

US ex rel. Kelly v. Serco, Inc.

Case no. 11cv2975 /WQH-RBB (S.D.Cal. Oct. 6, 2014)

Relator alleged the Defendant failed to follow government time and cost reporting requirements. The court found that Defendant impliedly certified compliance with certain regulations. However, the court found that the regulations, which applied to the Department of Homeland Security, were not specifically incorporated into a Department of Defense contract, and therefore were not express conditions of payment. Defendant's motion for summary judgment was granted.

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

UNITED STATES OF AMERICA *ex*
rel. DARRYN KELLY,

Plaintiff,

vs.
SERCO, INC., a New Jersey
Corporation, and DOES 1-5,

Defendant.

CASE NO. 11cv2975 WQH-RBB
ORDER

HAYES, Judge:

The matters before the Court are Defendant Serco, Inc.’s Motion for Summary Judgment (ECF No. 65), Motions to File Documents Under Seal in support of its motion and reply (ECF Nos. 63, 68), and Motion to Strike testimony of Relator’s expert, Kevin Martin (ECF No. 71).

I. Background

On December 21, 2011, Relator Darryn Kelly, suing on behalf of the United States, initiated this action against Defendant Serco, Inc. based on the False Claims Act (“FCA”) by filing a Complaint in this Court under seal. (ECF No. 3). On August 9, 2012, the Court ordered that the complaint be unsealed because the United States declined to intervene. (ECF No. 8). On September 7, 2012, Relator filed a First Amended Complaint (“FAC”). (ECF No. 11). The FAC alleges that Defendant tracked its time and costs pursuant to a government project in an unreliable and fraudulent manner by failing to follow the government’s reporting requirements. Specifically,

1 Defendant haphazardly collected time entries, fraudulently reallocated time among
2 various tasks codes, and failed to track time in an automated system with the task codes
3 that the government required. The FAC alleges that Relator reported these actions to
4 a Department of Homeland Security (“DHS”) employee, and Defendant retaliated by
5 terminating him three weeks later.

6 The FAC asserts the following claims for relief: (1) submitting false claims in
7 violation of the FCA, (2) making false records material to a false or fraudulent claim
8 in violation of the FCA, (3) conspiring to violate the FCA, (4) retention of
9 overpayments in violation of the FCA, (5) retaliation in violation of California
10 Government Code section 12653(b), (6) unlawful retaliatory discharge in violation of
11 California Labor Code section 1102.5, (7) termination in violation of public policy, and
12 (8) breach of contract of continued employment. Defendant moves for summary
13 judgment on all of Relator’s claims.

14 On April 21, 2014, Defendant filed the Motion for Summary Judgment (ECF No.
15 65) concurrently with the Motion to File Documents Under Seal (ECF No. 63). On
16 May 5, 2014, Relator filed an opposition. (ECF No. 66). On May 12, 2014, Defendant
17 filed a reply with the Motion to File Documents under Seal and the Motion to Strike.
18 (ECF Nos. 68, 70, 71). On May 16, 2014, Relator filed an opposition to the Motion to
19 Strike. (ECF No. 72). On May 27, 2014, Defendant filed a reply in support of the
20 Motion to Strike. (ECF No. 75).

21 **II. Facts**

22 **A. The AWS Project**

23 On an unspecified date, the Department of Homeland Security (“DHS”)
24 contracted the U.S. Navy, Space and Naval Warfare Systems (“SPAWAR”) to upgrade
25 the wireless communications systems in towers and facilities situated along the
26 U.S./Mexico border. (Serco’s SSUF ¶¶ 1-3, ECF No. 70-1 at 2-3). This project became
27 known as the Advanced Wireless Systems Spectrum Relocation Project (“AWS
28 Project”). *Id.* SPAWAR enlisted the services of Defendant Serco to work on the

1 project. SPAWAR and Defendant did not need to enter into an AWS-specific contract
2 because they had two ongoing contracts (known as “Indefinite Duration, Indefinite
3 Quantity” contracts), the “NESS Contract” and “SPECTECH Contract.” *Id.* ¶¶ 7, 9, 11.
4 Pursuant to the NESS and SPECTECH contracts, SPAWAR would submit individual
5 “Delivery Orders” to Defendant, detailing the work that Defendant was to complete for
6 pay. *Id.* ¶¶ 12, 17, 19-24. SPAWAR submitted a total of seven Delivery Orders to
7 Defendant for work on the AWS Project. Defendant performed work under six of these
8 Delivery Orders, and periodically submitted invoices, known as public vouchers, to the
9 Defense Finance and Accounting Service (“DFAS”) in order to receive payment for
10 work done under the Delivery Orders. *Id.* ¶¶ 31-32. It is undisputed that these vouchers
11 “constitute Serco’s demands for payment on the U.S. government for its work on the
12 AWS project.” *Id.* ¶ 33.

13 The first Delivery Order related to the AWS Project was Delivery Order No. 49,
14 which covered a period of performance from September 2, 2009 to September 1, 2010.
15 *Id.* ¶ 17. Under Delivery Order 49, Defendant submitted a total of 19 vouchers for a
16 total of \$876,758.45. *Id.* ¶ 36. The second Delivery Order related to the AWS Project
17 was Delivery Order No. 54, which covered a period of performance from January 25,
18 2010 to January 24, 2011. *Id.* ¶ 22. Under Delivery Order 54, Defendant submitted a
19 total of 28 vouchers for a total of \$4,623,908.61. *Id.* ¶ 37. Both of these Delivery
20 Orders were given pursuant to the Ness Contract. *Id.* ¶¶ 36-37.

21 **B. The Earned Value Management System (“EVMS”) and Hours and**
22 **Task Recording**

23 The EVMS is an accounting and management tool required to be implemented
24 in the performance of certain federal government contracts. The guidelines for utilizing
25 this system are laid out in the American National Standards Institute/Electronic
26 Industries Alliance Standard 748 (“ANSI 748”). *See* Pl.’s Ex. B, ECF No. 66-4. The
27 Federal Regulations call for government contractors performing certain government
28 contracts to implement an EVMS compliant with ANSI 748. For “cost or incentive

1 contracts valued at \$20,000,000 or more,” or whenever else an EVMS is required,
2 Department of Defense agencies are instructed to “[u]se the provision(s) at [48 C.F.R.
3 sections 252.234-7001, 52.234-2, and 52.234-3] in the solicitation” and “the clause at
4 252.234-7002 ... in the solicitation and contract.” 48 C.F.R. § 234.203. 48 C.F.R.
5 section 252.234-7002 (“DFARS”) is long form clause, requiring an “Earned Value
6 Management System (EVMS) that complies with [ANSI 748]” and detailing how the
7 contractor is to get its EVMS validated by the appropriate agency. 48 C.F.R. §
8 252.234-7002. Similarly, for other federal government contracts, “[t]he contracting
9 officer shall insert a clause that is substantially the same as the clause at [48 C.F.R.
10 section 52.234-4] in solicitations and contracts that require a contractor to use EVMS.”
11 48 C.F.R. § 34.203(c). 48 C.F.R. section 52.234-4 (“FARS”) is also a long form clause,
12 requiring an “Earned Value Management System (EVMS) that has been determined by
13 the Cognizant Federal Agency (CFA) to be compliant with [ANSI 748] to manage this
14 contract.” 48 C.F.R. § 52.234-4.

