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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF GUAM**

SURENDRANI HILL,

Plaintiff,

vs.

BOOZ ALLEN HAMILTON, INC., et al.,

Defendants.

Civil Case No. 07-00034

**ORDER RE: DEFENDANT’S MOTION
TO DISMISS SECOND AMENDED
COMPLAINT**

This case is before the court on Defendant’s “Motion to Dismiss the Second Amended Complaint,” brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* Docket No. 69. Having considered the filings and relevant authorities, the court hereby **DENIES** Defendant’s motion in its entirety, for the reasons given below.¹

I. FACTUAL BACKGROUND

In or around April of 2003, Defendant Booz Allen Hamilton (“Defendant” or “BAH”) hired Plaintiff Surendrani “Sue” Hill (“Plaintiff”) to provide “support services” at Norton and March Air Force Bases in California. Docket No. 68 (“Second Amended Complaint” or “SAC”) at ¶6. Plaintiff served in this capacity at these locations for about two years, until her transfer to Andersen Air Force Base on Guam in 2005. *Id.*

Toward the end of June of 2005, Defendant designated Plaintiff as a Global Engineering Integration and Technical Assistance contractor (“GEITA”). Docket No. 68 at ¶7. Plaintiff’s

¹ The court found this motion suitable for decision without oral argument. *See* Local Civ. R. 7.1 (reposing in court discretion to decide motions “on the basis of the written materials on file,” even if parties have requested oral argument).

1 then-supervisor told her that holding this position entailed the following duties: ensuring that
2 BAH's study/remediation sub-contractor, EA Engineering ("EA"), kept to Standard Operating
3 Procedures ("SOPs"); providing the United States Air Force ("USAF"), BAH's client, with
4 "quality" deliverables; and maintaining the USAF's mission and goals in environmental clean-up
5 projects proceeding under the Installation Restoration Program ("IRP"). *Id.*

6 Plaintiff's overall narrative is that, while carrying out her duties, she saw evidence of
7 failures and possible acts of fraud by EA and by Defendant; that she brought this evidence to the
8 attention of her supervisors; that her supervisors were unwilling to confront and act on this
9 evidence; and that, after bringing this evidence to the attention of a USAF employee, she was
10 ultimately fired for her quality-control actions. Docket No. 68 at ¶¶8-14.

11 Thus, she alleges that in July of 2005 she determined that EA's "document deliverable"
12 was of substandard quality, and that "[a]lthough at first [James Rosacker, her supervisor]
13 appeared to listen and agree with Plaintiff that the documents were not up to standard, he soon
14 started acting as a shield for EA by running interference whenever Plaintiff provided any
15 negative feedback on EA's work." Docket No. 68 at ¶9.

16 She also alleges that around October or November of 2005—after both she and the USAF
17 gave negative feedback to EA—she took part in a conference call with BAH management and
18 her supervisor, during which she was "sternly warned that she was making it difficult for EA to
19 succeed and that if it came down to choosing between Plaintiff or EA, the USAF would choose
20 EA and Plaintiff would lose her position and jeopardize [BAH]." Docket No 68 at ¶10.

21 Further, she alleges that around the end of 2005, she determined that EA was "double
22 billing" and brought this to her supervisor's attention, only to be told in April of 2006 that
23 "although she was deemed technically capable by their client [the USAF], her attitude towards
24 [EA] was 'unacceptable' according to [Defendant's] core values," and "that she was being placed
25 on a tentative one-month probation and that she would be terminated if she did not improve her
26 relationship with EA." Docket No. 68 at ¶¶11-13. She also alleges that, between January 2006
27 and April 2006, she found evidence that BAH itself had been over-billing, in the form of
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1 “invoices indicat[ing] that the actual hours of fieldwork did not match the amount charged for the
2 fieldwork.” *Id.* at ¶12.

3 Finally, she alleges that after presenting spreadsheets “itemiz[ing] these billing
4 discrepancies” to her supervisors on May 11, 2006, she was informed the following day that she
5 was to be terminated because “she had made only small improvements” after being put on
6 probation, notwithstanding the fact her supervisor had earlier assured her “on two separate
7 occasions . . . that he was getting positive feedback on her progress.” Docket No. 68 at ¶¶12-14.

8 **II. PROCEDURAL BACKGROUND**

9 As the court has said before, the procedural history in this case is a bit involved.² On
10 June 21, 2007, Plaintiff initiated this action in the United States District Court for the Central
11 District of California, by filing a complaint alleging wrongful retaliatory termination, in violation
12 of Section 1102.5 of the California Labor Code, and wrongful termination in violation of public
13 policy, based on the policies underlying Section 1102.5 of the California Labor Code as well as
14 the California Fair Employment and Housing Act. Docket No. 1. On July 17, 2007, Defendant
15 moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and
16 also moved to strike portions of the complaint. Docket Nos. 7-10. On August 23, 2007, the
17 Central District granted Defendant’s motion as to the first claim (on account of failure to exhaust
18 administrative remedies) and denied it as to the second claim, and denied the motion to strike as
19 moot. Docket No. 16.

20 On September 7, 2007, Plaintiff filed her FAC. Docket No. 26. On October 22, 2007,
21 Defendant moved to transfer this case to this court, pursuant to Section 1404(a) of Title 28,
22 United States Code. Docket No. 28. The Central District granted this motion, over Plaintiff’s
23 opposition, on November 20, 2007. *See* Docket Nos. 35, 36.

24 On June 23, 2008, Defendant moved to dismiss the FAC. Docket Nos. 47, 48. On
25 September 5, 2008, Plaintiff opposed Defendant’s motion to dismiss. Docket No. 57. Defendant

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27 ² *See* Docket No. 66 at 3:5.

1 replied to Plaintiff's opposition on September 12, 2008. Docket No. 58.

2 Then, on October 22, 2008—before the court had ruled on Defendant's motion to dismiss
3 the FAC—Plaintiff moved for leave to file her SAC, pursuant to Rule 15(a) of the Federal Rules
4 of Civil Procedure. Docket No. 60. On November 19, 2008, Defendant opposed this motion.
5 Docket No. 64. Plaintiff replied to Defendant's opposition on November 26, 2008. Docket No.
6 65. On January 16, 2009, this court granted Plaintiff's motion to amend and denied as moot
7 Defendant's motion to dismiss the FAC. Docket No. 66.

8 Finally, on January 23, 2009, Plaintiff filed her SAC. Docket No. 68. The SAC makes
9 two claims: Workplace Retaliation in Violation of the False Claims Act, 31 U.S.C. § 3730(h)
10 ("Claim 1"), and Wrongful Termination in Violation of Public Policy ("Claim 2"). *Id.* at ¶¶15-
11 29. On February 17, 2009, Defendant moved to dismiss the SAC, pursuant to Rule 12(b)(6) of
12 the Federal Rules of Civil Procedure. Docket Nos. 69, 70. Plaintiff opposed this motion on
13 March 3, 2009. Docket No. 71. Defendant replied on March 10, 2009. Docket No. 72.

14 **III. JURISDICTION AND VENUE**

15 The court has jurisdiction over both of Plaintiff's claims. Claim 1 is within the court's
16 federal question jurisdiction. *See* 28 U.S.C. § 1331. Claim 2 is within the court's diversity
17 jurisdiction, as well as its supplemental jurisdiction. *See id.* §§ 1332, 1367.

18 Venue is proper in this judicial district, the District of Guam, because Defendant conducts
19 business here and because a substantial part of the events or omissions giving rise to Plaintiff's
20 claims occurred here. *See* 28 U.S.C. § 1391; *see also* Docket Nos. 28-31.

21 **IV. APPLICABLE STANDARDS**

22 A motion to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure
23 tests the legal sufficiency of the complaint. Such a motion "is viewed with disfavor and is rarely
24 granted." *Gilligan v. Jamco Develop. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (internal quotes
25 omitted).

