

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Sebastian Rako v. VMware LLC, et al.

Rako · No. 25-cv-05142-SVK · Decided November 25, 2025

SUMMARY

The United States District Court for the Northern District of California considers motions to dismiss Sebastian Rako’s claims against VMware LLC and other defendants. The court dismisses the False Claims Act retaliation claim, and related conspiracy and wrongful-termination claims to the extent based on that claim, with leave to amend. The remaining dismissal arguments are denied without prejudice, and the court permits filing of a First Amended Complaint by December 31, 2025.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	Susan van Keulen
JURISDICTION	United States District Court for the Northern District of California
DECIDED	November 25, 2025
DOCKET	25-cv-05142-SVK
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiff's pro se complaint asserted False Claims Act retaliation, California Labor Code retaliation, civil conspiracy, and wrongful termination in violation of public policy. Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6).
STANDARD OF REVIEW	On a Rule 12(b)(6) motion, the court considered the complaint, materials incorporated by reference, and matters subject to judicial notice; presumed well-pleaded allegations true; drew reasonable inferences in plaintiff's favor; and required enough facts to state a facially plausible claim for relief.
PRECEDENTIAL VALUE	Unknown; district court order with no reported citation.
PARTIES	Sebastian Rako v. VMware LLC, Michael Brewster, Jeremy Hoke, Kaiser Aluminum Corporation, Mike Wood, Tami Mills

TOPICS

motions to dismiss

false claims act

retaliation

whistleblower

civil procedure

PRACTICE AREAS

civil procedure

False Claims Act

employment retaliation

whistleblower law

QUESTIONS PRESENTED

1. Whether the complaint plausibly alleged that Rako engaged in protected conduct under the False Claims Act's retaliation provision.
2. Whether the complaint plausibly alleged that VMware knew Rako engaged in FCA-protected conduct.
3. Whether the FCA-based portions of the civil-conspiracy and wrongful-termination claims could survive when the underlying FCA retaliation claim was inadequately pleaded.
4. Whether the court should reach defendants' remaining arguments concerning the state-law and other claims at the motion-to-dismiss stage.

HOLDINGS

1. A plaintiff alleging efforts to stop FCA violations must plausibly allege that the plaintiff in good faith believed, and that a reasonable employee in the same or similar circumstances might believe, that the employer was possibly committing fraud against the government. Rako's complaint did not allege sufficient facts connecting VMware's alleged licensing fraud with a false claim made to the government.
2. The complaint did not plausibly allege that VMware knew Rako had engaged in FCA-protected conduct because the complaint did not first plausibly allege that Rako engaged in protected conduct.
3. The FCA retaliation cause of action was dismissed under Rule 12(b)(6), with leave to amend because the court did not find that the pleading deficiencies were incurable.
4. To the extent the civil-conspiracy and wrongful-termination claims depended on the deficient FCA retaliation claim, those portions were also dismissed with leave to amend.
5. In this case, the court ordered that future filings containing authorities located through specified AI or automated text-generation tools include a footnote stating: "Located through AI; Checked."

KEY QUOTATIONS

"an employee engages in protected activity where (1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe [] that the employer is possibly committing fraud against the government." (Document text, Section III.B.1)

"Parties, including pro se parties, and counsel shall not file or otherwise present to the Court any briefs, pleadings, materials, other documents, or argument which contain AI-hallucinated citations to law, case or legal citations which are fictitious or non-existent, or any assertions of law or fact that cannot be corroborated." (Document text, Section III.A)

FACTUAL BACKGROUND

Sebastian Rako worked as a VMware sales professional from approximately August 2021 until June 2022. He alleged that he discovered Kaiser Aluminum was using VMware licenses beyond authorized limits and had cybersecurity and compliance deficiencies relating to facilities involved in defense production. Rako alleged that he reported the issues internally, refused to process license information he believed was false, and was suspended and terminated after attempting to stop the conduct.

PROCEDURAL HISTORY

Plaintiff filed the complaint on June 18, 2025. The court considered fully briefed motions to dismiss filed by VMware, Kaiser and Wood, and Mills. The court dismissed the FCA retaliation claim with leave to amend, dismissed the derivative portions of the conspiracy and wrongful-termination claims with leave to amend, and denied the remaining dismissal arguments without prejudice.