15 It is undisputed that neither FARS or DFARS were incorporated by reference into
16 the NESS or SPECHTECH contracts. *See* Serco’s SSUF ¶ 13, ECF No. 70-1 at 7-8.
17 However, ANSI 748 was listed under “APPLICABLE DOCUMENTS” in Delivery
18 Order Nos. 49 and 54. (Brown Decl., Exs. C and D, ECF No. 64-1 at 117-18, 164-65).
19 Those sections of the delivery orders provided that “[i]n the event of a conflict between
20 the text of this SOW and the applicable document cited herein, the text of this SOW
21 should take precedence.” *Id.* at 117, 164. These Delivery Orders also required
22 Defendant to provide, among other Deliverables, Earned Value Management (“EVM”)
23 Reports “as called out in the CDRL [Contract Data Requirements List] requirements.”
24 *Id.* at 119-20. The CDRLs state that, with respect to EVM reports, “[c]ontract format
25 acceptable. Create reports using MS Office Applications.” *see, e.g., id.* at 175.

26 The process used by SPAWAR and Defendant in preparing these EVM reports,
27 termed Contract Performance Reports (“CPRs”), involved multiple components.
28 Defendant’s AWS team members would enter the time spent on each Delivery Order

1 daily into Serco's own accounting system. (Serco's SSUF ¶ 35, ECF No. 70-1 at 18).
2 Tom Helman, who headed the AWS Project at Serco, would then use the accounting
3 system and individual employees' records to compile a monthly Hours Report. *Id.* ¶ 50.
4 Helman testified that he would submit these monthly Hours Reports to Mike
5 Melechinsky, a Project Manager for the AWS project at SPAWAR, but for the first year
6 of the project, Helman would provide monthly hours totals only, not broken down by
7 the various task codes. (Helman Dep. at 66:17-67:9, ECF No. 66-8 at 5-6). Hours
8 Reports from SPAWAR, NAVFAC (another Navy agency working on the AWS
9 Project), and Defendant would then be combined into an Actual Cost Report, provided
10 to DHS. (Serco's SSUF ¶ 53, ECF No. 70-1 at 27). John Mitchell and Suzette Mankel,
11 SPAWAR Project Managers, and Raymond Day, the EVM lead for Serco, would then
12 insert data from the Actual Cost Report into an "Integrated Master Schedule" ("IMS"),
13 "which function was to break down a large project into a task by task basis, ordered
14 according to sequence, then estimate the projected time and cost to complete each task,
15 then track the actual performance against the estimates." *Id.* ¶¶ 54, 56; Mitchell Dep.
16 at 54:12-56:1, ECF No. 65-9 at 52-54). The IMS included a series of thousands of
17 tasks, known as a "Work Breakdown Structure" ("WBS"). *Id.* ¶ 55. Finally, data from
18 the IMS would be used to create final EVM reports, CPRs and "CSSRs." *Id.* ¶ 58.

19 C. Serco's EVM Performance

20 Serco employees kept track of their time manually, instead of "an *automated*
21 time keeping system that is tied to control accounts so that contemporaneous tracking
22 of time can be achieved." (Relator's Statement of Additional Undisputed Facts
23 ("SAUF") ¶ 138, ECF No. 66-1 at 43). Relator testified that Serco employees only
24 charged their time to a single charge code. (Kelly Dep. at 115:24-116:13, ECF No. 66-
25 10 at 8-9). Relator's Expert Kevin Martin opines that the Actual Cost Reports and final
26 CPR reports submitted to DHS were inherently inaccurate as a result of this practice.
27 (Expert Report of Kevin Martin at 8, ECF No. 66-3 at 10).

28 After the first year of the project, Helman started asking employees for a

1 breakdown of their total time by task category in order to provide more detailed Hours
2 Reports to SPAWAR. (Helman Dep. at 68:10-72:12, ECF No. 65-9 at 309-13). To do
3 this, Helman would ask employees for a breakdown of their time at the end of the
4 month. *Id.* at 72:2-12. Helman testified that these time allocations were estimates, and
5 that he did not disclose this fact to SPAWAR or DHS because they would not have
6 cared. *Id.* at 72:17-73:13. Relator testified that he could only recall two occasions
7 where Helman requested an estimate of a breakdown of his hours on the AWS project
8 for the prior month. (Kelly Dep. at 122:12-123:3, ECF No. 66-10 at 10-11).

9 In addition to time tracking, Relator also relies on his expert in identifying
10 sixteen different ANSI 748 guidelines that Defendant failed to comply with in
11 performing the Delivery Orders. (Relator's SAUF ¶ 136, ECF No. 66-1 at 41-42).

12 Relator testified that on two occasions, he witnessed inaccurate EVM reporting,
13 or the encouragement of inaccurate EVM reporting. On one occasion, he observed
14 Raymond Day, the EVM lead for Serco, and Mike Phillips, the Project Manager at
15 SPAWAR, improperly moving budget figures around in preparing a CPR report.
16 Relator testified: "Raymond [Day], it seemed, was attempting to kind of coach Mike
17 [Phillips], as to how to apply the numbers against the budget" in a way so as to avoid
18 giving "a bad EVM number down the road." (Kelly Dep. at 173:11-14, ECF No. 66-10
19 at 14). Relator further testified that, if an actual cost did not fit well within the budget,
20 Day and Phillips would move that dollar figure to a budgeted item that would look
21 better on the report. *Id.* at 173:24-175:1. On another occasion, Relator testified that he
22 overheard his fellow employee, Colleen, tell Relator's supervisor, Tom Helman, that
23 she didn't feel comfortable billing full-time to the AWS Project. Helman responded:
24 "[H]a, that's nothing, there's a guy over at SPAWAR named Steve Gable who is
25 charged to this project and has never worked a single hour on it." *Id.* at 190:7-191:6.

26 **D. Changes in Defendant's Performance**

27 Early in the performance of Delivery Order 49, Defendant attempted to set up
28 automated time tracking but informed SPAWAR that it was unable to do so. In January

1 2010, Defendant advised SPAWAR that its internal accounting system could not
2 accommodate “all the 2000 project task line items” of the Work Breakdown Structure.
3 (Serco’s SSUF ¶ 43, ECF No. 70-1 at 21). John Mitchell, a Project Manager at
4 SPAWAR for the AWS Project, testified that he advised Denise Ellison of Serco that
5 Serco did not need to install an automated time-tracking system and that it was
6 acceptable to track time manually. (Mitchell Dep. at 87:3-89:1, ECF No. 65-9 at 76-
7 78). Mitchell also testified that he would have sought DHS’s approval before tracking
8 time in this manner. *Id.* at 221:1-21. SPAWAR did not find the CPR reports helpful,
9 and “constantly requested that DHS drop the EVM requirements.” (Serco’s SSUF ¶ 62,
10 ECF No. 70-1 at 32). The project managers at SPAWAR did not use the CPR (EVM)
11 reports to manage the project, and instead limited use of these reports for DHS
12 reporting. *Id.* ¶ 63. From January 2010 onward, Defendant’s employees would track
13 and provide its monthly costs on Excel spreadsheets, although it is disputed as to how
14 accurately this was done. *Id.* ¶ 47. Between January 2010 and April 2011, DHS revised
15 the EVMS reporting requirements on the AWS project at least four times. *Id.* ¶¶ 65-67,
16 69.

17 **E. Relator Kelly’s Employment with Serco**

18 Relator was hired by Defendant in October of 2009 as an EVM Analyst III,
19 whose duties included “identifying and investigating deviations from the EVMS with
20 respect to project management for the AWS project.” (FAC ¶ 5, ECF No. 11 at 3).
21 Relator testified that in the month prior to his termination, he reported Defendant’s
22 allegedly fraudulent cost tracking to Terri Van, a DHS officer in Washington D.C., and
23 that, following his reporting, DHS “really started to dig into the contract performance
24 reports and the schedule and became a lot more scrutinizing of what they were looking
25 at.” (Kelly Dep. 215:17-217:24, 218:15-219:7, ECF No. 66-10 at 23-27). Relator was
26 laid off on May 4, 2011, and Serco personnel told him he was being laid off because
27 SPAWAR and DHS decided to downsize the EVM requirement for the AWS project.
28 (Magana Decl., Ex. D., ECF No. 65-7 at 18; Serco’s SSUF ¶ 97, ECF No 70-1 at 49).