26 Under 12(b)(6) analysis, the complaint must be construed on the assumption that all of its
27 allegations are true, even if doubtful in fact. *Bell Atlantic Corp. v. Twombly*, 550 US 544, 556
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1 (2007) (well-pleaded complaint may proceed even if it appears “that a recovery is very remote
2 and unlikely”). Similarly, the court must accept all reasonable inferences to be drawn from the
3 facts. *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). However, the court need not accept as
4 true conclusory allegations, legal characterizations, unreasonable inferences or unwarranted
5 deductions of fact. See *Beliveau v. Caras*, 873 F. Supp. 1391, 1395-96 (C.D. Cal. 1995);
6 *Transphase Systems, Inc. v. Southern Calif. Edison Co.*, 839 F. Supp. 711, 718 (C.D. Cal. 1993).

7 An FCA retaliation claim “does not require a showing of fraud and therefore need not
8 meet the heightened pleading requirements of Rule 9(b).” *Mendiondo v. Centinela Hosp. Med.*
9 *Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008) (quoting *United States ex rel. Karvelas v.*
10 *Melrose-Wakefield Hosp.*, 360 F.3d 220, 238 n. 23 (1st Cir. 2004)). “Where, as here, the
11 heightened pleading standard of Rule 9(b) does not apply, the complaint ‘need only satisfy the
12 Rule 8(a) notice pleading standard . . . to survive a Rule 12(b)(6) dismissal.” *Id.* at 1103-04
13 (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1062 (9th Cir. 2004)). Rule 8(a) requires
14 only “‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in
15 order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it
16 rests.’” *Twombly*, 550 U.S. at 555 (quoting Fed. R. Civ. P. 8(a)(2)). The complaint need not
17 contain detailed factual allegations, but it must provide more than “a formulaic recitation of the
18 elements of a cause of action.” *Id.*

19 In short, it must allege “enough facts to state a claim that is plausible on its face.” *Id.* at
20 570. If “plaintiffs [do] not nudg[e] their claims across the line from conceivable to plausible,
21 their complaint must be dismissed.” *Id.* Conversely, a complaint that *does* state “plausible”
22 claims should *not* be dismissed. “Dismissal under Rule 12(b)(6) is appropriate only where the
23 complaint lacks a cognizable legal theory *or* sufficient facts to support a cognizable legal theory.”
24 *Mendiondo*, 521 F.3d at 1104 (emphasis added).

1 **V. ANALYSIS**

2 **A. Claim 1, Workplace Retaliation in Violation of the False Claims Act, Is**
3 **Plausible and Therefore Adequately Alleged**

4 Defendant maintains that Claim 1 should be dismissed because it fails to state a claim
5 upon which relief may be granted. *See, e.g.*, Docket No. 70 at 4:6-10:25. The court disagrees.
6 Defendant’s account of the law is incorrect; on a correct account of the law, Claim 1 clearly
7 states a claim upon which relief may be granted. Moreover, Claim 1 is adequately alleged even
8 on Defendant’s incorrect account of the law. As such, Defendant’s argument fails as to Claim 1.

9 **1. Defendant’s account of the law is incorrect**

10 “A plaintiff alleging a[n] FCA retaliation claim must show three elements: (1) that he or
11 she engaged in activity protected under the statute; (2) that the employer knew the plaintiff
12 engaged in protected activity; and (3) that the employer discriminated against the plaintiff
13 because he or she engaged in protected activity.” *Mendiondo*, 521 F.3d at 1103. Engaging in
14 “protected activity” means (i) having a reasonable belief that someone was possibly committing
15 fraud against the government, and (ii) investigating that possible fraud. *Id.* at 1104.

16 Defendant argues that Plaintiff cannot have engaged in “protected activity” unless she
17 reasonably believed that her *employer*, and not any other party, was the entity committing fraud
18 against the government. *See, e.g.*, Docket No. 70 at 10:21-22. This is wrong, as will be shown
19 by an analysis of the statutory language, the relevant case law, and the policy underlying the
20 FCA.

21 **i. Statutory language**

22 First, the statutory language does not support Defendant’s account. The FCA retaliation
23 provision provides that “[a]ny employee who is discharged . . . by his or her employer because of
24 lawful acts done by the employee on behalf of the employee or others in furtherance of an action
25 under this section, *including investigation for . . . an action filed or to be filed under this section*,
26 shall be entitled to all relief necessary to make the employee whole.” 31 U.S.C. § 3730(h)
27 (emphasis added). The plain language, then, gives a cause of action to a person who was fired
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1 for engaging in lawful actions “in furtherance” of an FCA investigation. The statute says nothing
2 about who the target of the FCA investigation must be. *See also United States ex rel. Satalich v.*
3 *City of Los Angeles*, 160 F. Supp. 2d 1092, 1107 (C.D. Cal. 2001) (“The language of [Section
4 3730(h)] precludes *any employer* from retaliating against an employee for engaging in lawful
5 actions that further an FCA claim or investigation, irrespective of whether it is the employer that
6 is the target of the FCA investigation.”) (emphasis in original). *Cf. United States ex rel. Kent v.*
7 *Aiello*, 836 F. Supp. 720, 724 (E.D. Cal. 1993) (“It appears relatively clear that properly read, the
8 statute defines the class of plaintiffs who may bring suit under 31 U.S.C. § 3730(h) rather than
9 those against whom suit may be brought. That is to say that while it is true that under the statute
10 a plaintiff must have been an employee, the statute says nothing about the class of defendants.”).³

11 **ii. Relevant case-law**

12 The second reason Defendant’s account of the law is wrong that the relevant case-law
13 directly contradicts it. Courts that actually considered the issue have held that “protected
14 activity” under Section 3730(h) may be found where a plaintiff reasonably believed that her
15 employer, or a related third party, was possibly committing fraud against the government. For
16 example, the *Satalich* court rejected the view that Section 3730(h) is “so limited as to protect
17 only those whistleblowers who investigate matters which could lead to a viable FCA action
18 against their employers.” *Satalich*, 160 F. Supp. 2d at 1108. The court pointed out that “[t]he
19 statute does *not* read: ‘Any employee who is discharged by his or her employer because of lawful
20 acts done by the employee . . . in furtherance of an action against the employer under this

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22 ³ In fact, the statutory language makes it fairly clear that the target of the FCA investigation may be an unrelated
23 party. Section 3730 provides for “a civil action for a violation of section 3729.” *Id.* § 3730(b)(1). Section 3729
24 imposes liability on, *inter alia*, any person who “knowingly presents, or causes to be presented, to an officer or employee
25 of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for
26 payment or approval.” *Id.* § 3729(a)(1). And “claim” is defined to include “any request or demand, whether under a
27 contract or otherwise, for money or property *which is made to a contractor* . . . if the United States Government provides
28 *any* portion of the money or property which is requested or demanded, or if the Government will reimburse such
contractor . . . for any portion of the money or property which is requested or demanded.” *Id.* § 3729(c) (emphasis
added). *See also* S. Rep. No. 110-507, at 15 (2008) (“[L]iability under 3729(a) attaches whenever a person knowingly
makes a false claim to obtain money or property, any part of which is provided by the Government without regard to
whether the wrongdoer deals directly with the Federal Government; with an agent acting on the Government’s behalf;
or with a third party contractor, grantee, or other recipient of such money or property.”).

1 section” *Id.* (emphasis in original). “Rather,” the court held, “the statute protects
2 employees who are retaliated against for investigating or prosecuting FCA actions against their
3 employers and third parties.” *Id.* Thus, the *Satalich* court held that the plaintiff had adequately
4 stated an FCA retaliation claim by alleging that he was fired after bringing a subcontractor’s
5 allegedly fraudulent conduct to the attention of his employer, a municipality. *Id.* See also
6 *Nguyen v. City of Cleveland*, 121 F. Supp. 2d 643, 648-49 (N.D. Ohio 2000) (holding that the
7 FCA “reaches an employer who discriminates against an employee, at the behest of or on behalf
8 of another, when it is the other that seeks to retaliate against the employee for protected
9 conduct”); *United States ex rel. Lang v. Northwestern University*, No. 04 C 3290, 2005 WL
10 670612, at *2 (N.D. Ill. Mar. 22, 2005) (noting that Section 3730(h) “contains no language
11 requiring proof that the retaliation was for protected activity involving a false claim by [the
12 plaintiff’s] employer” and holding that “[t]here is nothing in the language of § 3730(h) that
13 precludes a claim for retaliation in a situation where the employer learns that the employee has
14 engaged in protected activity regarding a false claim by, for example, a related entity . . . , and for
15 that reason terminates the employee.”).

