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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA ex rel.
BRIAN MARKUS,

Plaintiff,

v.

AEROJET ROCKETDYNE HOLDINGS,
INC., a corporation and AEROJET
ROCKETDYNE, INC., a corporation,

Defendants.

No. 2:15-cv-2245 WBS AC

MEMORANDUM & ORDER RE:
DEFENDANTS' MOTION TO DISMISS
RELATOR'S SECOND AMENDED
COMPLAINT, STAY PROCEEDINGS,
and COMPEL ARBITRATION

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Plaintiff-relator Brian Markus brings this action against defendants Aerojet Rocketdyne Holdings, Inc. ("ARH") and Aerojet Rocketdyne, Inc. ("AR"), arising from defendants' allegedly wrongful conduct in violation of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729 et seq., and relating to defendants' termination of relator's employment. Defendants now move to (1) dismiss the Second Amended Complaint ("SAC") in part for the failure to state upon which can be granted under Federal Rule of

1 Civil Procedure 12(b)(6), (2) stay proceedings, and (3) compel
2 arbitration.

3 I. Background

4 Relator Brian Markus is resident of the State of
5 California. (SAC ¶ 6 (Docket No. 42).) He worked for defendants
6 as the senior director of Cyber Security, Compliance, and
7 Controls from June 2014 to September 2015. (Id.) Defendants ARH
8 and AR develop and manufacture products for the aerospace and
9 defense industry. (Id. ¶ 7.) Defendants' primary aerospace and
10 defense customers include the Department of Defense ("DoD") and
11 the National Aeronautics & Space Administration ("NASA"), who
12 purchase defendants' products pursuant to government contracts.
13 (See id.) Defendant AR is a wholly-owned subsidiary of ARH, and
14 ARH uses AR to perform its contractual obligations. (Id. ¶ 8.)

15 Government contracts are subject to Federal Acquisition
16 Regulations and are supplemented by agency specific regulations.
17 On November 18, 2013, the DoD issued a final rule, which imposed
18 requirements on defense contractors to safeguard unclassified
19 controlled technical information from cybersecurity threats. 48
20 C.F.R. § 252.204-7012 (2013). The rule required defense
21 contractors to implement specific controls covering many
22 different areas of cybersecurity, though it did allow contractors
23 to submit an explanation to federal officers explaining how the
24 company had alternative methods for achieving adequate
25 cybersecurity protection, or why standards were inapplicable.
26 See id. In August 2015, the DoD issued an interim rule,
27 modifying the government's cybersecurity requirements for
28 contractor and subcontractor information systems. 48 C.F.R. §

1 252.204-7012 (Aug. 2015). The interim rule incorporated more
2 cybersecurity controls and required that any alternative measures
3 be "approved in writing prior by an authorized representative of
4 the DoD [Chief Information Officer] prior to contract award."
5 Id. at 252.204-7012(b)(1)(ii)(B). The DoD amended the interim
6 rule in December 2015 to allow contractors until December 31,
7 2017 to have compliant or equally effective alternative controls
8 in place. See 48 C.F.R. § 252.204-7012(b)(1)(ii)(A) (Dec. 2015).
9 Each version of this regulation defines adequate security as
10 "protective measures that are commensurate with the consequences
11 and probability of loss, misuse, or unauthorized access to, or
12 modification of information." 48 C.F.R. § 252.204-7012(a).

13 Contractors awarded contracts from NASA must comply
14 with relevant NASA acquisition regulations. 48 C.F.R. §
15 1852.204-76 lists the relevant security requirements where a
16 contractor stores sensitive but unclassified information
17 belonging to the federal government. Unlike the relevant DoD
18 regulation, this NASA regulation makes no allowance for the
19 contractor to use alternative controls or protective measures. A
20 NASA contractor is required to "protect the confidentiality,
21 integrity, and availability of NASA Electronic Information and IT
22 resources and protect NASA Electronic Information from
23 unauthorized disclosure." 48 C.F.R. § 1852.204-76(a).