1 Following Kelly's termination, there was no longer an EVM Analyst position within
2 Serco. *Id.* ¶ 98.

3 **III. Motion for Summary Judgment (ECF No. 65)**

4 Defendant moves for summary judgment on all eight of Relator's claims for
5 relief.

6 **A. Summary Judgment Standard**

7 "A party may move for summary judgment, identifying each claim or
8 defense—or the part of each claim or defense—on which summary judgment is sought.
9 The court shall grant summary judgment if the movant shows that there is no genuine
10 dispute as to any material fact and the movant is entitled to judgment as a matter of
11 law." Fed. R. Civ. P. 56(a). A material fact is one that is relevant to an element of a
12 claim or defense and whose existence might affect the outcome of the suit. *See*
13 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The
14 materiality of a fact is determined by the substantive law governing the claim or
15 defense. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Celotex Corp.*
16 *v. Catrett*, 477 U.S. 317, 322 (1986).

17 The moving party has the initial burden of demonstrating that summary judgment
18 is proper. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). Where the party
19 moving for summary judgment does not bear the burden of proof at trial, "the burden
20 on the moving party may be discharged by 'showing'—that is, pointing out to the
21 district court—that there is an absence of evidence to support the nonmoving party's
22 case." *Celotex*, 477 U.S. at 325; *see also United Steelworkers v. Phelps Dodge Corp.*,
23 865 F.2d 1539, 1542-43 (9th Cir. 1989) ("[O]n an issue where the plaintiff has the
24 burden of proof, the defendant may move for summary judgment by pointing to the
25 absence of facts to support the plaintiff's claim. The defendant is not required to
26 produce evidence showing the absence of a genuine issue of material fact with respect
27 to an issue where the plaintiff has the burden of proof. Nor does Rule 56(c) require that
28 the moving party support its motion with affidavits or other similar materials negating

1 the nonmoving party's claim.”) (quotation omitted).

2 If the moving party meets the initial burden, the nonmoving party cannot defeat
3 summary judgment merely by demonstrating “that there is some metaphysical doubt as
4 to the material facts.” *Matsushita*, 475 U.S. at 586; *see also Anderson*, 477 U.S. at 252
5 (“The mere existence of a scintilla of evidence in support of the nonmoving party’s
6 position is not sufficient.”). The nonmoving party must “go beyond the pleadings and
7 by her own affidavits, or by the depositions, answers to interrogatories, and admissions
8 on file, designate specific facts showing that there is a genuine issue for trial.” *Celotex*,
9 477 U.S. at 324 (quotations omitted). The nonmoving party’s evidence is to be
10 believed, and all justifiable inferences are to be drawn in its favor. *See Anderson*, 477
11 U.S. at 256.

12 **B. Submitting False Claims in Violation of the False Claims Act, 31 U.S.C.**

13 **§ 3729(a)(1)(A) (First Claim)**

14 **i. Contentions of the Parties**

15 Defendant contends that the only “claims” submitted to the government for
16 payment were the public vouchers submitted for payment under the delivery orders, and
17 that Relator has not identified anything false about the public vouchers. (ECF No. 65-1
18 at 11). Defendant asserts that Relator does not identify problems with the total dollars
19 billed to the government. Defendant further asserts that it made no implied or express
20 certification, as a condition of payment, that it was complying with ANSI 748.
21 Defendant contends that Plaintiff’s “allegations” at best establish nothing more than a
22 regulatory violation, which does not give rise to FCA liability. *Id.* at 22.

23 Defendant contends that any alleged failure to comply with ANSI 748 is not
24 material because there is no evidence that, “had the payments been broken down in the
25 method [Relator] asserts was required, the government would have paid any more or
26 less to Serco.” *Id.* at 24. Finally, Defendant contends that it cannot be liable where the
27 government had approved of its method of submitting its monthly cost reports on Excel
28 spreadsheets.

1 Relator contends that Defendant implicitly certified compliance with ANSI 748
2 because compliance with ANSI 748 was a condition of payment on the AWS Project.
3 First, Relator contends that Defendant's submitted vouchers implicitly certified
4 compliance with ANSI 748 because the government would not have paid Defendant had
5 it known about non-compliance with ANSI 748. (ECF No. 66 at 21). Second, Relator
6 contends that compliance with ANSI 748 was required by law, pursuant to OMB
7 Circular A-11, HSAM 3034.200(a)(3), and 48 C.F.R. 234.203. *Id.* at 11-12. As to 48
8 C.F.R. § 234.203, Relator contends that compliance was required because the NESS
9 Contract was valued in excess of \$20 Million. *Id.* Third, Relator contends that the
10 Delivery Orders at issue expressly required compliance with ANSI 748 as a condition
11 of payment. Relator contends that this express condition is supported by the fact that
12 a substantial portion of the deliverables required by the Delivery Orders were related
13 to EVM reporting, and EVM reports must comply with ANSI 748. *Id.* at 22. Relator
14 further contends that these Delivery Orders were also "completion delivery orders,"
15 meaning that unless the deliverables are actually delivered, payment is improper. *Id.*
16 at 9. Finally, Relator contends ANSI 748 condition was not waived because John
17 Mitchell, the SPAWAR project manager, did not have authority to waive contractual
18 requirements. *Id.* at 14.

19 Relator asserts that Defendant did not comply with the ANSI 748 condition in
20 many regards, including: failing to set up "control accounts," failing to assign control
21 managers, failing to integrate timekeeping and accounting with control accounts, and
22 failing to record hours worked according to each control account. *Id.* at 15.

23 Finally, Relator asserts that Defendant knew of the EVMS requirement and
24 declined to follow it. Relator asserts that hours were tracked in an inaccurate manner
25 because Tom Helman, Relator's supervisor, only periodically requested employees to
26 provide a breakdown of their hours. In addition, Relator offers the results of "validity
27 tests" conducted by his expert, Kevin Martin, on monthly CPRs which demonstrate that
28 actual costs were so closely aligned to budgeted costs in the reports that the numbers

1 must have been fraudulently changed in order to feign compliance with ANSI 748. *Id.*
2 at 17-18.

3 **ii. Law**

4 The False Claims Act provides for liability for one who “knowingly presents, or
5 causes to be presented, a false or fraudulent claim for payment or approval.” 31 U.S.C.
6 § 3729(a)(1)(A). To establish a cause of action under section 3729(a)(1)(A), the relator
7 must prove the following elements: (1) a false or fraudulent claim (2) that was material
8 to the decision-making process (3) which defendant presented, or caused to be
9 presented, to the United States for payment or approval (4) with knowledge that the
10 claim was false or fraudulent. *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1047
11 (9th Cir. 2012). “Claim” is defined as “any request or demand, whether under a
12 contract or otherwise, for money or property ... presented to an officer, employee, or
13 agent of the United States....” 31 U.S.C. § 3729(b)(2).

14 Under a false certification theory, FCA liability can attach where a party “falsely
15 certifies compliance with a statute or regulation as a condition to payment.” *U.S. ex rel.*
16 *Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1171 (9th Cir. 2006). There are two types
17 of false certifications, express and implied. “Express certification simply means that
18 the entity seeking payment certifies compliance with a law, rule or regulation as part of
19 the process through which the claim for payment is submitted.” *Ebeid ex rel. U.S. v.*
20 *Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). “Implied false certification occurs when
21 an entity has previously undertaken to expressly comply with a law, rule, or regulation,
22 and that obligation is implicated by submitting a claim for payment even though a
23 certification of compliance is not required in the process of submitting the claim.” *Id.*
24 Under a theory of implied false certification, it is only possible for a claimant to
25 implicitly certify compliance with a law, rule, or regulation if there is a relevant
26 “statute, rule, regulation, or contract” in place that conditions payment of the claim on
27 compliance with that underlying law, rule or regulation. *See id.* at 999-1001.
28 “Violations of laws, rules, or regulations alone do not create a cause of action under the

1 FCA. It is the false *certification* of compliance which creates liability when
2 certification is a prerequisite to obtaining a government benefit.” *U.S. ex rel. Hopper*
3 *v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) (emphasis in original).