16 Defendant’s attempts to circumvent this case-law do not succeed. Defendant cites cases
17 for the proposition that the retaliation provision of the FCA protects only those whistleblowers
18 “who come forward with evidence their *employer* is defrauding the government.” Docket No. 70
19 at 7:12-13 (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269) (emphasis added
20 by Defendant). See also *id.* at 6:12-8:16; Docket No. 72 at 3:12-22 (citing, *inter alia*,
21 *Mendondo*, 521 F.3d at 1103-04; *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab*, 275 F.3d 838,
22 845 (9th Cir. 2002); *Fanslow v. Chicago Mfg. Ctr.*, 384 F.3d 469, 480 (7th Cir. 2004); *Wilkins v.*
23 *St. Louis*, 314 F.3d 927, 933 (8th Cir. 2002)). These cases do not support Defendant’s argument,
24 because not one of them considered the issue at hand—namely, whether “protected activity”
25 under Section 3730(h) requires a showing that the plaintiff reasonably believed that her
26 employer, and *only* her employer, was possibly committing fraud against the government. In its
27 discussion, Defendant repeatedly underlines words and phrases like “defendant,” “employer,”
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1 and “their employer,” to make it seem, presumably, that the cited cases *did* consider the issue.
2 But this court is not so easily convinced.⁴ The issue simply is not addressed in any of
3 Defendant’s cases. “Questions which merely lurk in the record, neither brought to the attention
4 of the court nor ruled upon, are not to be considered as having been so decided as to constitute
5 precedents.” *Webster v. Fall*, 266 U.S. 507, 511 (1925). Defendant cannot use underlining to
6 transmute an issue that “merely lurk[s] in the record” into one that was actually considered and
7 resolved.

8 Also, Defendant characterizes *Satalich* and *Nguyen* as applicable only upon an allegation
9 of a conspiracy between the employer and the third party. *See* Docket No. 70 at 8:19-21. This is
10 inaccurate. The *Satalich* plaintiff did “appea[r] to allege” a conspiracy, but this fact did not enter
11 into the court’s analysis of the scope of Section 3730(h); it was only mentioned, in *dicta*, as a
12 possible source of motive. *Satalich*, 160 F. Supp. 2d at 1108. Similarly, while *Nguyen* appears
13 to contain facts suggesting concerted action, there is no allegation of conspiracy—indeed, the
14 word “conspiracy” does not even appear in the text of the opinion.⁵ At any rate, even if the rules
15 laid down in *Satalich* and *Nguyen* are taken to require an allegation of conspiracy or concerted
16 action, Plaintiff’s SAC does allege facts that allow for an inference of some kind of concerted
17 action between BAH and EA. *See* Docket No. 68 at ¶¶ 9-10, 12-13; *cf. Mendiondo*, 521 F.3d at
18 1104 (dismissal under Rule 12(b)(6) not appropriate where has “sufficient facts to support a
19 cognizable legal theory”) (emphasis added). As for *Lang*, that opinion contains no mention of
20 conspiracy or concerted action. As such, Defendant’s attempt to distinguish these cases fails.

21 **iii. Policy concerns of the False Claims Act**

22 The third reason why Defendant’s account of the law is wrong is that it is at odds with the
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24 ⁴ Defendant generally indicated where it had added emphasis, but failed to do so a few times. *See, e.g.*, Docket
25 No. 70 at 4:17, 8:11-12; Docket No. 72 at 3:19. These failures are most likely oversights. However, since Defendant’s
26 argument on this point is nothing other than selective use of underlining, they could be viewed as serious distortions of
case language. Accordingly, Defendant is urged to be more careful in its representations to this court.

27 ⁵ In light of this fact, the court does not understand Defendant’s assertion that “[t]he decision in *Nguyen, supra*,
28 also involved a conspiracy between the employer and a third party.” Docket No. 70 at 9:27-28.

1 policy underlying the FCA. For example, in its Report on the 1986 Amendments to the FCA, the
2 United States Senate opined that

3 The “protected activity” under this section includes any “good
4 faith” exercise of an individual “on behalf of himself or others of
5 any option afforded [*sic*] by this Act, including investigation for,
6 initiation of, testimony for, or assistance in an action filed or to be
7 filed under this act.” Consequently, the Committee believes
8 protection should extend not only to actual *qui tam* litigants, but
9 those who assist or testify for the litigant, as well as those who
10 assist the Government in bringing a false claims action. *Protected
11 activity should therefore be interpreted broadly.*

12 S. Rep. No. 99-345, at 34 (1986) (emphasis added). More recently, the Senate has expressed its
13 concern that, “[w]ith such a great potential for fraud against the Government, it is important that
14 the [Committee on the Judiciary] revisit the FCA and correct erroneous court interpretations that
15 have limited the scope and application of the FCA in contravention of Congress’s intent in
16 passing the 1986 Amendments.” S. Rep. No. 110-507, at 6 (2008) (emphasis added). The
17 Senate reiterated these ideas in its March 23, 3009 report on the “Fraud Enforcement and
18 Recovery Act of 2009,” wherein it declared its intent to

19 improv[e] one of the most potent civil tools for rooting out waste
20 and fraud in Government—the False Claims Act. The
21 effectiveness of the False Claims Act has recently been
22 undermined by court decisions which limit the scope of the law
23 and, in some cases, allow subcontractors paid with Government
24 money to escape responsibility for proven frauds. The False
25 Claims Act must be corrected and clarified in order to protect from
26 fraud the Federal assistance and relief funds expended in response
27 to our current economic crisis.

28 S. Rep. 111-10 (2009).

29 In the same vein, the United States House of Representatives has recently expressed its
30 disapproval of “court decisions [that] have created a complex patchwork of procedural and
31 jurisdictional hurdles that have often derailed meritorious actions and discouraged private
32 citizens from filing *qui tam* actions.” H.R. Rep. 111-97 (2009). The House stressed the need to
33 “preven[t] dismissals of certain *qui tam* actions” and to “strengthe[n] anti-retaliation
34 protections,” noting that such an approach “is particularly relevant during this period of
35 *increased reliance on private contractors to perform what have traditionally been viewed as*

1 *governmental functions.” Id.* (emphasis added).

2 The overall point, then, is that Congress has signaled that the FCA should be interpreted
3 quite broadly so that its protections are put to work. *Cf. Kent*, 836 F. Supp. at 725 (“[A]s the
4 high court has explained, in statutes of this type the remedial purpose of the statute counsels a
5 broad reading. Whistleblower protection statutes are remedial in nature and thus should be
6 liberally construed.”) (internal citation omitted) (*citing NLRB v. Hearst Publ’ns*, 322 U.S. 111,
7 124 (1944)). Though such signals are not statements of law, they are generally relevant to the
8 enterprise of statutory interpretation. *See, e.g., Landgraf v. USI Film Prod.*, 511 U.S. 244,
9 262-63 (1994). As such, these statements of legislative history constitute additional reasons to
10 reject Defendant’s interpretation of the FCA, according to which Plaintiff cannot have engaged in
11 “protected activity” unless she reasonably believed that her *employer*, and not any other party,
12 was the entity committing fraud against the government. That is not the broad, liberal reading
13 that Congress and the Supreme Court have called for.

14 Thus, the statutory language, the relevant case-law, and the policy concerns underlying
15 the FCA all persuade the court that engaging in “protected activity” under Section 3730(h) means
16 (i) having a reasonable belief that an employer or a related third party was possibly committing
17 fraud against the government, and (ii) investigating that possible fraud.

18 **2. On a correct account of the law, Plaintiff has stated a claim under the**
19 **False Claims Act**

20 Again, “[a] plaintiff alleging a[n] FCA retaliation claim must show three elements: (1)
21 that he or she engaged in activity protected under the statute; (2) that the employer knew the
22 plaintiff engaged in protected activity; and (3) that the employer discriminated against the
23 plaintiff because he or she engaged in protected activity.” *Mendiondo*, 521 F.3d at 1103. And,
24 as demonstrated above, engaging in “protected activity” under Section 3730(h) means (i) having
25 a reasonable belief that an employer *or a related third party* was possibly committing fraud
26 against the government, and (ii) investigating that possible fraud.