24 Relator alleges that defendants fraudulently entered
25 into contracts with the federal government despite knowing that
26 they did not meet the minimum standards required to be awarded a
27 government contract. (SAC ¶ 30.) He alleges that when he
28 started working for defendants in 2014, he found that defendants'

1 computer systems failed to meet the minimum cybersecurity
2 requirements to be awarded contracts funded by the DoD or NASA.
3 (Id. ¶ 36.) He claims that defendants knew AR was not compliant
4 with the relevant standards as early as 2014, when defendants
5 engaged Emagined Security, Inc. to audit the company's
6 compliance. (See id. at ¶¶ 43, 51-53.) Relator avers that
7 defendants repeatedly misrepresented its compliance with these
8 technical standards in communications with government officials.
9 (Id. ¶ 59-64.) Relator alleges that the government awarded AR a
10 contract based on these allegedly false and misleading
11 statements.¹ (Id. ¶ 65.) In July 2015, relator refused to sign
12 documents that defendants were now compliant with the
13 cybersecurity requirements, contacted the company's ethics
14 hotline, and filed an internal report. (Id. ¶¶ 81-82.)
15 Defendants terminated relator's employment on September 14, 2015.
16 (Id. ¶ 83.)

17 Relator filed his initial complaint in this action on
18 October 29, 2015. (Docket No. 1.) While the government was
19 still deciding whether to intervene in this action, relator filed
20 his First Amended Complaint ("FAC") on September 13, 2017.
21 (Docket No. 22.) On June 5, 2018, the United States filed a
22 notice of election to decline intervention. (Docket No. 25.) A
23 few months later defendants filed a motion to dismiss, stay
24 proceedings, and compel arbitration as to the FAC. (Docket No.
25 39.) In response to this motion, relator filed the SAC, alleging

26 ¹ In total, relator alleges that AR entered into at least
27 six contracts with the DoD between February 2014 and April 2015
28 (id. ¶¶ 84-93) and at least nine contracts with NASA between
March 2014 and April 2016 (id. ¶¶ 105-114).

1 the following causes of action against defendants: (1) promissory
2 fraud in violation of 31 U.S.C. § 3729(a)(1)(A); (2) false or
3 fraudulent statement or record in violation of 31 U.S.C. §
4 3729(a)(1)(B); (3) conspiracy to submit false claims in violation
5 of 31 U.S.C. § 3729(a)(1)(C); (4) retaliation in violation of 31
6 U.S.C. § 3730(h); (5) misrepresentation in violation of
7 California Labor Code § 970; and (6) wrongful termination.

8 Defendants now move to dismiss the SAC, stay proceedings, and
9 compel arbitration. (Docket No. 50.)

10 II. Motion to Dismiss

11 A. Legal Standard

12 On a Rule 12(b)(6) motion, the inquiry before the court
13 is whether, accepting the allegations in the complaint as true
14 and drawing all reasonable inferences in the plaintiff's favor,
15 the plaintiff has stated a claim to relief that is plausible on
16 its face. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "The
17 plausibility standard is not akin to a 'probability requirement,'
18 but it asks for more than a sheer possibility that a defendant
19 has acted unlawfully." Id. "A claim has facial plausibility
20 when the plaintiff pleads factual content that allows the court
21 to draw the reasonable inference that the defendant is liable for
22 the misconduct alleged." Id. A complaint that offers mere
23 "labels and conclusions" will not survive a motion to dismiss.
24 Id. (internal quotation marks and citations omitted).

25 B. Fraud Claims under the FCA

26 Relator brings two claims for fraud under the FCA.
27 These two claims impose liability on anyone who "knowingly
28 presents, or causes to be presented, a false or fraudulent claim

1 for payment or approval," 31 U.S.C. § 3729(a)(1)(A), or
2 "knowingly makes, uses, or causes to be made or used, a false
3 record or statement material to a false or fraudulent claim," id.
4 § 3729(a)(1)(B).