4 **iii. Analysis**

5 “[T]he [FCA] attaches liability, not to the underlying fraudulent activity or to the
6 government’s wrongful payment, but to the claim for payment.” *U.S. ex rel. Cafasso*
7 *v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (quoting
8 *U.S. v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995)). It is undisputed that Defendant’s
9 claims submitted to the government were sent in the form of public vouchers. There
10 is no evidence demonstrating, and Relator has not alleged or contended, that the
11 vouchers contained any false or inaccurate information.¹ Relator’s FCA claim is that
12 the vouchers implicitly falsely certified compliance with ANSI 748. *See Ebeid*, 616
13 F.3d at 998. The Court must determine whether there was a “statute, rule, regulation,
14 or contract that condition[ed] payment on compliance with [ANSI 748].” *Id.* at 1000.

15 **a. Regulations**

16 Relator relies on three regulations: HSAM 3034.200(a)(3); OMB Circular A-11,
17 Part 7; and 48 C.F.R. section 234.203. HSAM 3034.200(a)(3) is part of the Department
18 of Homeland Security Acquisition Manual, which states in its Foreword that it is “non-
19 regulatory in nature and provides uniform procedures for the internal operation of
20 acquiring supplies and services within the Department of Homeland Security.”
21 Department of Homeland Security Acquisition Manual, U.S. Department of Homeland
22 Security (October 2009). HSAM 3034.200(a)(3) states that OMB Circular A-11
23 requires the use of an EVMS “that meets the American National Standards Institute
24 (ANSI)/Electronics Industries Alliance (EIA) Standard - 748 for both Government and
25 contractors.” HSAM 3034.200(a)(3).

27 ¹ Although Relator contends that Defendant’s EVM reporting and time tracking
28 methods were improper, Relator does not present evidence or contend that any of the
alleged misconduct led to explicitly false statements on the public vouchers.

1 The latest version of OMB Circular A-11, Part 7 that discusses ANSI 748 is the
2 July 2010 version. *See* Office of Mgmt. & Budget, Exec. Office of the President, OMB
3 Circular A-11, pt. 7, Planning, Budgeting, Acquisition, and Management of Capital
4 Assets (July 2010) (“OMB Circular A-11, Part 7”), *available at*:
5 [http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a_11_20](http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a_11_2010.pdf)
6 [10.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a_11_2010.pdf). Section 300.2, titled “Does this section apply to me?,” provides that “[t]he
7 policy and budget justification and reporting requirements in this section apply to all
8 agencies of the Executive Branch of the Government subject to Executive Branch
9 review (see section 25).” OMB Circular A-11, pt. 7, section 300.2. Section 25.1 of Part
10 2 of the Circular, in turn, provides that “the instructions in Part 2 generally apply to all
11 Government agencies,” the District of Columbia, and Government-sponsored
12 enterprises. OMB Circular A-11, pt. 2, § 25.1.

13 Neither HSAM 3034.200(a)(3) nor OMB Circular A-11, Part 7 regulate
14 government contractors. These publications do not impose requirements on
15 government contractors directly. The Court concludes that these regulations cannot
16 provide the basis for Relator’s implied certification claim.

17 48 C.F.R. section 234.203 provides that Department of Defense agencies are
18 instructed to “[u]se the provision(s) at [48 C.F.R. §§ 252.234-7001, 52.234-2, and
19 52.234-3] in the solicitation” and “[DFARS]... in the solicitation and contract” for
20 “cost or incentive contracts valued at \$20,000,000 or more,” or whenever else an EVMS
21 is required. 48 C.F.R. § 234.203. 48 C.F.R. section 234.203 *does* require the insertion
22 of the DFARS clause into contracts valued at \$20 Million or more, and the DFARS
23 clause does, in turn, require compliance with ANSI 748. However, this regulation does
24 not, without incorporation into a contract, expressly condition payment on compliance
25 with ANSI 748, or impose any duties on a government contractor. It is undisputed that
26 DFARS was not incorporated by reference into the NESS Contract or Delivery Orders.
27 (Serco’s SSUF ¶ 14, ECF No. 70-1 at 8; Relator’s Evidence in Support of Response
28 to Serco’s SSUF ¶ 13, ECF No. 66-1 at 5 (“Delivery orders issued pursuant to the

1 NESS contract cannot incorporate FARS or DFARS that were not included in the
2 underlying NESS Contract.”)).

3 The Court concludes that there is no regulation that expressly conditions payment
4 for the vouchers in this case on Defendant’s compliance with ANSI 748.

5 **b. Contracts**

6 It is undisputed that the NESS Contract and the Delivery Orders did not
7 incorporate FARS or DFARS by reference, the two regulations that, if incorporated,
8 might be read as expressly conditioning payment on compliance with ANSI 748.
9 (Serco’s SSUF ¶ 14, ECF No. 70-1 at 8; Relator’s Evidence in Support of Response to
10 Serco’s SSUF ¶ 13, ECF No. 66-1 at 5 (“Delivery orders issued pursuant to the NESS
11 contract cannot incorporate FARS or DFARS that were not included in the underlying
12 NESS Contract.”)). There is no other language in the Delivery Orders expressly
13 conditioning payment on compliance with ANSI 748. The reference to ANSI 748 under
14 a section titled “APPLICABLE DOCUMENTS” does not expressly condition payment
15 on compliance with ANSI 748.

16 Relator contends that compliance with ANSI 748 was an implied condition in the
17 Delivery Orders because: (1) ANSI 748 was referenced under a section entitled
18 “APPLICABLE DOCUMENTS” in the Delivery Orders, (2) Defendant was hired for
19 the very purpose of doing EVM reporting, (3) ANSI 748 is the only way to do EVM
20 reporting, and (4) the Delivery Orders were “completion delivery orders,” meaning
21 “you have products and deliverables that are expected to be completed in order to be
22 paid.” (Martin Dep. at 120:6-8, ECF No. 66-6 at 19). However, an *implied* condition
23 in a contract cannot form the basis for an implied false certification claim, which
24 requires that the defendant undertake to “*expressly* comply with a law, rule, or
25 regulation.” *Ebeid*, 616 F.3d at 998 (emphasis added). Even accepting Relator’s
26 contractual interpretation, Defendant may have breached the contract, but it has not
27 violated the FCA. *U.S. ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 326 (9th
28 Cir. 1995) (“[Relator’s] argument [that the defendant’s ‘fail[ure] to adhere strictly to the

1 contractual and military specifications constituted a violation of the FCA’] raises
2 questions of contract interpretation rather than false claims.”); *Cafasso*, 637 F.3d at
3 1047 (holding that a contractor’s failure to comply with a contract’s disclosure
4 requirements and then receiving payment on the contract is not a false claim but a
5 breach of contract); *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th
6 Cir. 2010) (noting that the requirement for false certification claims—that the
7 contractor’s compliance with federal statutes, regulations, or contract provisions be a
8 “condition” or “prerequisite” for payment—exists because “[t]he FCA is not a general
9 ‘enforcement device’ for federal statutes, regulations, and contracts.”).

10 The Court finds that neither the NESS Contract nor the Delivery Orders require
11 compliance with ANSI 748 as a condition of payment by the government.