27 On that (correct) account of the law, Plaintiff has adequately alleged facts in accordance
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1 with the elements of an FCA retaliation claim. As to element (1), Plaintiff describes her
2 reasonable belief in possibly fraudulent billing activities by both Defendant and its sub-
3 contractor, EA, and her investigations into these activities. *See* Docket No. 68 at ¶¶11-14.
4 Though most of Plaintiff’s allegations focus on EA’s activities, Plaintiff also clearly alleges that,
5 at some time between January and April of 2006, she discovered evidence that BAH had over-
6 billed the USAF. *Id.* at ¶12. This evidence took the form of “invoices indicat[ing] that the actual
7 hours of fieldwork did not match the amount charged for the fieldwork.” *Id.* As to element (2),
8 Plaintiff states that she presented the findings of her investigations to her employer on May 11,
9 2006. *See id.* at ¶14. This allegation sufficiently pleads that her employer knew she was engaged
10 in protected activity. *See Mendiondo*, 521 F.3d at 1104. Finally, as to element (3), Plaintiff
11 states that Defendant terminated her because she “investigated, reported, complained about, took
12 actions to expose, and refused to cover up [Defendant’s] billing practices amounting to fraud
13 against the United States government.” Docket No. 68 at ¶19. At the pleading stage of an FCA
14 case, it suffices for a plaintiff to simply give notice that she believes she was terminated because
15 of her investigations into the practices specified in the complaint. *See Mendiondo*, 521 F.3d
16 1104.

17 **3. Even on Defendant’s incorrect account of the law, Plaintiff has stated**
18 **a claim under the False Claims Act**

19 Even if it were the case that Plaintiff could not have engaged in “protected activity”
20 unless she reasonably believed that *her employer*, and not any other party, was the entity
21 committing fraud against the government, the court still finds that Plaintiff has stated a retaliation
22 claim under the FCA. This is because, as stated above, Plaintiff clearly alleges that, at some time
23 between January and April of 2006, she discovered evidence that BAH itself had over-billed the
24 USAF, that she brought this fact to their attention, and that she was terminated for doing so.
25 Docket No. 68 at ¶12. Her evidence consists of “invoices indicat[ing] that the actual hours of
26 fieldwork did not match the amount charged for the fieldwork.” *Id.*
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1 Defendant labels this allegation “conclusory.” *See, e.g.*, Docket No. 70 at 5:12. The court
2 disagrees with this label. In the legal context, the term “conclusory” means “expressing a factual
3 inference without expressing the fundamental facts on which the inference is based.” Bryan A.
4 Garner, *Modern Legal Usage* 191 (2d ed. 1995). Here, Plaintiff’s allegation is not conclusory
5 because it expresses a factual inference (that BAH over-billed the USAF) *and* expresses the
6 fundamental facts on which that inference is based (that, as shown by certain invoices, the actual
7 hours of work did not match the amount charged for the work).

8 Moreover, contrary to Defendant’s assertions—*see, e.g.*, Docket No. 70 at 5
9 n.1—Plaintiff’s discovery responses support this allegation. For example, in her interrogatory
10 responses, Plaintiff states: “[BAH employee] James Rosacker was copied on all these emails, and
11 he was aware of the billing problems I discovered. *Rosacker made changes to Task Order 14*
12 *(see mod 2) dated 26 August 2004 which resulted in an additional \$252,000 payment to EA for a*
13 *site (AOC 81) for which EA had not performed the work claimed in the payment request.”*
14 Docket No. 70, Exh. 1, at 2 (emphasis added). By ascribing a causal role to a BAH employee in
15 a particular instance of over-billing, this response states the specific facts underlying the assertion
16 that BAH over-billed the USAF.

17 At any rate, the court rejects the contention that, in this pre-discovery stage of the
18 proceedings, Plaintiff should somehow have evidence at hand to support her claims. Generally, a
19 Rule 12(b)(6) motion precedes any discovery by plaintiff, as the very “purpose of [the motion] is
20 to enable defendants to challenge the legal sufficiency of complaints *without subjecting*
21 *themselves to discovery.”* *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir.
22 1987) (emphasis added). Similarly, in its May 5, 2009 report on the “False Claims Correction
23 Act of 2009,” the United States House of Representatives expressed alarm that

24 [i]n False Claims Act suits . . . many courts have required a degree
25 of specificity that is not only beyond what is necessary to give
26 defendants notice of the charges against them *but goes far beyond*
27 *the information readily available at the pleading stage to many qui*
28 *tam relators with meritorious allegations. A relator may have*
knowledge of the method of fraud employed, for example, but not
be in possession of detailed records documenting precisely how the

1 *fraud was executed.* Courts have nevertheless ruled against
2 relators who could not provide the false invoices or phoney billing
3 records, even though they are not generally available to anyone
outside a company's billing department—often without even
providing an opportunity for discovery.

4 H.R. Rep. 111-97 (2009) (footnote omitted; emphasis added).⁶ Obviously, this case is still in the
5 pleading stage. Plaintiff thus cannot realistically be expected to “be in possession of detailed
6 records documenting precisely how the [alleged] fraud was executed.”

7 In sum, Defendant’s account of the law is incorrect. On a correct account of the law,
8 Claim 1 clearly states a claim upon which relief may be granted. Moreover, Claim 1 is
9 adequately alleged even on Defendant’s incorrect account of the law. As such, Defendant’s
10 argument fails as to Claim 1. The claim is adequately alleged.

11 **B. Claim 2, Wrongful Termination in Violation of Public Policy, Is Plausible**
12 **and Therefore Adequately Alleged**

13 Defendant also maintains that Claim 2 should be dismissed because it fails to state a
14 claim upon which relief may be granted. *See, e.g.*, Docket No. 70 at 10:26-11:11. The court
15 again disagrees. California law guides the court’s choice-of-law analysis, which indicates that
16 California law should apply to Claim 2 unless Guam law “materially differs” from California law
17 on the relevant point. Under Ninth Circuit law, Guam law does not materially differ from
18 California law in this manner. Thus, California law applies, and Plaintiff has adequately stated a
19 claim for relief under California law. As such, Defendant’s argument fails as to Claim 2.

20 **1. California law guides the court’s choice-of-law analysis**

21 The threshold question is what body of law controls that second claim—California’s, or
22 Guam’s. Plaintiff argues the former, while Defendant argues the latter (though both also offer in-
23 the-alternative analyses). *Compare* Docket No. 71 at 9:5-6 *with* Docket No. 72 at 5:7-28.

24 The first step in answering this threshold question is to identify the proper choice-of-law
25 rule. *See* Restatement (Second) of Conflict of Laws §§ 2-7 (1971). A federal court sitting in

27 ⁶ While Plaintiff is not a *qui tam* relator, the court believes that the same concerns apply here.
28

1 diversity applies the forum state's choice-of-law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313
2 U.S. 487, 496-97 (1941); *Abogados v. AT & T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000) (same).
3 However, when a Section 1404(a) transfer is granted on the defendant's motion, "the transferee
4 court must follow the choice-of-law rules of the transferor court." *Muldoon v. Tropitone*
5 *Furniture Co.*, 1 F.3d 964, 965 (9th Cir. 1993) (citing *Van Dusen v. Barrack*, 376 U.S. 612
6 (1964)). This is because "a change of venue under § 1404(a) generally should be, with respect to
7 state law, but a change of courtrooms." *Van Dusen*, 376 U.S. at 639. See also *Ferens v. John*
8 *Deere Co.*, 494 U.S. 516, 524-25 (1990) ("choice-of-law rules should not change following a
9 (Section 1404) transfer initiated by a defendant"); *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d
10 1207, 1210 (9th Cir. 2001) (same); *Newton v. Thomason*, 22 F.3d 1455, 1459 (9th Cir. 1994)
11 (same); *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1191 (S.D. Cal.
12 2007) (same). Since this case was transferred from the Central District of California to this court
13 by Defendant's Section 1404 motion, then, California law should guide the court's choice-of-law
14 analysis.