5 Outside of the context where "the claim for payment is
6 itself literally false or fraudulent," the Ninth Circuit
7 recognizes two different doctrines that attach FCA liability to
8 allegedly false or fraudulent claims: (1) false certification and
9 (2) promissory fraud, also known as fraud in the inducement. See
10 United States ex rel. Hindow v. Univ. of Phoenix, 461 F.3d 1166,
11 1170-71 (9th Cir. 2006) (citation omitted). Under a false
12 certification theory, the relator can allege either express false
13 certification or implied false certification. The express false
14 certification theory requires that the claimant plainly and
15 directly certify its compliance with certain requirements that it
16 has breached. See id. An implied false certification theory
17 "can be a basis for liability, at least where two conditions are
18 satisfied: first, the claim does not merely request payment, but
19 also makes specific representations about the goods or services
20 provided; and second, the defendant's failure to disclose
21 noncompliance with material statutory, regulatory, or contractual
22 requirements makes those representations misleading half-truths."
23 Universal Health Servs., Inc. v. United States ex rel. Escobar,
24 136 S. Ct. 1989, 2001 (2016). The promissory fraud approach is
25 broader and "holds that liability will attach to each claim
26 submitted to the government under a contract, when the contract
27 or extension of government benefit was originally obtained
28 through false statements or fraudulent conduct." Hindow, 461

1 F.3d at 1173.

2 Under either false certification or promissory fraud,
3 "the essential elements of [FCA] liability remain the same: (1) a
4 false statement or fraudulent course of conduct, (2) made with
5 scienter, (3) that was material, causing (4) the government to
6 pay out money or forfeit moneys due." Id. Only the sufficiency
7 of the complaint as to the materiality requirement is at issue on
8 this motion.²

9 Under the FCA, a falsehood is material if it has "a
10 natural tendency to influence, or be capable of influencing, the
11 payment or receipt of money or property." 31 U.S.C. §
12 3729(b)(4). Most recently in Escobar, the Supreme Court
13 clarified that "[t]he materiality standard is demanding." 136 S.
14 Ct. at 2003. Materiality looks to the effect on the behavior of
15 the recipient of the alleged misrepresentation. Id. at 2002. A
16 misrepresentation is not material simply because the government
17 requires compliance with certain requirements as a condition of
18 payment. Id. at 2003. Nor can a court find materiality where
19 "the Government would have the option to decline to pay if it
20 knew of the defendant's noncompliance." Id. Relatedly, mere
21 "minor or insubstantial" noncompliance is not material. Id.
22 Evidence relevant to the materiality inquiry includes the

23
24 ² Defendants correctly observe that relator's FCA claims
25 must not only be plausible but pled with particularity under
26 Federal Rule of Civil Procedure 9(b). See Cafasso ex rel. United
27 States v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054-55
28 (9th Cir. 2011). However, defendants reference Rule 9(b) only to
the extent they argue that relator has failed to plead particular
facts in support of materiality. (See Mot. to Dismiss at 2-3, 15
& 18.) Therefore, the court assumes, without deciding, that
relator has otherwise satisfied the requirements of Rule 9(b).

1 government's conduct in similar circumstances and whether the
2 government has knowledge of the alleged noncompliance. See id.
3 Defendants puts forth four different arguments in support of
4 their contention that relator has insufficiently pled facts as to
5 the materiality requirement.

6 First, defendants argue that AR disclosed to its
7 government customers that it was not compliant with relevant DoD
8 and NASA regulations and therefore it is impossible for relator
9 to satisfy the materiality prong. The Supreme Court did observe
10 in Escobar that "if the Government pays a particular claim in
11 full despite its actual knowledge that certain requirements were
12 violated, that is very strong evidence that those requirements
13 are not material." Id. Here, however, relator properly alleges
14 with sufficient particularity that defendants did not fully
15 disclose the extent of AR's noncompliance with relevant
16 regulations. See id. at 2000 ("[H]alf-truths--representations
17 that state the truth only so far as it goes, while omitting
18 critical qualifying information--can be actionable
19 misrepresentations."). For instance, relator alleges that AR
20 misrepresented in its September 18, 2014 letter to the government
21 the extent to which it had equipment required by the regulations
22 (SAC ¶ 63), instituted required security controls (id. ¶¶ 60-61,
23 63), and possessed necessary firewalls (id. ¶ 62). Relator also
24 alleges that these misrepresentations persisted over time,
25 whereby AR knowingly and falsely certified compliance with
26 security requirements when submitting invoices for its services.