DISPOSITION

other

REMAND INSTRUCTIONS

No remand. Plaintiff may file a First Amended Complaint by December 31, 2025, with a redline comparing it to the original complaint. Defendants must respond within fourteen days after filing. VMware's motion was granted with leave to amend as to the FCA retaliation claim and derivative FCA-based portions of the conspiracy and wrongful-termination claims; the remaining dismissal arguments in the motions were denied without prejudice.

CASES CITED

- Metzler Inv. GmbH v. Corinthian Colls., Inc., 540 F.3d 1049, 1061 (9th Cir. 2008)
- Usher v. City of L.A., 828 F.2d 556, 561 (9th Cir. 1987)
- In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)
- Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)
- Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)
- Moore v. Cal. Institute of Tech., 275 F.3d 838, 844-45 (9th Cir. 2002)
- Winter ex rel. United States v. Garden Reg'l Hosp. & Med. Ctr., Inc., 953 F.3d 1108, 1114 (9th Cir. 2020)
- Allison Engine Co. v. United States ex rel. Sanders, 553 U.S. 662 (2008)
- Amphastar Pharms. Inc. v. Aventis Pharma SA, No. EDCV-09-0023 MJG, 2012 WL 5512466, at *10-11 (C.D. Cal. Nov. 14, 2012)
- Mooney v. Fife, 118 F.4th 1081, 1089-92 (9th Cir. 2024)
- U.S. ex rel. Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996)
- Layton v. Terremark No. Amer., No. 5:13-cv-03093-PSG, 2014 WL 2538679, at *7 (N.D. Cal. June 5, 2014)
- U.S. ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890, 907 (9th Cir. 2017)
- United States v. Wal-Mart Stores East, LP, 858 Fed. App'x 867, 879-80 (6th Cir. 2021)
- Sneddon v. ABF Freight Sys., 489 F. Supp. 2d 1124, 1131 (S.D. Cal. 2007)

- Vasile v. Flagship Financial Grp., LLC, No. 2:12-cv-02912-KJM-CKD, at *4 (E.D. [text truncated])

OPINION

1 2 3 UNITED STATES DISTRICT COURT 4 NORTHERN DISTRICT OF CALIFORNIA 5 6
SEBASTIAN RAKO, Case No. 25-cv-05142-SVK 7 Plaintiff, ORDER ON MOTIONS TO
DISMISS 8 v. Re: Dkt. Nos. 17, 18, 44 9 VMWARE LLC, et al., 10 Defendants. 11 I.
INTRODUCTION AND BACKGROUND 12 This background discussion is taken primarily from
the allegations of the Complaint. 13 Dkt. 1 – “Complaint”.

Plaintiff Sebastian Rako, appearing pro se, worked as a sales professional 14 for Defendant
VMware LLC (“VMware”) from approximately August 2021 until June 2022. 15 See id. ¶¶ 1, 16,
40. Plaintiff claims that VMware suspended and then terminated his employment 16 after he
reported that Defendant Kaiser Aluminum Corporation (“Kaiser”) had defrauded VMware 17
under a license issued by VMware to Kaiser.

See id. ¶¶ 1, 33-40. 18 Plaintiff filed the Complaint in this case on June 18, 2025. The Defendants
are VMware 19 and its employees Michael Brewster and Jeremy Hoke, and Kaiser and its
employees Mike Wood 20 and Tami Mills.

The Complaint contains four causes of action: (1) retaliation in violation of the 21 False Claims
Act (31 U.S.C. § 3730(h)); (2) retaliation in violation of California Labor Code 22 § 1102.5; (3)
civil conspiracy to retaliate against whistleblower and facilitate wire fraud; and 23 (4) wrongful
termination in violation of public policy.

The first, second, and fourth causes of 24 action are asserted against VMware only. The third
cause of action is asserted against all other 25 Defendants. All Parties have consented to the
jurisdiction of a magistrate judge. Dkt. 4, 11, 14, 26 46. 27 Now before the Court are three fully-
briefed motions to dismiss the Complaint: (1) the 1 dismiss”); (2) the motion to dismiss filed by
Kaiser and Wood (Dkt.

18 – “Kaiser motion to 2 dismiss”); and (3) the motion to dismiss filed by Mills (Dkt. 44 – “Mills
motion to dismiss”). 3 These motions are suitable for determination without a hearing. Civ. L.R. 7-
1(b). For the reasons 4 discussed below, VMware’s motion to dismiss the first cause of action for
retaliation in violation 5 of the False Claims Act (“FCA”) is GRANTED WITH LEAVE TO
AMEND.