15 Defendant does not seem to agree that California law should guide the court's choice-of-
16 law analysis. See, e.g., Docket No. 72 at 6:3-4. However, Defendant makes no good argument
17 against this result. First, Defendant puts heavy emphasis on the word "generally" in *Van Dusen's*
18 formulation of the principle that "a change of venue under § 1404(a) generally should be, with
19 respect to state law, but a change of courtrooms." See Docket No. 72 at 4:28-5:6 (discussing *Van*
20 *Dusen*, 376 U.S. at 639)) (emphasis added).⁷ Defendant insists that this adverb is a "very
21 important" limitation. *Id.* at 5:4. While that may be, it is a limitation that deals with issues not
22 present here—namely, *forum non conveniens* and lack of personal jurisdiction.⁸ See *Van Dusen*,

24 ⁷ Defendant also mistakenly attributes the following sentence to *Van Dusen*: "[g]enerally, where a defendant
25 in a diversity case obtains a transfer, the transferee district court must be obligated to apply the state law that would have
26 been applied if there had been no change of venue." Docket No. 72 at 4:28-5:2. This sentence does not appear in *Van*
Dusen.

27 ⁸ *Van Dusen* also suggests that another limitation on its principle might be the procedural variant of a Section
28 1404 transfer made on a plaintiff's motion. *Van Dusen*, 376 U.S. at 640. However, the Court has since decided that the
Van Dusen principle applies "regardless of who makes the § 1404(a) motion." *Ferens*, 494 U.S. at 531.

1 376 U.S. at 640. Second, Defendant appears to suggest that *Van Dusen* and its progeny are
2 inapplicable “because the connection between the facts of the case and the laws of the State of
3 California are [*sic*] so minimal.” Docket No. 72 at 5:7-9. But it is not clear what relevance this
4 statement has for the selection of the applicable choice-of-law rule, since the cases state in
5 “bright line” manner that “choice-of-law rules should not change following a (Section 1404)
6 transfer initiated by a defendant.” *Ferens*, 494 U.S. at 525. If anything, the statement might be
7 relevant to the (later) selection of the applicable *substantive* law. But that is a separate issue, and
8 it is wrong to run the two issues together. Third, BAH claims that it “has fully briefed the Court
9 on the myriad cases that enable this Court to apply Guam’s substantive law to Plaintiff’s SAC.”
10 Docket No. 72 at 5:20-22. Again, this point is not relevant here. The court has no doubt that it
11 may *ultimately* apply Guam’s substantive law to Plaintiff’s second claim for relief; the question
12 at the outset, though, is what choice-of-law rule to adopt in order to properly determine which
13 jurisdiction’s substantive law applies. And of BAH’s “myriad” cases, not one shows a transferee
14 court applying the choice-of-law rule of its forum state in order to resolve a choice-of-law issue.
15 Thus, the cases are all off-point.⁹

16 In sum, given the mass of cases indicating that “choice-of-law rules should not change
17 following a (Section 1404) transfer initiated by a defendant” and Defendant’s inability to explain
18 why those cases should not apply here, California law will guide the court’s choice-of-law
19 analysis.

20 **2. Choice-of-law analysis indicates that California law should apply**
21 **unless Guam law “materially differs” from California law**

22 Under the first step of California’s approach to choice-of-law analysis, “the foreign law
23 proponent must identify the applicable rule of law in each potentially concerned state and must
24

25 ⁹ Defendant’s two principal cases here—*Jenkins v. Armstrong World Indus., Inc.*, 643 F. Supp. 17 (D. Idaho
26 1985), *vacated by* 820 F.2d 329 (9th Cir. 1987), and *Les Schwimley Motors, Inc. v. Chrysler Motors Corp.*, 270 F. Supp.
27 418 (E.D. Cal. 1967)—are also of highly questionable value. *See, e.g., Gallagher v. Allied Weldery, Inc.*, 972 F.2d 1339
28 (9th Cir. 1992) (Table) (criticizing appellant for relying on *Jenkins* because it had been vacated); 15 Charles Alan Wright
et al., *Federal Practice & Procedure* § 3846 n. 25 (finding *Les Schwimley Motors* “persuasively criticized” in 56 *Geo. L.J.*
1004 (1968)). A Westlaw citation search shows that both cases are dead as precedent.

1 show it materially differs from the law of California.” *Washington Mutual Bank, FA v. Superior*
2 *Court*, 15 P.3d 1071, 1080 (Cal. 2001).¹⁰ If the applicable rules of law do not “materially
3 diffe[r],” the analysis ends—“there is no problem and the trial court may find California law
4 applicable to [the claim].” *Id.*

5 As Defendant makes clear, the applicable rules of law are the at-will employment
6 doctrines of California and Guam. *See* Docket No. 72 at 6:1-9:12. The point on which it must
7 be determined whether these rules materially differ is whether both doctrines admit of a “public
8 policy exception.” Defendant does not dispute that California law recognizes such an exception,
9 but vigorously argues that Guam law does not recognize it. *See id.*¹¹ Plaintiff argues, just as
10 vigorously, that Guam law does recognize such an exception—or, at least, should be taken to do
11 so under Ninth Circuit law. *See* Docket No. 71 at 13:24-16:22. Thus, the question at this point
12 is whether Plaintiff is right. If so, California law applies, under *Washington Mutual Bank*; if not,
13 the choice-of-law analysis continues.

14 **3. Under Ninth Circuit law, Guam law should be taken to recognize a**
15 **public policy exception to the at-will employment doctrine, so it does**
16 **not “materially differ” from California law**

17 Both Plaintiff and Defendant acknowledge that the Supreme Court of Guam has not
18 decided whether Guam law recognizes a public policy exception to the at-will employment
19 doctrine.¹² *See, e.g.,* Docket No. 71 at 13:25-26; Docket No. 72 at 7:15-18.

20 ¹⁰ In its discussion of California’s approach to choice-of-law analysis, Defendant cites *Hite v. Triton Energy*
21 *Ltd.*, 35 Fed. Appx. 434 (9th Cir. June 5, 2002) (unpublished). *Hite*, as an unpublished order issued before January 1,
2007, should not be cited to this court. *See* 9th Cir. R. 36-3(c).

22 ¹¹ Of course, the court realizes that Defendant *does* dispute that Plaintiff has successfully stated a claim under
23 the public policy exception to the at-will employment doctrine. *See* Docket No. 72 at 7:23-9:12. The court will come
24 to that challenge later; here, it simply points out that Defendant does not deny that such an exception exists under
25 California law.

26 ¹² Defendant states that “[t]he Supreme Court of Guam [has] declined to adopt the argument being made by
27 the Plaintiff in the case at bar” Docket No. 72 at 7:11-12 (*citing Quijano v. Atkins-Kroll, Inc.*, 2008 Guam 14 ¶
28 30). However, the cited case only shows the Supreme Court of Guam declining to adopt a rule that would “create for-
cause employment rights based only on evidence of raises, promotions and benefits.” *Id.* That particular rule is
considerably narrower than the public policy exception, and considerably more burdensome on employers, such that its
rejection is not relevant to the court’s analysis. However, the *Quijano* court even suggests, in *dicta*, that a public policy
exception might apply to Guam’s at-will employment statute. *See id.* ¶ 7 (stating that the at-will presumption of Section

1 “When a decision turns on applicable state law and the state’s highest court has not
2 adjudicated the issue, a federal court must make a *reasonable determination* of the result the
3 highest state court would reach if it were deciding the case.” *Medical Lab. Mgmt. Consultants v.*
4 *American Broadcasting Companies, Inc.*, 306 F.3d 806, 812 (9th Cir. 2002) (emphasis added);
5 *see also Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 885 n. 7 (9th Cir. 2000) (same);
6 *Aetna Cas. & Sur. Co. v. Sheft*, 989 F.2d 1105, 1108 (9th Cir. 1993) (same). To make such a
7 “reasonable determination,” the federal court looks to “intermediate appellate court decisions,
8 decisions from other jurisdictions, statutes, treatises, and restatements as guidance.” *McCoy v.*
9 *Chase Manhattan Bank, USA*, 559 F.3d 963, 970 (9th Cir. 2009); *see also Arizona Elec. Power*
10 *Co-op., Inc. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995); *In re Kirkland*, 915 F.2d 1236, 1239
11 (9th Cir. 1990) (same). As there are no intermediate appellate courts in Guam, the court will
12 look only to decisions from other jurisdictions, statutes, treatises, and the like, giving special
13 weight to decisions from other jurisdictions. *See Vigortone AG Products, Inc. v. PM AG*
14 *Products, Inc.*, 316 F.3d 641, 644 (7th Cir. 2002) (Posner, J.) (“When state law on a question is
15 unclear . . . , the best guess is that the state’s highest court, should it ever be presented with the
16 issues, will line up with the majority of the states.”).