12 c. Conclusion

13 The Court concludes Defendant has met its initial burden of demonstrating the
14 lack of evidence of a false claim in the record. The Court further concludes that Relator
15 has not carried his burden to come forward with evidence demonstrating that the public
16 vouchers Defendant submitted for payment contained anything false or inaccurate, or
17 demonstrating an implicitly false certification of compliance with ANSI 748 in those
18 vouchers. Without evidence of a false claim, Relator’s First Claim must fail. *See U.S.*
19 *ex rel. Aflatooni v. Kitsap Physicians Serv.*, 314 F.3d 995, 997 (9th Cir. 2002) (“It
20 seems to be a fairly obvious notion that a False Claims Act suit ought to require a false
21 claim.”). Relator’s evidence of Serco employees moving hours around into different
22 task codes to better fit the budget does not raise an issue of material fact because there
23 is no evidence or contention that this practice resulted in a false claim submitted to the
24 government.² *See Cafasso*, 637 F.3d at 1055 (noting that the focus of the FCA is on the
25 “claim for payment,” not the underlying fraud). Defendant’s Motion for Summary

26
27 ² Specifically, Relator’s testimony (1) that he overheard Tom Helman discussing
28 the inflated billing practices of a SPAWAR employee and (2) that he witnessed
Raymond Day and Mike Phillips improperly moving budget figures around are not
relevant.

1 Judgment on Relator's First Claim is granted.

2 **B. Making False Records Material to a False or Fraudulent Claim in**
3 **Violation of the False Claims Act, 31 U.S.C. § 3729(a)(1)(B) (Second Claim)**

4 Defendant contends that there is no evidence of any false claim or that any
5 allegedly false statement was material to the government's decision to pay Defendant.
6 Relator asserts that on a monthly basis, "every IMS, CPR, CSSR and cost spreadsheet
7 submitted by Defendant contained unreliable and false cost information." (ECF No. 66
8 at 22). Relator contends that these "records" were "material" because they were
9 deliverables under the Delivery Orders. *Id.*

10 Section 3729(a)(1)(B) creates liability for one who "knowingly makes, uses, or
11 causes to be made or used, a false record or statement material to a false or fraudulent
12 claim." 31 U.S.C. § 3729(a)(1)(B). Section 3729(a)(1)(B) requires that a false claim
13 be submitted. *Cf. Cafasso*, 637 F.3d at 1055 (interpreting former FCA false records
14 provision as requiring "an actual demand for payment"). "To prove a claim under this
15 subsection, a plaintiff must show that: (1) the defendant made (or caused to be made)
16 a false statement, (2) the defendant knew it to be false, and (3) the statement was
17 material to a false claim. [Citation.]. Thus, this subsection contains a 'double falsity'
18 requirement-the plaintiff must plead both a false statement and a corresponding false
19 claim." *U.S. ex rel. Kester v. Novartis Pharm. Corp.*, No. 11 Civ. 8196, —F. Supp.
20 2d—, 2014 WL 2324465, at *8 (S.D.N.Y. May 29, 2014) (citation omitted).

21 Without a false claim, a "false record or statement" cannot, by definition, be
22 "material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). The asserted
23 inaccuracies in Defendant's various EVM-related reports are not material because
24 Relator does not contend or present evidence that there is anything inaccurate in the
25 public vouchers themselves. Relator has failed to present any evidence to support this
26 essential element of a false records claim. The Court finds that Relator's false records
27 claim fails as a matter of law.

28 Defendant's Motion for Summary Judgment on Relator's Second Claim is

1 granted.

2 **C. Conspiring to Violate the False Claims Act, 31 U.S.C. §**
3 **3729(a)(1)(C) (Third Claim)**

4 Relator asserts that Defendant “secretly conspired” with John Mitchell, the AWS
5 project manager from SPAWAR, when they agreed that Defendant no longer had to
6 comply with ANSI 748’s requirements and could collect costs manually. (ECF No. 66
7 at 25). Relator asserts that this agreement was made without the knowledge of anyone
8 else at SPAWAR, and that Mitchell lacked the authority to modify the contract. *Id.*
9 Defendant contends that this was not a conspiracy, but an agreement concerning cost
10 tracking and reporting that was approved by DHS. (ECF No. 70 at 10).

11 Section 3729(a)(1)(C) creates liability for one who “conspires” to violate the
12 FCA, including conspiring to “present.... a false or fraudulent claim” or make or use a
13 “false record or statement material to a false or fraudulent claim.” 31 U.S.C. §
14 3729(a)(1)(A)-(C). Although the Ninth Circuit does not appear to have interpreted this
15 recently enacted provision, courts have applied general principles of civil conspiracy
16 to former versions of this provision. *See U.S. ex rel. Durcholz v. FKW, Inc.*, 189 F.3d
17 542, 545 n.3 (7th Cir. 1999). As the Sixth Circuit explained in an FCA case:

18 A civil conspiracy is an agreement between two or more persons to injure
19 another by unlawful action. Express agreement among all the conspirators
20 is not necessary to find the existence of a civil conspiracy. Each
21 conspirator need not have known all of the details of the illegal plan or all
22 of the participants involved. All that must be shown is that there was a
single plan, that the alleged coconspirator shared in the general
conspiratorial objective, and that an overt act was committed in
furtherance of the conspiracy that caused injury to the complainant.

23 *United States v. Murphy*, 937 F.2d 1032, 1039 (6th Cir. 1991) (quoting *Hooks v. Hooks*,
24 771 F.2d 935, 943-44 (6th Cir. 1985)). The Supreme Court has also interpreted the
25 former version of this provision to require intent to defraud the government. *Allison*
26 *Engine Co., Inc. v. U.S. ex rel. Sanders*, 553 U.S. 662, 672-3 (2008).

27 Defendant has met its initial summary judgment burden by demonstrating an
28 absence of evidence in the record of a conspiracy to submit a false claim. Defendant

1 has also presented testimony negating a conspiracy between John Mitchell and
2 Defendant. Mitchell's uncontroverted testimony is that he informed DHS of
3 Defendant's modified hours tracking and DHS approved the change. (Mitchell Dep.
4 at 87:21-88:15, ECF No. 65-9 at 76-77).

5 Relator has failed to meet his burden to come forward with any evidence to show
6 a conspiracy to present a fraudulent claim to the government. First, there is no evidence
7 of an agreement between John Mitchell and Serco personnel to submit a false claim.
8 Relator asserts that the agreement was "secret" and "Defendant has no evidence that
9 DHS approved a violation of ANSI-748 guidelines and failed to provide any evidence
10 that the delivery orders were changed to allow such a waiver of applicable regulations."
11 (ECF No. 66 at 25; Relator's Evidence in Support of Response to Serco's SSUF ¶ 45,
12 ECF No. 66-1 at 15-16). Relator's unsubstantiated assertion of a secret agreement is
13 not *evidence* of a conspiracy to submit a false claim. Construing the facts in a light
14 most favorable to Relator, the agreement between Defendant and Mitchell to track time
15 manually is an effort to modify a contract without authority to do so, not a conspiracy
16 to submit a false claim in the form of public vouchers.

17 Second, even if there was a conspiracy to modify the Delivery Orders without
18 DHS consent, that conspiracy cannot result in liability under 31 U.S.C. section
19 3729(a)(1)(C) absent any evidence of a resulting false claim or intent to submit a false
20 claim. *See* 31 U.S.C. § 3729(a)(1)(C) (the conspiracy must be, among other violations
21 of the FCA, to present a false claim or to make a false record material to a false claim).
22 As discussed above, there is no evidence of a false claim in this case. Nor is there
23 evidence that Defendant and Mitchell's agreement to track time manually was intended
24 to result in a false claim. Finally, to the extent Relator's theory is a conspiracy to
25 implicitly falsely certify compliance with ANSI 748, it fails as a matter of law on the
26 ground that there is no statute, regulation, or contractual provision expressly
27 conditioning Defendant's right to be paid on the vouchers with compliance with ANSI
28

1 748.