1 (Id. ¶¶ 135-36.)³ While it may be true that AR disclosed some of
2 its noncompliance (see id. ¶¶ 59-64), a partial disclosure would
3 not relieve defendants of liability where defendants failed to
4 “disclose noncompliance with material statutory, regulatory, or
5 contractual requirements.” See Escobar, 136 S. Ct. at 2001.

6 In fact, some of the evidence defendants put forth in
7 favor of their motion to dismiss provides support for relator’s
8 allegations relevant to materiality.⁴ The DoD informed the
9 federal contracting officer that it could not waive compliance
10 with DoD regulations, even for an urgent contract. (SAC ¶¶ 67-
11 68; Req. for Judicial Notice Ex. Z at 1-4.) While the
12 contracting officer was not prohibited from awarding the contract
13 because of AR’s noncompliance, AR could not process, store, or
14 transmit controlled technical information until it was fully
15 compliant. (Req. for Judicial Notice Ex. Z at 1.) Still, the
16 DoD representative believed it to “be a relatively simple matter
17 for the contractor to become compliant” based on the disclosure
18 letter AR sent to the contracting negotiator. (Id. at 1-2.)
19 Yet, relator’s complaint alleges possible material nondisclosures

20 ³ The court recognizes that “allegations of fraud based
21 on information and belief usually do not satisfy the
22 particularity requirements under rule 9(b).” Moore v. Kayport
23 Package Exp., Inc., 885 F.2d 531, 540 (9th Cir. 1989) (citation
24 omitted). However, as explained elsewhere in this motion, there
25 are other parts of the complaint that allege fraud with
26 sufficient particularity for the purposes of Rule 9(b).

25 ⁴ Because relator’s complaint references the documents
26 contained in defendants’ Exhibits Y & Z (Docket Nos. 52-25 & 52-
27 26) in his complaint, the court considers these materials,
28 without converting the motion to dismiss into a motion for
summary judgment, under the doctrine of incorporation by
reference. See United States v. Ritchie, 342 F.3d 903, 908 (9th
Cir. 2003).

1 in this letter, such as AR's failure to report its status on all
2 required controls, its alleged misstatements as to partial
3 compliance with protection measures, and the fact that the
4 company cherrypicked what data it chose to report. (See SAC ¶¶
5 59-64.)⁵ Accepting these allegations as true, the government may
6 not have awarded these contracts if it knew the full extent of
7 the company's noncompliance, because how close AR was to full
8 compliance was a factor in the government's decision to enter
9 into some contracts.⁶

10 Second, defendants contend that the government's
11 response to the investigation into AR's representations

12 ⁵ Defendants argue for the first time in their reply that
13 these alleged misstatements were not associated with a claim for
14 payment and thus cannot support liability under the FCA. (See
15 Reply in Supp. of Mot. to Dismiss ("Reply") at 4 (Docket No.
16 54).) Contrary to defendants' understanding, the FCA merely
17 requires that the false statement(s) or fraudulent course of
18 conduct cause the government to pay out money due. See Hendow,
19 461 F.3d at 1173. Under a promissory fraud theory, the relator
20 only needs to allege that a claim was submitted "under a
21 contract" that "was originally obtained through false statements
22 or fraudulent conduct." See id.; see also United States ex rel.
Campie v. Gilead Scis., Inc., 862 F.3d 890, 902 (9th Cir. 2017)
(reaffirming Hendow's test for promissory fraud after Escobar).
Here, relator alleges that AR secured its contracts with the
government through misrepresentations made to government
contracting agents and that the government ultimately paid out on
these contracts. (See SAC ¶¶ 59-66, 129-131.)

23 ⁶ This promissory fraud theory, supported by these
24 allegations of specific misrepresentations, distinguishes this
25 case from United States ex rel. Mateski v. Raytheon Co., No.
26 2:06-CV-03614 ODW KSX, 2017 WL 3326452 (C.D. Cal. Aug. 3, 2017),
27 aff'd, 745 F. App'x 49 (9th Cir. 2018). In Mateski, the relator
28 merely alleged general violations of contract provisions that the
government designated compliance with as mandatory to support a
false certification theory. See id. at *7. Applying Escobar,
the district court concluded that "such designations do not
automatically make misrepresentations concerning those provisions
material." Id. (citing 136 S. Ct. at 2003).