17 The court finds that the Supreme Court of Guam would probably hold that Guam law
18 recognizes a public policy exception to the at-will employment doctrine because most other
19 United States jurisdictions have recognized such an exception. For example, *forty-three* states
20 recognized the exception as of October 1, 2000. *See* Charles J. Muhl, “The Employment-at-will
21 Doctrine: Three Major Exceptions,” *Month. Lab. Rev.*, Jan. 2001, at 3, 4, *available at*
22 <http://www.bls.gov/opub/mlr/2001/01/art1full.pdf>.¹³ As for island territories of the United
23 States, Puerto Rico and the U.S. Virgin Islands have gone beyond the public policy exception by
24

25 55404 of Guam Code Title 18 “has been subject to several limitations,” and citing *Guz v. Bechtel Nat’l Inc.*, 8 P.3d 1089,
26 1100 (Cal. 2000), which discusses various limitations on at-will employment).

27 ¹³ The only states not recognizing the exception were Alabama, Florida, Georgia, Maine, Nebraska, New York,
28 and Rhode Island. *Id.*

1 providing *statutory* protection from arbitrary discharge, in the form of laws allowing for
2 termination of private employees only upon a showing of just cause. *See* P.R. Laws Ann. tit. 29,
3 § 185a (2006); V.I. Code Ann. tit. 24, §§ 76-79 (2007). *See also* 82 Am. Jur. 2d Wrongful
4 Discharge §§ 53-63; Mark A. Rothstein et al., 2 Employment Law § 9:1; 1 Williston on
5 Contracts § 4:23.

6 Further, as Plaintiff points out, the Guam Legislature has enacted a whistleblower
7 protection scheme at Sections 4501 through 4507 of Title 4, Guam Code Annotated. *See* Docket
8 No. 71 at 16:8-20 (*citing* 4 Guam Code Ann. §§ 4501-05).¹⁴ The court recognizes that this
9 scheme protects public employees,¹⁵ while Defendant is a private employer. Still, the Guam
10 Legislature has stated that “[Government of Guam] employees should be encouraged to disclose
11 information on actions of agencies that are not in the public interest and that legislation is needed
12 to ensure that any employee making such disclosures shall not be subject to disciplinary
13 measures or harassment by any public official.” 4 Guam Code Ann. § 4501. The court considers
14 this to be relevant evidence of Guam’s public policy, and therefore an indication that the
15 Supreme Court of Guam would be inclined to protect from retaliation employees who find
16 themselves in circumstances similar to those alleged in Plaintiff’s SAC.

17 Defendant points out that neither the Supreme Court of Guam nor the Guam Legislature
18 has explicitly recognized a public policy exception to the at-will employment doctrine, and then
19 argues that such facts constitute determinative evidence that Guam law should not be taken to
20 recognize such an exception. *See* Docket No. 72 at 7:13-20. For that kind of reasoning to be

22 ¹⁴ Defendant asserts that the court may not consider the import of these statutes because Plaintiff did not cite
23 them in her SAC. *See* Docket No. 72 at 7 n.2. However, Plaintiff has not cited the statutes as ones that somehow directly
24 authorize her claims for relief (in which case Defendant’s assertion might be valid). Rather, she has adduced them as
25 evidence that may be useful in making the “reasonable determination” called for under *Medical Laboratory Management*
26 *Consultants*. 306 F.3d at 812. Again, to make such a determination, a federal court looks to “intermediate appellate
27 court decisions, decisions from other jurisdictions, *statutes*, treatises, and restatements as guidance.” *McCoy*, 559 F.3d
28 at 970 (emphasis added). Nowhere does *McCoy*, or any other case, say that these “guidance” materials must be cited
in the underlying complaint. Indeed, such a requirement would transform the complaint into a legal brief, and would
therefore be fundamentally at odds with the “short and plain statement of the claim” style contemplated by the Federal
Rules of Civil Procedure. *See, e.g.*, Fed. R. Civ. P. 8(a).

¹⁵ It is not, however, limited to classified employees.

1 cogent, though, the operative rule would have to be something like: “when a decision turns on
2 applicable state law and the state’s highest court has not adjudicated the issue and its legislature
3 has not addressed it, a federal court should take that judicial and legislative silence as evidence of
4 rejection of that particular rule of law.” But the operative rule is different: “[w]hen a decision
5 turns on applicable state law and the state’s highest court has not adjudicated the issue, a federal
6 court must make a *reasonable determination* of the result the highest state court would reach if it
7 were deciding the case,” relying on “intermediate appellate court decisions, decisions from other
8 jurisdictions, statutes, treatises, and restatements” to do so. *Medical Lab. Mgmt. Consultants*,
9 306 F.3d at 812 (emphasis added); *McCoy*, 559 F.3d at 970. Silence is not contemplated as
10 evidence bearing on the federal court’s “reasonable determination” of what a state court or
11 legislature would do. The court thus rejects this argument.

12 In sum, based on the “decisions from other jurisdictions, statutes, treatises, and
13 restatements” that it has considered on this point, the court finds that the Supreme Court of Guam
14 would probably hold that Guam law recognizes a public policy exception to the at-will
15 employment doctrine. Since California law also recognizes a public policy exception to the at-
16 will employment doctrine, Defendant has failed to show that Guam law “materially differs from
17 the law of California.” *Washington Mutual Bank*, 15 P.3d at 1080. Thus, “there is no [choice-of-
18 law] problem and the trial court may find California law applicable to [the claim].” *Id.*

19 **4. Plaintiff states a claim for relief under California law**

20 Under California law, “an employer’s right to discharge an at-will employee is subject to
21 limits that fundamental public policy imposes.” *Green v. Ralee Engineering Co.*, 960 P.2d 1046,
22 1048 (Cal. 1998) (citing *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1332-33 (Cal. 1980)).
23 “[A]t-will employees may recover tort damages from their employers if they can show they were
24 discharged in contravention of fundamental public policy.” *Id.* In virtue of their provenance,
25 such tort claims are also known as “*Tameny* claims.” To support a *Tameny* claim, the public
26 policy must be “(1) delineated in either constitutional or statutory provisions; (2) ‘public’ in the
27 sense that it ‘inures to the benefit of the public’ rather than serving merely the interests of the
28

1 individual; (3) well established at the time of discharge; and (4) substantial and fundamental.”
2 *City of Moorpark v. Superior Court*, 959 P.2d 752, 762 (Cal. 1998) (internal quotation omitted).

3 For instance, it is established that a complaint states a *Tameny* claim when it alleges (1)
4 that the plaintiff was employed by the defendant; (2) that the defendant terminated the plaintiff’s
5 employment; (3) that the plaintiff had a reasonably based suspicion that the defendant and/or a
6 third party were engaged in fraudulent billing activities; (4) that plaintiff’s act of reporting of
7 his/her reasonably based suspicion was a motivating reason for the plaintiff’s discharge; and (5)
8 that being fired caused the plaintiff harm. See *Casella v. SouthWest Dealer Servs., Inc.*, 69 Cal.
9 Rptr. 3d 445, 455 (Cal. Ct. App. 2007) (following Judicial Council of Calif. Civil Jury Instr’n
10 No. 2430, “Wrongful Discharge / Demotion in Violation of Public Policy”).