VMWare’s 6 motion to dismiss the third (civil conspiracy) and fourth (wrongful termination in
violation of 7 public policy) causes of action is also GRANTED WITH LEAVE TO AMEND to
the extent 8 those causes of action are based on Plaintiff’s deficient FCA retaliation claim.

Because Plaintiff 9 bases his assertion that this Court has original subject matter jurisdiction solely
on his FCA 10 claims, the Court does not reach Defendants’ other arguments as to the other causes

of action at 11 this time and therefore DENIES WITHOUT PREJUDICE the remaining portions of VMware's 12 motion to dismiss as well as the motions to dismiss filed by Kaiser and Mills.

Defendants may re- 13 assert those arguments as appropriate if Plaintiff files a First Amended Complaint. 14 II. LEGAL STANDARD 15 Federal Rule of Civil Procedure 12(b)(6) authorizes a district court to dismiss a complaint 16 if it fails to state a claim upon which relief can be granted.

In ruling on a motion to dismiss, courts 17 may consider only "the complaint, materials incorporated into the complaint by reference, and 18 matters of which the court may take judicial notice." *Metzler Inv. GmbH v. Corinthian Colls., 19 Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

In deciding whether the plaintiff has stated a claim, the 20 court must presume the plaintiff's allegations are true and draw all reasonable inferences in the 21 plaintiff's favor. *Usher v. City of L.A.*, 828 F.2d 556, 561 (9th Cir. 1987).

However, the court is 22 not required to accept as true "allegations that are merely conclusory, unwarranted deductions of 23 fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 24 2008) (citation omitted). 25 To survive a motion to dismiss, the plaintiff must allege "enough facts to state a claim to 26 relief that is plausible on its face." *Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 570 (2007). This 27 "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer 1 If a motion to dismiss is granted, the court must grant leave to amend unless it is clear that 2 the complaint's deficiencies cannot be cured by amendment. *Eminence Capital, LLC v. Aspeon, 3 Inc.*, 316 F.3d 1048, 1052 (9th Cir.

2003). 4 III. DISCUSSION 5 A. COURT ORDER re Plaintiff's "Notices of Errata" With Regard to Opposition Briefs 6 On September 10, 2025, Plaintiff filed "Notices of Errata" in connection with the briefs he 7 filed in opposition to the VMware and Kaiser motions to dismiss, stating that those opposition 8 briefs contained "inadvertent citation errors." Dkt. 55, 56.

The Notices of Errata were filed 9 almost six weeks after Plaintiff filed the relevant opposition briefs and only after VMware and 10 Kaiser noted in their reply briefs that Plaintiff's opposition briefs cited non-existing caselaw. 11 See Dkt. 37 at 1; Dkt. 38 at 4-5. Plaintiff's Notices of Errata provided "corrected" citations, which 12 in most instances differed substantially from the original citations, including the case names, 13 issuing courts, and dates.

Id. 14 Although the Court recognizes that Plaintiff came forward and attempted to correct the 15 record, it is concerned that Plaintiff may have relied on Artificial Intelligence ("AI") to identify 16 legal authorities without checking that the authorities exist and were accurately characterized. 17 Under the circumstances of this case, the Court finds it appropriate to ORDER as follows: 18 Parties, including pro se parties, and counsel shall not file or otherwise present to the Court 19 any

briefs, pleadings, materials, other documents, or argument which contain AI-hallucinated 20 citations to law, case or legal citations which are fictitious or non-existent, or any assertions of law 21 or fact that cannot be corroborated.

The failure of a pro se party or counsel to confirm or double- 22 check the accuracy, veracity, or even existence of a case or legal citation (or assertion of fact) 23 created by an AI tool is grounds for potential sanctions.

In light of Plaintiff's previous citations to 24 non-existent cases in this litigation, IN ALL FUTURE FILINGS IN THIS CASE, PLAINTIFF 25 MUST INCLUDE A FOOTNOTE FOR EACH CITATION LOCATED THROUGH AI 26 CONFIRMING THAT THE CITED AUTHORITY WAS LOCATED THROUGH AI AND 27 THAT PLAINTIFF HAS VERIFIED THE EXISTENCE AND ACCURACY OF THE 1 CITATION BEFORE INCLUDING IT IN HIS FILING.