1 surrounding its cybersecurity compliance undermines relator's
2 allegations as to materiality. Both the DoD and NASA have
3 continued to contract with AR since the government's
4 investigation into the allegations of this complaint. (See Req.
5 for Judicial Notice Exs. S-V (Docket Nos. 52-19, 52-20, 52-21 &
6 52-22).)⁷ Such evidence is not entirely dispositive on a motion
7 to dismiss. Cf. Campie, 862 F.3d at 906 (cautioning courts not
8 to read too much into "continued approval" by the government,
9 albeit in a different context). Instead, the appropriate inquiry
10 is whether AR's alleged misrepresentations were material at the
11 time the government entered into or made payments on the relevant
12 contracts. See Escobar, 136 S. Ct. at 2002. The contracts
13 government agencies entered with AR after relator commenced this
14 litigation are not at issue and possibly relate to a different
15 set of factual circumstances. As discussed previously, relator
16 has sufficiently alleged that AR's misrepresentations as to the
17 extent of its noncompliance with government regulations could
18 have affected the government's decision to enter into and pay on
19 the contracts at issue in this case.

20 Defendants also argue that the government's decision
21

22 ⁷ The court GRANTS defendants' request that it take
23 judicial notice of these exhibits. Exhibits T through V are
24 publications on government websites and thus properly subject to
25 judicial notice. See, e.g., Daniels-Hall v. Nat'l Educ. Ass'n,
26 629 F.3d 992, 998-99 (9th Cir. 2010) (finding that it is
27 "appropriate to take judicial notice of [information on
28 government website], as it was made publicly available by
government entities [], and neither party disputes the
authenticity of web sites or the accuracy of the information
displayed therein."). Exhibit S is an official Authorization to
Operate signed by NASA officials, so its "accuracy cannot
reasonably be questioned." See Fed. R. Evid. 201(b)(2).

1 not to intervene in this case indicates that the alleged
2 misrepresentations were not material. (See Mot. to Dismiss at 3;
3 Reply at 9.) As the Sixth Circuit has observed, in Escobar
4 itself, the government chose not to intervene and the Supreme
5 Court did not mention it as a factor relevant to materiality.
6 See United States ex rel. Prather v. Brookdale Senior Living
7 Communities, Inc., 892 F.3d 822, 836 (6th Cir. 2018) (citing 136
8 S. Ct. at 1998). Separately, “[i]f relators’ ability to plead
9 sufficiently the element of materiality were stymied by the
10 government’s choice not to intervene, this would undermine the
11 purposes of the Act,” as the FCA allows relators to proceed even
12 without government intervention. Id. (citation omitted). And
13 finally, there is no reason believe that the decision not to
14 intervene is a comment on the merits of this case. See, e.g.,
15 United States ex rel. Atkins v. McInteer, 470 F.3d 1350, 1360
16 n.17 (11th Cir. 2006) (“In any given case, the government may
17 have a host of reasons for not pursuing a claim.”); United States
18 ex rel. Chandler v. Cook Cty., Ill., 277 F.3d 969, 974 n.5 (7th
19 Cir. 2002) (“The Justice Department may have myriad reasons for
20 permitting the private suit to go forward including limited
21 prosecutorial resources and confidence in the relator’s
22 attorney.”).

23 Third, defendants argue that AR’s noncompliance does
24 not go to the central purpose of any of the contracts, as the
25 contracts pertain to missile defense and rocket engine
26 technology, not cybersecurity. See Escobar, 136 S. Ct. at 2004
27 n.5 (noting that a misrepresentation is material where it goes to
28 the “essence of the bargain”). This argument is unavailing at

1 this stage of the proceedings. Relator alleges that all of AR's
2 relevant contracts with the DoD and NASA incorporated each
3 entity's acquisition regulations. (See SAC ¶¶ 84, 105.) These
4 acquisition regulations require that the defense contractor
5 undertake cybersecurity specific measures before the contractor
6 can handle certain technical information. Here, compliance with
7 these cybersecurity requirements could have affected AR's ability
8 to handle technical information pertaining to missile defense and
9 rocket engine technology. (See Req. for Judicial Notice Ex. Z at
10 1.) Accordingly, misrepresentations as to compliance with these
11 cybersecurity requirements could have influenced the extent to
12 which AR could have performed the work specified by the contract.