11 In *Casella*, plaintiff Zachary Casella worked for defendant SouthWest Dealer Services,
12 Inc. (“SouthWest”) as a sales representative, selling aftermarket car products to car dealerships.
13 69 Cal. Rptr. 3d at 449. One of SouthWest’s customers was the Spreen family of dealerships.
14 *Id.* One of Casella’s duties was to create certain written reports for the Spreen dealerships. *Id.*
15 Shortly after learning how to create these written reports, Casella realized that the Spreen
16 dealerships were quoting artificially inflated base sales prices to their customers in order to entice
17 them to buy aftermarket products that Spreen would offer at artificially low prices—a process
18 called “payment packing”—and that one of the purposes of his written reports was to quantify
19 and keep track of Spreen’s payment packing. *Id.* at 449-50. In January of 2003, Casella talked
20 with some of his superiors at SouthWest about his concerns, stating that “he was concerned
21 because he thought there ‘was some type of payment packing going on’ at the Spreen dealerships
22 which might be illegal.” *Id.* at 450. Shortly thereafter, he was fired. *Id.* at 451.

23 Casella went to trial on a complaint naming SouthWest and its president as defendants.
24 69 Cal. Rptr. 3d at 448. The complaint alleged, *inter alia*, that his employment was wrongfully
25 terminated in violation of public policy “because he reported his belief that SouthWest was
26
27
28

1 participating in certain of its clients' illegal payment-packing schemes."¹⁶ *Id.* at 451. It also
2 "alleged [that] SouthWest's conduct was illegal, citing several state and federal statutes." *Id.*
3 After 23 days of trial, including 19 days of testimony, the jury found for Casella on all claims.
4 *Id.* at 452. Along the way, the trial court denied the defendants' demurrer, motion for summary
5 adjudication, motion for judgment *non obstante veredicto*, and motion for new trial. *Id.* at 451-
6 52. The defendants appealed. *Id.* at 452.

7 On appeal, the defendants challenged the verdict on the *Tameny* claim by arguing that
8 "the public policy at issue was not tethered to a constitutional or statutory provision." 69 Cal.
9 Rptr. 3d at 453. The court of appeal rejected this argument. *Id.* at 458. First, it noted that

10 [t]he jury was instructed with a modified version of [Judicial
11 Council of California Civil Jury Instruction] No. 2430 which
12 stated that in order to establish wrongful termination in violation of
13 public policy, Casella had to prove: (1) he was employed by
14 SouthWest; (2) SouthWest terminated Casella's employment; (3)
15 Casella had a reasonably based suspicion that SouthWest and/or
the Spreen dealerships were engaged in fraudulent activities; (4)
the reporting by Casella of his reasonably based suspicion that
SouthWest and/or the Spreen dealerships were engaged in
fraudulent activities was a motivating reason for Casella's
discharge; and (5) the discharge caused Casella harm.

16 *Id.* at 455 n.4 (emphasis added). Next, it noted that "[t]erm 'fraudulent activities' was defined
17 for the jury based on [California] Penal Code section 487 and its then-corresponding jury
18 instruction, [California Jury Instructions–Criminal] No. 14.05" *Id.* Finally, the court noted
19 that the jury was also instructed on aiding and abetting. *Id.* On the basis of these three facts, the
20 court of appeal held that "the policy underlying Casella's claim was indeed tethered to a statute."
21 *Id.* at 456.

22 *Casella* thus establishes that a *Tameny* claim lies on any complaint making allegations
23 that would support the jury instructions given in *Casella*. In this case, Plaintiff's complaint
24 alleges (1) that she was employed by BAH; (2) that BAH terminated her employment; (3) that

26 ¹⁶ Defendant may argue that this statement indicates that, under *Casella*, Plaintiff's SAC must allege that BAH
27 was participating in EA's fraudulent billing activities. As stated above, though, Plaintiff's SAC alleges facts from which
28 one could infer concerted action between BAH and EA. See Docket No. 68 at ¶¶ 9-10, 12-13; cf. *Mendiondo*, 521 F.3d
at 1104

1 Plaintiff had a reasonably based suspicion that BAH and EA were engaged in fraudulent billing
2 activities; (4) that Plaintiff's act of reporting of her reasonably based suspicion was a motivating
3 reason for her discharge; and (5) that being fired caused Plaintiff harm. See Docket No. 68 at
4 ¶¶ 6 (employment with BAH); 14 (termination); 8-12 (reasonably based suspicion of fraudulent
5 billing activities by BAH and/or EA); 13, 19 & 26 (reporting of suspicion as motivating reason
6 for discharge); 20, 26-29 (harm to Plaintiff). These allegations, if true, would support the jury
7 instructions given in *Casella*. And, again, Plaintiff also alleges facts that would support an
8 aiding and abetting instruction, insofar as they suggest some level of concerted action between
9 BAH and EA.¹⁷ See *id.* at ¶¶ 9-10, 12-13. Thus, under *Casella*, Plaintiff's SAC states a claim for
10 wrongful discharge in violation of public policy.

11 Defendant argues that *Casella* is inapposite because the wrongful termination claim in
12 that case "was premised on an alleged violation of [California] Penal Code § 487," while
13 Plaintiff's SAC lacks allegations that BAH violated Section 487. Docket No. 72 at 9:2-5. The
14 court rejects this argument for at least three reasons.

15 First, there is no evidence to support the statement that the wrongful termination claim in
16 *Casella* "was premised on an alleged violation of Penal Code § 487." The text of the opinion
17 only indicates that Section 487 was used to define "fraudulent activities" for the jury; it does not
18 say that the plaintiff's claim was "premiered on" that statute in any way. More to the point, there
19 is no indication that the complaint in *Casella* made any reference to Section 487.

21 ¹⁷ Defendant may argue that *Casella* is inapposite because Plaintiff's SAC does not specifically allege any
22 aiding and abetting. However, there is no indication that the complaint in *Casella* alleged aiding and abetting. In fact,
23 there is evidence that this theory was added at trial. See *Casella*, 69 Cal. Rptr.3d at 458 ("The court further stated, '[i]f
24 this case goes to a jury, and if it goes to the jury on 2430, it's got to go on fraud and aiding and abetting.'").

25 Also, in the criminal context, each charging document is read to include an aiding and abetting charge. Thus,
26 "aiding and abetting liability is implicit in every California information," and need not be specifically charged. *United*
27 *States v. Reveles-Espinoza*, 522 F.3d 1044, 1048 (9th Cir. 2008) (citing Cal. Penal Code § 971). Likewise, "aiding and
28 abetting is embedded in every federal indictment for a substantive crime." *United States v. Garcia*, 400 F.3d 816, 820
(9th Cir. 2005) (citing, *inter alia*, 18 U.S.C. § 2). Although this obviously is not a criminal case, the court does not see
why it would be problematic to apply similar reasoning here, particularly since the presumptions and proof rules set up
to protect criminal defendants are more stringent than those set up to protect civil defendants. Moreover, Defendant is
not charged with any crime. The only reason criminal statutes are at all relevant here is that they are taken to put a
defendant on notice of what California public policy is, and which aspects thereof may be implicated by firing a plaintiff.
See *Green*, 960 P.2d at 1049.

1 Second, even if the *Casella* plaintiff’s wrongful termination claim truly were “premiered
2 on” Section 487—in the sense that he cited that statute in his complaint as a relevant indicator of
3 public policy—there is no indication that this fact was analytically important, since the court of
4 appeal did not mention it in its analysis.

5 Third, even if the *Casella* plaintiff’s wrongful termination claim truly were “premiered on”
6 Section 487 and this fact somehow were analytically important, the ensuing requirement would
7 be satisfied by Plaintiff’s citation of California Penal Code Section 484 in her SAC. *See* Docket
8 No. 68 at ¶ 24. Indeed, Section 484 is broader than Section 487, in that Section 484 defines and
9 criminalizes theft *in general*, while Section 487 defines “grand theft” as a species of theft.
10 *Compare* Cal. Penal Code § 484 (West 2009) *with id.* § 487; *cf. id.* § 486 (dividing theft “into
11 two degrees,” grand theft and petty theft). And, as stated in footnote 17, *supra*, the only reason
12 criminal statutes are at all relevant in wrongful termination cases is that they are taken to put a
13 defendant on notice of what California public policy is. *See Green*, 960 P.2d at 1049. Section
14 484, being broader than Section 487, does a better job at this notice-giving, and so is, in this
15 regard, substantively “better” than Section 487.

