" and "back off"—lead to the reasonable inference that Burgar, and therefore TruConnect, knew and understood Relators' allegations.

Finally, Defendants insist Burgar's responses "[m]ore plausibly . . . relate to his annoyance and frustration that Relators were diverting time and energy away from their job functions." *Mot.* 32:5–8. This, according to Defendants, "likely would have been grounds to terminate Relators for cause had they not been terminated due to a company-wide reduction in force." *Id.* 32:14–15. But this is not the standard on a motion to dismiss. Relators' inferences need not be the most plausible or possible explanation for the alleged facts, rather, they must "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Iqbal*, 556 U.S. at 678. Relators claim that Burgar responded to their accusations of fraud defensively and then promptly terminated them two days later. *Opp.* 20:14–25. They also allege that shortly thereafter, Defendants began searching for Relators' replacements, which rebuts TruConnect's purported reason for Relators' dismissal.

Id. 20:10–14. Defendants have failed to establish why Relators' version of events is implausible. Accordingly, the TAC successfully states a claim for FCA retaliation, and the Court DENIES the motion to dismiss on this ground.

C. The State Law Claims

Defendants argue that the CFCA and CFCA retaliation claims—the third, fourth, and sixth causes of action—should be dismissed for the same reasons as the related federal law claims. *Mot.* 32:18–33:2. The Court agrees that the state law claims should bear the same fate as their federal counterparts.[6] As such, for the same reasons as described above, the Court **GRANTS** the motion to dismiss the third and fourth causes of action for CFCA violations and **DENIES** leave to amend. Similarly, the Court **DENIES** the motion to dismiss the sixth cause of action for CFCA retaliation.

Defendants further argue that the because the Court should dismiss all of the federal law claims, the Court should decline to exercise supplemental

[6] Since the CFCA is patterned on the federal statutory scheme, the requirements for state liability are the same as for federal liability. *See State ex rel. Grayson v. Pac. Bell Tel. Co.*, 142 Cal.App.4th 741, 747 n. 3 (2006); *see also United States v. Shasta Servs., Inc.*, 440 F.Supp.2d 1108, 1111 (E.D.Cal. 2006). Furthermore, the same pleading specificity requirements applicable to fraud causes of action under Rule 9(b) also apply to a complaint alleging CFCA violations. *United States v. Sequel Contractors, Inc.*, 402 F. Supp. 2d 1142, 1152 (C.D. Cal. 2005); *see also Less v.Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003).

jurisdiction over the pendant California claims and dismiss them. *Mot.* 33:3–13. The state law claims currently before the Court are (1) the sixth cause of action for CFCA retaliation and (2) the seventh cause of action for wrongful termination in violation of the California Labor Code. Because the Court finds that Relators state a federal law claim for FCA retaliation, and their CFCA retaliation and wrongful termination claims substantially reflect their allegations under the FCA retaliation claim, the Court retains supplemental jurisdiction over the remaining state law claims and **DENIES** the motion to dismiss them.

IV. Conclusion

For the foregoing reasons, the Court rules as follows:

- The Court **GRANTS** the motion to dismiss the first, second, third, and fourth causes of action for violations of the FCA and CFCA without leave to amend.
- The Court **DENIES** the motion to dismiss the fifth, sixth, and seventh causes of action for FCA retaliation, CFCA retaliation, and wrongful termination.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REGIE SALGADO, ex rel. United States of America; MELINDA ZAMBRANO, ex rel. United States of America, Plaintiffs-Appellants, and STATE OF CALIFORNIA; UNITED STATES OF AMERICA, Plaintiffs, v. TRUCONNECT, Defendant-Appellee, and NATHAN JOHNSON; MATTHEW JOHNSON, Defendants.	No. 22-55721 D.C. No. 2: 16-cv-03767-PSG-SK Central District of California, Los Angeles ORDER (Filed Jan. 30, 2024)

Before: CLIFTON and SANCHEZ, Circuit Judges, and KORMAN,* District Judge.

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

Judge Sanchez voted to deny the petition for rehearing en Banc, and Judges Clifton and Korman recommended denying the same. The full court has been advised of the petition, and no judge has requested to vote on whether to rehear the matter en banc. Fed. R. App. 35. Accordingly, Appellants' petition for rehearing en banc, filed January 5, 2024, (Dkt. No. 59) is **DENIED.** No further petitions will be entertained.