13 Fourth and finally, defendants argue that the
14 government's response to the defense industry's non-compliance
15 with these regulations as a whole weighs against a finding of
16 materiality. When evaluating materiality, courts should
17 "consider how the [government] has treated similar violations."
18 See United States ex rel. Rose v. Stephens Inst., 909 F.3d 1012,
19 1020 (9th Cir. 2018). Defendants contend that the DoD never
20 expected full technical compliance because it constantly amended
21 its acquisition regulations and promulgated guidances that
22 attempted to ease the burdens on the industry. This observation
23 is not dispositive. Even if the government never expected full
24 technical compliance, relator properly pleads that the extent to
25 which a company was technically compliant still mattered to the
26 government's decision to enter into a contract. (See SAC ¶¶ 66-
27 72.) Defendants have not put forth any judicially noticeable
28 evidence that the government paid a company it knew was

1 noncompliant to the same extent as AR was. Therefore, this
2 consideration does not weigh in favor of dismissal.

3 Accordingly, given the above considerations, relator
4 has plausibly pled that defendants' alleged failure to fully
5 disclose its noncompliance was material to the government's
6 decision to enter into and pay on the relevant contracts.⁸

7 C. Conspiracy under the FCA

8 Relator's third count alleges that defendants
9 participated in a conspiracy to submit false claims in violation
10 of 31 U.S.C. § 3729(a) (1) (C). Relator maintains that defendants
11 and their officers conspired together to defraud the United
12 States by knowingly submitting false claims. (See SAC ¶ 144.)
13 Section 3729(a) (1) (C) imposes liability on a person who conspires
14 to commit a violation of Section 3729(a) (1) (A) or Section
15 3729(a) (1) (B).

16 Defendants argue that this count fails as a matter of
17 law because relator has failed to identify two distinct entities
18 that conspired. Derived from antitrust law, the intracorporate
19 conspiracy doctrine "holds that a conspiracy requires an
20 agreement among two or more persons or distinct business
21 entities." United States v. Hughes Aircraft Co., 20 F.3d 974,
22 979 (9th Cir. 1994) (internal quotation marks omitted). The
23 doctrine stems from the definition of a conspiracy and the
24 requirement that there be a meeting of the minds. See Hoefer v.
25 Fluor Daniel, Inc., 92 F. Supp. 2d 1055, 1057 (C.D. Cal. 2000)
26 (citing Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983)). While

27 _____
28 ⁸ The court expresses no opinion as to what relator will
be able to establish at summary judgment or trial.

1 the Ninth Circuit has not addressed this issue, several district
2 courts have applied the intracorporate conspiracy doctrine to FCA
3 claims. See United States ex rel. Lupo v. Quality Assurance
4 Servs., Inc., 242 F. Supp. 3d 1020, 1027 (S.D. Cal. 2017)
5 (collecting cases). Courts have used this principle to bar
6 conspiracy claims where the alleged conspirators are a parent
7 corporation and its wholly-owned subsidiary. See, e.g., United
8 States ex. rel. Campie v. Gilead Scis., Inc., No. C-11-0941 EMC,
9 2015 WL 106255, at *15 (N.D. Cal. Jan. 7, 2015).

10 Here, relator identifies only a parent company, ARH,
11 and its wholly-owned subsidiary, AR, as defendants. (SAC ¶¶ 7-
12 8.) While relator alleges that defendants also conspired with
13 its officers, a corporation, as a matter of law, "cannot conspire
14 with its own employees or agents." Hoefer, 92 F. Supp. 2d at
15 1057. By failing to allege that defendants conspired with any
16 independent individual or entity, relator's conspiracy claim
17 fails as a matter of law.