16 Defendant also argues that “Plaintiff’s public policy claim fails because the SAC is void
17 of any factual allegations establishing that BAHI contravened the letter of the different California
18 statutory provisions relied on by Plaintiff.” Docket No. 72 at 9:9-11. The court rejects this
19 argument for two reasons.

20 First, the court disagrees that the SAC is “void of” such allegations. The allegations in
21 Paragraphs 9 through 13, if true, would likely establish that BAH had violated Section 484 of the
22 California Penal Code. *See* Docket No. 68 at ¶¶ 9-13.

23 Second, this argument assumes a standard that does not apply: the viability of Plaintiff’s
24 public policy claim does not turn on whether Defendant “contravened the letter of” any particular
25 California statute. To prove wrongful termination in violation of public policy, “an employee
26 need not prove an actual violation of law; it suffices if the employer fired him for reporting his
27 ‘reasonably based suspicions’ of illegal activity.” *Green*, 960 P.2d at 1059. It follows that a
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1 complaint for wrongful termination in violation of public policy need not allege any actual
2 violation of law, only facts supporting “reasonably based suspicions” of illegal activity.¹⁸ *Id.* See
3 also *Freund v. Nycomed Amersham*, 347 F.3d 752, 759 (9th Cir. 2003) (applying California law)
4 (rejecting argument that wrongful termination claim requires showing of actual violation of rule
5 cited as basis of public policy). As discussed, Plaintiff has alleged such facts.

6 Defendant also argues that the *Tameny* claim fails because “plaintiffs should not be
7 permitted to end run around the statutory and procedural requirements of the [FCA].” Docket
8 No. 72 at 8:1-2 (*discussing Campbell v. Aerospace Corp.*, 123 F.3d 1308 (9th Cir. 1997)). See
9 also Docket No. 70 at 15:7-17:8. This argument is incomprehensible. Defendant does not
10 explain *how* Plaintiff’s *Tameny* claim constitutes an “end run around the statutory and procedural
11 requirements of the FCA”—or, alternatively, an “attemp[t] to ‘backdoor’ a state public policy
12 claim to avoid the provisions of the [FCA].” Docket No. 70 at 16:21-22. To the extent it asserts
13 that the FCA preempts *Tameny* claims, this argument is rejected. See *Hoefer v. Fluor Daniel,*
14 *Inc.*, 92 F. Supp. 2d 1055, 1059 (C.D. Cal. 2000) (holding, on reconsideration, that the FCA does
15 not preempt *Tameny* claims for whistleblower protection); see also *Palladino ex rel. United*
16 *States v. VNA of Southern N.J.*, 68 F. Supp. 2d 455, 465-69 (D.N.J. 1999) (holding that the FCA
17 does not preempt New Jersey’s Conscientious Employee Protection Act). And, to the extent it
18 asserts that *Campbell* somehow bars Plaintiff’s *Tameny* claim, this argument is rejected.

19 *Campbell* held that while the FCA may constitute a source of public policy for a *Tameny* claim,
20 its citation as such does not implicate a “substantial, disputed question of federal law” sufficient
21 to maintain federal question jurisdiction under Section 1331 of Title 28, United States Code. See
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25 ¹⁸ This reasoning disposes of Defendant’s related point that “the allegations of the proposed SAC do not satisfy
26 [California Penal Code Section 484], which requires an intent to steal.” Docket No. 70 at 17:18-19. Defendant also
27 argues that Section 484 should not apply because, “by its own terms, [it] only applies to personal property.” *Id.* Setting
28 aside the fact that Plaintiff need not prove “an actual violation of law,” this assertion is blatantly false: beyond “personal
property,” Section 484 clearly applies to “money,” “labor,” “real property,” “credit,” and the “service of another.” Cal.
Penal Code § 484 (West 2009). Again, Defendant is urged to be more careful in its representations to this court.

1 *Campbell*, 123 F.3d at 1314-15. *Campbell* is off-point and not helpful.¹⁹

2 Finally, Defendant argues that “the proposed SAC [*sic*] also fails to state a claim because
3 the claims for emotional distress *damages* alleged by Plaintiff . . . are subject to the exclusive
4 remedy provisions of either the Guam workers [*sic*] compensation laws or the California workers
5 [*sic*] compensation laws” Docket No. 70 at 17:26-20:28; Docket No. 72 at 9:15-10:10
6 (emphasis added). The court rejects this argument for two reasons.

7 First, as a threshold matter, it is irrelevant even if correct, because “a Rule 12(b)(6)
8 motion ‘will not be granted merely because [a] plaintiff requests a remedy to which he or she
9 [may not be] entitled.’” *Massey v. Banning Unified School Dist.*, 256 F. Supp. 2d 1090, 1092
10 (C.D. Cal. 2003) (*quoting* Schwarzer et al., Rutter Group Practice Guide: Federal Civil Procedure
11 Before Trial § 9:230).

12 Second, it is incorrect. As Plaintiff has noted, “[i]n each case cited by BAH [in support
13 of this argument], the court dismissed *tort claims alleging intentional infliction of emotional*
14 *distress* under worker’s compensation exclusivity.” Docket No. 71 at 17:25-27 (emphasis in
15 original) (*citing Miklosy v. Regents of Univ. of Cal.*, 188 P.2d 629, 645-46 (Cal. 2008),
16 *Shoemaker v. Myers*, 801 P.2d 1054, 1069 (Cal. 1990), and *Chmielewski v. Target Corp.*, No.
17 B199456, 2008 WL 2042611, at *3 (Cal. Ct. App. May 14, 2008)). A *Tameny* claim is not the
18 same thing as a claim for intentional infliction of emotional distress. Thus, Defendant’s cited
19 cases do not support its argument.²⁰

20 In sum, California law guides the court’s choice-of-law analysis, which indicates that
21 California law should apply to Claim 2 unless Guam law “materially differs” from California law

23 ¹⁹ Defendant also seems to argue that the *Tameny* claim fails insofar as it relies on the False Claims Act
24 (“FCA”), 31 U.S.C. §§ 3729-33, as its “source” of public policy. See Docket No. 70 at 15:2-8 & 17:7-8. The court
25 passes over this argument, since its analysis does not depend on the FCA being a valid source of public policy for a
Tameny claim.

26 ²⁰ In fact, Defendant’s cited cases actually—and clearly—undermine its argument. See, e.g., *Miklosy*, 188 P.2d
27 at 646 (noting that “exception for conduct that ‘contravenes fundamental public policy’ [permits] a *Tameny* action to
28 proceed despite the workers’ compensation exclusive remedy rule”). Defendant is, once again, urged to be more careful
in its representations to this court.

1 on the relevant point. Under Ninth Circuit law, Guam law does not materially differ from
2 California law in this manner. Thus, California law applies, and Plaintiff has adequately stated a
3 claim for relief under California law. As such, Defendant’s argument fails as to Claim 2. The
4 claim is adequately alleged.

5 **VI. CONCLUSION**

6 Defendant has not persuaded the court to dismiss the SAC. Its argument as to Claim 1
7 fails because—as shown by an analysis of the statutory language, relevant case-law, and policy
8 concerns underlying the FCA—its account of the law is incorrect. On a correct account of the
9 law, Claim 1 clearly states a claim upon which relief may be granted. Moreover, Claim 1 is
10 adequately alleged even on Defendant’s incorrect account of the law.

11 Similarly, Defendant’s argument as to Claim 2 fails. California law guides the court’s
12 choice-of-law analysis, which indicates that California law should apply to Claim 2 unless Guam
13 law “materially differs” from California law on the relevant point. Under Ninth Circuit law,
14 Guam law does not materially differ from California law in this manner. Thus, California law
15 applies, and Plaintiff has adequately stated a claim for relief under California law.

16 For these reasons, the court **DENIES** Defendant’s motion to dismiss Plaintiff’s SAC.
17 Defendant is directed to answer Plaintiff’s SAC by June 19, 2009.²¹

18 **SO ORDERED.**



19 /s/ **Frances M. Tydingco-Gatewood**
20 **Chief Judge**
21 **Dated: Jun 09, 2009**

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²¹ See Fed. R. Civ. P. 12(a)(4)(A).
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