2 The Court concludes that there is no triable issue of material fact as to the
3 existence of a conspiracy to violate the FCA. Defendant's Motion for Summary
4 Judgment on Relator's Third Claim is granted.

5 **D. Retention of Overpayments in Violation of the False Claims Act, 31**
6 **U.S.C. § 3729(a)(1)(G) (Fourth Claim)**

7 Section 3729(a)(1)(G) creates liability for one who "knowingly makes, uses, or
8 causes to be made or used, a false record or statement material to an obligation to pay
9 or transmit money or property to the Government, or knowingly conceals or knowingly
10 and improperly avoids or decreases an obligation to pay or transmit money or property
11 to the government." 31 U.S.C. § 3729(a)(1)(G). This "reverse false claims" provision
12 "attempts to provide that fraudulently reducing the amount owed to the government
13 constitutes a false claim." *Cafasso*, 637 F.3d at 1056.

14 Defendant contends that Relator's retention claim must fail because Defendant
15 never had a duty to pay the government at the time of any alleged false claim. Relator
16 contends that "all monies paid to Defendant were paid in error and in reliance upon
17 Defendant's fraud" because ANSI 748 was not complied with. (ECF No. 66 at 26).
18 Relator contends Defendant has a resulting duty to repay the government all money
19 received from the vouchers. *Id.*

20 The Court finds that Relator's Fourth Claim fails as a matter of law. The Court
21 having previously determined that there is no evidence of a false claim, Defendant
22 cannot be liable under the FCA for retaining the money it received from the public
23 vouchers. Nor can Defendant be liable for a "reverse false claim" without a false
24 statement to avoid paying the government back for work on the AWS Project. *Cafasso*,
25 637 F.3d at 1056 ("The 'reverse false claims' provision does not eliminate or supplant
26 the FCA's false claim requirement; it rather expands the meaning of a false claim to
27 include statements to avoid paying a debt or returning property to the United States.").

28 Defendant's Motion for Summary Judgment on Relator's Fourth Claim is

1 granted.

2 **E. Retaliation in Violation of California Government Code § 12653(b)**
3 **(Fifth Claim)**

4 Defendant contends that section 12653(b) did not extend protection to federal
5 whistle-blowers and that Relator lacks evidence that he engaged in protected activity
6 or that Defendant knew about his activity. Relator did not address Defendant's section
7 12653(b) arguments in his opposition or at oral argument. Defendant contends that
8 Relator has abandoned this claim. (ECF No. 70 at 10).

9 California Government Code section 12653(b) is part of California's False
10 Claims Act, California Government Code sections 12650-12655. Former section
11 12653(b) prohibited employers from discharging or otherwise discriminating against
12 employees "[1] in disclosing information to a government or law enforcement agency
13 or [2] in furthering a false claims action, including investigation for, initiation of,
14 testimony for, or assistance in, an action filed or to be filed under Section 12652." Cal.
15 Gov. Code § 12653(b).³ Under former section 12653(b), a plaintiff must establish "(1)
16 she was engaged in protected conduct; (2) [the defendant] knew she engaged in such
17 conduct; and (3) [the defendant] retaliated against her because of the conduct."
18 *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). The
19 only court to address this issue has held that former section 12653(b) does not protect

21
22 ³ Effective January 1, 2013, after Relator filed the FAC, this provision was
23 moved to section 12653(a) and revised to explicitly exclude protection for federal
24 whistle-blowers:

25 Any employee, contractor, or agent shall be entitled to all relief necessary
26 to make that employee, contractor, or agent whole, if that employee,
27 contractor, or agent is discharged, demoted, suspended, threatened,
28 harassed, or in any other manner discriminated against in the terms and
conditions of his or her 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. Code § 12653(a).

1 federal whistle-blowers because it was part of California's False Claims Act, which
2 prohibits false claims made only to California state and local governments. *See Hoefer*
3 *v. Fluor Daniel, Inc.*, 92 F. Supp. 2d 1055, 1056 (C.D. Cal. 2000).

4 The Court concludes that Relator has abandoned this claim. *Ramirez v. City of*
5 *Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009) (holding that a plaintiff abandons his
6 claims by failing to address them in opposition to a motion for summary judgment and
7 waives his challenge to the district court's order). Defendant's Motion for Summary
8 Judgment on Relator's Fifth Claim is granted.⁴

9 **F. Unlawful Retaliatory Discharge, California Labor Code § 1102.5 (Sixth**
10 **Claim)**

11 The FAC alleges violations of California Labor Code section 1102.5,
12 subdivisions (b), (c), and (d).

13 **i. Section 1102.5(b)**

14 Defendant contends that there is no evidence that Relator actually reported
15 Defendant's practices to DHS. Defendant also contends that Relator's reporting was
16 not a protected activity because Defendant's practices were not illegal. Finally,
17 Defendant asserts that no one at Serco was aware that Relator reported Defendant's
18 practices to DHS. Relator contends that he did testify that he reported Defendant's
19 practices to DHS and that "[t]he timing of Relator's termination is evidence of the
20 retaliatory conduct alleged." (ECF No. 66 at 28).

21 California Labor Code section 1102.5(b) provides:

22
23 ⁴ Even in the absence of Relator's abandonment, the Court finds that summary
24 judgment is proper on Relator's Fifth Claim. There is no issue of material fact as to
25 whether Defendant knew that Relator reported to Terri Van at DHS. Tom Helman,
26 Relator's supervisor, and Denise Ellison, Helman's supervisor, both testified that they
27 were not aware of Relator's reporting activities. (Helman Dep. at 150:4-15, ECF No.
28 65-9 at 328; Ellison Decl. ¶ 17, ECF No. 65-5 at 4). Relator has not presented any
evidence controverting this testimony, or any evidence that would permit the inference
that any other Serco employee was aware of his reporting activity.

1 (b) An employer, or any person acting on behalf of the employer, shall not
2 retaliate against an employee for disclosing information, or because the
3 employer believes that the employee disclosed or may disclose
4 information, to a government or law enforcement agency, to a person with
5 authority over the employee or another employee who has the authority to
6 investigate, discover, or correct the violation or noncompliance, or for
7 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.

8 Cal. Lab. Code § 1102.5(b). “The elements of a section 1102.5(b) retaliation cause of
9 action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the
10 defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the
11 plaintiff show this explanation is merely a pretext for the retaliation.” *Patten v. Grant*
12 *Joint Union High Sch. Dist.*, 134 Cal. App. 4th 1378, 1384 (2005). “To [establish a
13 prima facie case], a plaintiff must show (1) she engaged in a protected activity, (2) her
14 employer subjected her to an adverse employment action, and (3) there is a causal link
15 between the two.” *Id.* “The causal link may be established by an inference derived
16 from circumstantial evidence, such as the employer’s knowledge that the [employee]
17 engaged in protected activities and the proximity in time between the protected action
18 and allegedly retaliatory employment decision.” *Morgan v. Regents of Univ. of Cal.*,
19 88 Cal. App. 4th 52, 69 (2000) (citing *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir.
20 1988) and *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 614-15 (1989))
21 (internal quotations omitted).