18 Accordingly, the court will dismiss relator's third
19 claim, that defendants participated in a conspiracy to submit
20 false claims in violation of 31 U.S.C. § 3729(a)(1)(C).

21 III. Motion to Compel Arbitration and Stay Proceedings

22 "Relator does not oppose defendants' motion to refer
23 his employment related claims to arbitration" based on his
24 arbitration agreement with defendants. (Opp'n to Mot. to Dismiss
25 at 16 (Docket No. 53); see also Decl. of Ashley Neglia Ex. 1
26 (arbitration agreement) (Docket No. 51-1).) Relator does oppose,
27 however, defendants' request that the entire proceedings be
28 stayed pending the resolution of these employment related claims

1 in arbitration. Relator contends that a stay is inappropriate as
2 to his FCA claims because they are brought on behalf of the
3 government, are not referable to arbitration, and are separate
4 from the issues involved in his employment-related claims. (See
5 Opp'n to Mot. to Dismiss at 16-17.)

6 Section 3 of the FAA provides that a court "shall on
7 application of one of the parties stay the trial" of "any suit
8 proceeding" brought "upon any issue referable to arbitration
9 under [an arbitration] agreement . . . until such arbitration has
10 been had in accordance with the terms of the agreement." 9
11 U.S.C. § 3. A party is only "entitled to a stay pursuant to
12 section 3" as to arbitrable claims. Leyva v. Certified Grocers
13 of Cal., Ltd., 593 F.2d 857, 863 (9th Cir. 1979). As to
14 nonarbitrable claims, which defendants concede the FCA claims
15 are, this court has discretion whether to stay the litigation
16 pending arbitration. Id. at 863-64. This court may decide
17 whether "it is efficient for its own docket and the fairest
18 course for the parties to enter a stay of an action before it,
19 pending resolution of independent proceedings which bear upon the
20 case." Id. at 863. If there is a fair possibility that the stay
21 may work damage to another party, a stay may be inappropriate.
22 See Dependable Highway Exp., Inc. v. Navigators Ins. Co., 498
23 F.3d 1059, 1066 (9th Cir. 2007) (citation omitted).

24 The court will not expand the stay to encompass the
25 nonarbitrable FCA claims. The issues involved in the FCA claims
26 differ from those involved in relator's employment-based claims.
27 Relator's FCA claims concern fraud that defendants allegedly
28 perpetrated on the government, while relator's employment-based

1 claims concern the alleged violation of his own rights during his
2 employment. Resolution of relator's employment-based claims will
3 not narrow the factual and legal issues underlying the FCA
4 claims. While relator brings one of his employment claims under
5 the FCA, "[t]he elements differ for a FCA violation claim and a
6 FCA retaliation claim." Mendiondo v. Centinela Hosp. Med. Ctr.,
7 521 F.3d 1097, 1103 (9th Cir. 2008). Moreover, a stay would
8 unnecessarily work to delay resolution of relator's FCA claims,
9 which have been pending for more than three years.

10 Accordingly, the court will refer relator's employment-
11 based claims, Counts Four, Five, and Six, to arbitration and stay
12 proceedings as to these claims only.⁹

13 IT IS THEREFORE ORDERED that defendants' Motion to
14 Dismiss Relator's Second Amended Complaint (Docket No. 50) be,
15 and the same hereby is, GRANTED IN PART. Count Three of
16 relator's Second Amended Complaint is DISMISSED WITH PREJUDICE.
17 The motion is DENIED in all other respects.

18 IT IS FURTHER ORDERED that defendants' Motion to Compel
19 Arbitration and Stay Proceedings (Docket No. 50) be, and the same
20 hereby is, GRANTED with respect to Counts Four, Five, and Six of
21 relator's Second Amended Complaint. Proceedings as to Counts One
22 and Two are not stayed.

23 Dated: May 8, 2019

24 

25 **WILLIAM B. SHUBB**
26 **UNITED STATES DISTRICT JUDGE**

27 ⁹ All remaining Requests for Judicial Notice (Docket No.
28 52) are DENIED as MOOT.