22 Defendant has met its initial summary judgment burden in demonstrating an
23 absence of evidence that anyone at Serco was aware of Relator’s reporting to Terri Van
24 at DHS. Tom Helman, Relator’s supervisor, and Denise Ellison, Helman’s supervisor,
25 both testified that they were not aware of Relator’s reporting activities. (Helman Dep.
26 at 150:4-15, ECF No. 65-9 at 328; Decl. of Denise Ellison ¶ 17, ECF No. 65-5 at 4).
27 Relator has not presented any evidence controverting this testimony or any evidence
28 that would permit the inference that any other Serco employee knew of Relator’s

1 reporting to Terri Van. Without any evidence of Defendant's knowledge, a causal link
2 based on proximity in time cannot be inferred. *Morgan*, 88 Cal. App. 4th at 69 (noting
3 that the causal link may be established by both "the employer's knowledge that the
4 [employee] engaged in protected activities *and* the proximity in time between the
5 protected action and alleged retaliatory employment decision.") (emphasis added). The
6 Court finds that Relator has failed to establish a prima facie case as to a "causal link"
7 between Relator's protected activity and his termination. *Patten*, 134 Cal. App. 4th at
8 1384.

9 The Court further finds that, even if Relator had established a prima facie case,
10 Defendant has rebutted it with "substantial evidence" of a legitimate, nondiscriminatory
11 reason for Relator's termination. *Morgan*, 88 Cal. App. 4th at 68. Tom Helman,
12 Relator's supervisor, and John Mitchell, the AWS Project Manager from SPAWAR,
13 both testified that Mitchell informed Defendant via email in April or May 2011 that
14 SPAWAR and DHS no longer needed two employees to work on EVM for the AWS
15 Project. (Helman Dep. at 103:12-105:21, 149:12-20, ECF No. 65-9 at 319-21, 327;
16 Mitchell Dep. at 124:18-125:22, ECF No. 65-9 at 105-106). Relator admitted that he
17 was given this reason at the time he was fired, and it is undisputed that Relator's
18 position no longer existed after he was laid off. (Kelly Dep. at 226:14-227:2, ECF No.
19 65-9 at 425-26; Serco's SSUF ¶ 98, ECF No. 70-1 at 49).

20 Finally, without evidence of Defendant's knowledge, Relator's conversation with
21 Terri Van is not "specific" and "substantial" circumstantial evidence that would create
22 a triable issue with respect to whether Defendant's proffered reason was pre-textual.
23 *See Morgan*, 88 Cal. App. 4th at 69 ("Circumstantial evidence of pretense must be
24 specific and substantial in order to create a triable issue with respect to whether the
25 employer intended to discriminate on an improper basis") (internal quotations and
26 citations omitted).

27 The Court concludes that Defendant is entitled to summary judgment on Relators
28 California Labor Code section 1102.5(b) claim.

1 **ii. Section 1102.5(c)**

2 Defendant contends that it is entitled to summary judgment on Relator's section
3 1102.5(c) claim because Relator did not refuse to engage in any conduct. Defendant
4 further contends that its conduct was not illegal. Finally, Defendant contends that
5 Relator was not terminated for his refusal to engage in any conduct. (ECF No. 65-1 at
6 31-32). Relator asserts that he did, in fact, object to Defendant's practices, and "[t]he
7 timing of Relator's termination is evidence of the retaliatory conduct alleged." (ECF
8 No. 66 at 28).

9 California Labor Code section 1102.5(c) prohibits an employer from retaliating
10 against an employee for "refusing to participate in an activity that would result in a
11 violation of state or federal statute, or a violation of or noncompliance with a local,
12 state, or federal rule or regulation." Cal. Lab. Code § 1102.5(c). To establish a prima
13 facie case under section 1102.5, a plaintiff must offer proof that (1) he engaged in a
14 protected activity, (2) the defendant subjected them to adverse employment actions, and
15 (3) there is a causal link between the two. *Casissa v. First Republic Bank*, Nos. C 09-
16 4129 and C 09-4130, 2012 WL 3020193, at *9 (N.D. Cal. July 24, 2012).

17 The Court finds that there is no triable issue of fact as to whether Relator "refused
18 to participate" in any allegedly illegal activity. Relator's only evidence confirms just
19 the opposite, that Relator did not object. Relator admitted that any refusal to participate
20 in the allegedly fraudulent practices of SERCO "wasn't an outward refusal." (Kelly
21 Dep. at 229:9-17, ECF No. 66-10 at 28). Significantly, there is evidence that Relator
22 participated in the practice that he complains of: waiting until the end of a month to
23 allocate his monthly time to specific tasks. In a response to a request from his
24 supervisor, Tom Helman, for his time allocations for the month of October, Relator
25 stated:

26 For Oct., I would put the first half of the month (50%) into EVM Monitor
27 - 1.1.5.24. For the 2nd half of the month (50%), it could technically be
28 charged to IMS Rework, w/in the PDR file, which is 1.6.2.7.1.3. However
if that is all supposed to be behind the scenes, you could just throw 50%
into 1.6.2.7.1.1, which is PDR Planning. Thanks.

1 (ECF No. 66-15 at 2).

2 The Court concludes that Relator has not raised a triable issue of material fact as
3 to his California Labor Code section 1102.5(c) claim.

4 **iii. Section 1102.5(d)**

5 Subdivision (d) prohibits an employer from retaliating against an employee for
6 “having exercised his or her rights under subdivision (a), (b), or (c)” in “any former
7 employment.” Cal. Lab. Code § 1102.5(d).

8 Because there is no evidence that Defendant retaliated against Relator for
9 exercising his rights under subdivisions (b) or (c), Defendant is also entitled to summary
10 judgment as to a section 1102.5(d) claim.

11 **iv. Conclusion**

12 Defendant’s Motion for Summary Judgment on Relator’s Sixth Claim is granted.

13 **G. Termination in Violation of Public Policy (Seventh Claim)**

14 Defendant contends that Relator’s termination in violation of public policy claim
15 fails because all of Relator’s claims alleging violations of laws fail. Relator contends
16 that summary judgment is not proper on this ground because Defendant is not entitled
17 to summary judgment on his other claims.

18 A termination in violation of public policy claim requires a “violation of a
19 fundamental public policy expressed in a statute or a constitutional provision.”
20 *Jennings v. Marralle*, 8 Cal. 4th 121, 130 (1994). The Court finds that there is no
21 evidence of a “violation of a fundamental public policy” to support a termination in
22 violation of public policy claim. Defendant is entitled to summary judgment on all
23 claims alleging violations of law, and Relator has identified no other fundamental public
24 policy to support this claim. *See Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354
25 (9th Cir. 1996) (holding that, where the defendant is entitled to summary judgment on
26 ADA claims, the termination in violation of public policy claim must fall with it).

27 Defendant’s Motion for Summary Judgment on Relator’s Seventh Claim is
28 granted.

1 **H. Breach of Contract of Continued Employment (Eighth Claim)**

2 Defendant asserts that its Human Resources Policy makes clear that Relator's
3 employment was at-will. Defendant further asserts that Relator admitted he was never
4 assured that he would not be arbitrarily terminated or that he read anything anywhere
5 about good cause being required for termination. *Id.* Relator contends that the relevant
6 Human Resources Policy stated that "employment with Serco is at will, meaning
7 employment is voluntary and subject to termination by the employee or Serco at any
8 time and for any reason *not prohibited by law.*" (ECF No. 66 at 29) (emphasis added).
9 Relator contends that his termination was in fact prohibited by law, specifically 31
10 U.S.C. section 3730(h), an FCA provision that prohibits retaliation for FCA whistle-
11 blowing, and California Labor Code section 1102.5.

12 The Court finds that there is no issue of material fact as to Relator's Eighth
13 Claim. Defendant is entitled to summary judgment on Relator's FCA claims and
14 section 1102.5 claims. Because Defendant did not violate the FCA or section 1102.5,
15 Relator's termination was not "prohibited by law."⁵

16 Defendant's Motion for Summary Judgment on Relator's Eighth Claim is
17 granted.

18 **IV. Motions to File Documents Under Seal (ECF Nos. 63, 68)**

19 Defendant lodged twenty-one full exhibits under seal in support of its Motion for
20 Summary Judgment (ECF No. 63) and four full exhibits under seal in support of its
21 Reply Regarding Motion for Summary Judgment (ECF No. 68). These exhibits consist
22 of (1) every contract relevant to this case, including the SPECTECH Contract, the
23 NESS Contract, and all of the relevant Delivery Orders pursuant to those contracts, (2)
24 the public vouchers submitted by Defendant for payment from the U.S. Government,
25 (3) the AWS Project Statement of Work from DHS to SPAWAR, (4) EVM-related

26
27 ⁵ Apart from allegedly terminating Relator in violation of law, Relator does not
28 contend that there are any other ways in which Defendant breached its employment
contract with Relator, whether express or implied.

1 deliverables completed pursuant to the Delivery orders, including the relevant IMSs,
2 CPRs, Monthly Cost Reports, and Risk Management Plans, and (5) other AWS work
3 product, including minutes from AWS Project meetings and AWS Project timelines.
4 Defendant contends that each and every exhibit warrants sealing because they contain
5 “information that may be exempt from public disclosure, such as commercially or
6 competition sensitive information and internal confidential information produced by the
7 government.” (ECF Nos. 63 at 4, 68 at 2). Second, Defendant contends that “some of
8 the documents have been designated as ‘For Official Use Only’ by the U.S.
9 government, now identified as Controlled Unclassified Information (“CUI”).” (ECF
10 Nos. 63 at 4, 68 at 3). Third, Defendant contends that “several of the documents
11 contained herein have been designated as ‘CONFIDENTIAL’ or ‘CONFIDENTIAL –
12 ATTORNEYS’ EYES ONLY’ under the Protective Order.” (ECF Nos. 63 at 4, 68 at
13 3).

14 “Historically, courts have recognized a ‘general right to inspect and copy public
15 records and documents, including judicial records and documents.’” *Kamakana v. City
16 and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Nixon v. Warner
17 Commc’ns, Inc.*, 435 U.S. 589, 597 & n.7 (1978)). Except for documents that are
18 traditionally kept secret, there is “a strong presumption in favor of access to court
19 records.” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003);
20 *see also Kamakana*, 447 F.3d at 1178-79. “A party seeking to seal a judicial record
21 then bears the burden of overcoming this strong presumption by meeting the compelling
22 reasons standard. That is, the party must articulate compelling reasons supported by
23 specific factual findings ... that outweigh the general history of access and the public
24 policies favoring disclosure, such as the public interest in understanding the judicial
25 process.” *Kamakana*, 447 F.3d at 1178-79 (citations and quotation marks omitted).
26 The presumed right to access to court proceedings and documents can be overcome
27 “only by an overriding right or interest ‘based on findings that closure is essential to
28 preserve higher values and is narrowly tailored to serve that interest.’” *Oregonian*

1 *Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) (quoting
2 *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1985)).

3 “Under the compelling reasons standard, a district court must weigh relevant
4 factors, base its decision on a compelling reason, and articulate the factual basis for its
5 ruling, without relying on hypothesis or conjecture.” *Pintos v. Pac. Creditors Ass'n*,
6 605 F.3d 665, 679 (9th Cir. 2010) (quotations omitted). “‘Relevant factors’ include the
7 ‘public interest in understanding the judicial process and whether disclosure of the
8 material could result in improper use of the material for scandalous or libelous purposes
9 or infringement upon trade secrets.’” *Id.* at 659 n.6 (citing *Hagestad v. Tragesser*, 49
10 F.3d 1430, 1434 (9th Cir.1995)); *see also Kamakana*, 447 F.3d at 1179 (“In general,
11 ‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and
12 justify sealing court records exist when such ‘court files might have become a vehicle
13 for improper purposes,’ such as the use of records to gratify private spite, promote
14 public scandal, circulate libelous statements, or release trade secrets.”).

15 The Court finds that Defendant has not met its high burden of demonstrating
16 “compelling reasons” for sealing twenty-five entire exhibits. Defendant gives only
17 generalized reasons as to why all twenty-five exhibits should be sealed and does not
18 give any particularized reason as to why any particular exhibit should be sealed. Even
19 under the “good cause” standard of Rule 26(c), a particularized showing is required.
20 *Kamakana*, 447 F.3d at 1180. Furthermore, reliance on a blanket protective order is not
21 sufficient to meet the “compelling reasons” standard. *See Beckman Indus., Inc. v. Int’l*
22 *Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). However, the Court will not deny
23 Defendant’s Motions to File Documents Under Seal (ECF Nos. 63, 68) because it is
24 impossible to ascertain, based on the present motion, whether any of the exhibits
25 contain competitively sensitive information or confidential information of the U.S.
26 Government. Defendant shall have an opportunity to offer specific and particularized
27 “compelling reasons” as to why each exhibit warrants sealing.

28 **V. Motion to Strike (ECF No. 71)**

1 Relator has offered deposition testimony of his expert, Kevin Martin, on several
2 aspects of EVM reporting in compliance with ANSI 748, including whether compliance
3 with ANSI 748 was required in this case, whether Defendant complied with ANSI 748,
4 whether the ANSI 748 requirement was waived by the government, and whether
5 Defendant was capable of doing EVM reporting in compliance with ANSI 748 with
6 their own accounting system. (ECF No. 66-6).

7 Defendant moves to strike Martin's deposition testimony offered in Relator's
8 Opposition as it relates to three opinions: (1) whether ANSI 748 was incorporated by
9 reference into Defendant's contracts with SPAWAR, (2) whether John Mitchell, the
10 AWS project manager from SPAWAR, had authority to waive the EVM requirement
11 for Defendant, and (3) whether Defendant's accounting system could accommodate
12 2,000 task codes. (ECF No. 71 at 3). Defendant asserts that Martin is not qualified to
13 testify as to EVM requirements and interpretations of government contracts because he
14 has no legal or accounting training. *Id.* at 3. Defendant further asserts that testimony
15 regarding incorporation by reference of ANSI 748 and John Mitchell's statements are
16 outside the scope of Relator's initial expert disclosure, and, therefore, in violation of the
17 Court's Case Management Order. *Id.* at 4. Defendant asserts that these opinions also
18 exceed the scope of Martin's own expert report. *Id.* at 5. Finally, Defendant contends
19 that Martin's interpretations are inadmissible as legal conclusions. (ECF No. 75 at 2-3).

20
21 In deciding Defendant's motion for summary judgment, the Court has reviewed
22 Kevin Martin's deposition testimony. The Court did not consider Martin's testimony
23 as it relates to legal requirements. The remainder of Martin's testimony is irrelevant
24 because the Court determined that Defendant's entitlement to payment was not
25 expressly conditioned on compliance with ANSI 748. Therefore, the Court did not
26 consider Martin's testimony as to whether ANSI 748 was complied with or could be
27 complied with.

28 Because the Court has granted Defendant summary judgment on all Relator's

1 claims and Martin's testimony played no part in the Court's analysis, Defendant's
2 motion to strike is denied as moot.

3 **VI. Conclusion**

4 IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment
5 (ECF No. 65) is GRANTED. Defendant's Motion to Strike the Testimony of Kevin
6 Martin (ECF No. 71) is DENIED as moot.

7 IT IS FURTHER ORDERED that Defendant's Motions to File Documents Under
8 Seal (ECF Nos. 63, 68) remain pending. Within ten (10) days of this Order, Defendant
9 may file a Supplemental Motion to File Documents Under Seal. If a Supplemental
10 Motion is not filed by that time, the Motions to File Documents Under Seal will be
11 denied, and all exhibits will be ordered unsealed.

12 DATED: October 6, 2014

13 
14 **WILLIAM Q. HAYES**
United States District Judge

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