This information shall appear in a 2 footnote for each such citation, as follows: "Located through AI; Checked." This requirement 3 applies to any cited authority Plaintiff locates using any tool labelled as AI, generative AI, 4 language model, natural language processing tool, machine learning tool, artificial neural network, 5 deep learning neural network, or any other automated generator of text.

6 B. First Cause of Action: Retaliation in violation of False Claims Act (31 U.S.C. § 3730(h)) 7 The first cause of action is asserted against VMware only and alleges that VMware 8 violated the False Claims Act ("FCA"), 31 U.S.C. § 3730(h), by taking various actions against 9 Plaintiff, including terminating his employment, in retaliation for his attempts to stop what he 10 believed were violations of the FCA.

Dkt. 1 ¶¶ 47-66. 11 The FCA "was enacted with the purpose of combating widespread fraud by government 12 contractors who were submitting inflated invoices and shipping faulty goods to the government." 13 *Moore v. Cal. Institute of Tech.*, 275 F.3d 838, 844 (9th Cir. 2002) (citation and internal quotation 14 marks omitted). "The FCA imposes significant civil liability on any person who...

15 (A) 'knowingly presents, or causes to be presented, a false or fraudulent claim for payment or 16 approval,' (B) 'knowingly makes, uses, or causes to be used, a false record or statement material 17 to a false or fraudulent claim,' or (C) 'conspires to commit a violation of [the FCA].'" Winter ex 18 rel. *United States v. Garden Reg'l Hosp. & Med. Ctr., Inc.*, 953 F.3d 1108, 1114 (9th Cir.

2020) 19 (quoting 31 U.S.C. § 3729(a)(1)).1 20 The FCA contains an anti-retaliation provision which (as also amended in 2009) states that 21 22 1 2009 amendments the FCA "expanded the

scope of conduct for which persons and organizations can be liable.” *Amphastar Pharms. Inc. v. Aventis Pharma SA*, No. EDCV-09-0023 MJG, 2012 23 WL 5512466, at *10–11 (C.D. Cal. Nov.

14, 2012). By expanding liability from any person who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or 24 fraudulent claim paid or approved by the Government” to any person who “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent 25 claim,” “[t]he amendment effectively abrogated the Supreme Court’s decision in *Allison Engine Co. v. United States ex rel.*

Sanders, 553 U.S. 662, 128 S.Ct. 2123, 170 L.Ed.2d 1030 (2008), 26 which held that proof of intent to defraud is an element of a false statement claim.” *Id.* at *11. “Rather, liability now attaches merely so long as a false statement is material to a false or 27 fraudulent claim.” *Id.* 1 “[a]ny employee, contractor, or agent shall be entitled to all relief necessary to make that 2 employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, 3 demoted, suspended, threatened, harassed, or in any other manner discriminated against in the 4 terms and conditions of employment because of lawful acts done by the employee, contractor, 5 agent or associated others in furtherance of an action under this section or other efforts to stop 1 or 6 more violations of this subchapter.” 31 U.S.C. § 3730(h).

7 An employee must prove three elements in a FCA retaliation claim: (1) the employee 8 engaged in conduct protected under the statute; (2) the employer knew that the employee engaged 9 in protected conduct; and (3) the employer discriminated against the employee because she 10 engaged in protected conduct.” *Mooney v. Fife*, 118 F.4th 1081, 1089 (9th Cir. 2024).

11 VMware argues that Plaintiff has failed to state a claim for retaliation in violation of the 12 FCA because the complaint does not contain sufficient and plausible factual allegations that 13 (1) Plaintiff engaged in activity protected under the statute or (2) VMware knew that Plaintiff was 14 engaged in protected activity. Dkt. 17 at 6-13. 15 1. Protected activity by Plaintiff 16 VMware argues that Plaintiff fails to plausibly allege that he engaged in protected conduct.

17 Dkt. 17 at 6-10. In opposition to the motion to dismiss, Plaintiff argues that he is not required to 18 prove an actual FCA violation, but need only have a reasonable and good faith belief in possible 19 fraud. Dkt. 33 at 4-5. 20 Before the 2009 amendments to section 3730(h), the Ninth Circuit required that the 21 employee “must be investigating matters which are calculated, or reasonably could lead, to a 22 viable FCA action” in order to be engaged in “protected conduct.” See *Mooney*, 118 F.4th at 1091 23 (quoting *U.S. ex rel.*

Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996)). *Mooney*, however, 24 held that “Hopper’s ‘investigating’ requirement does not apply when the plaintiff alleges that he 25 was ‘discharged ... because of ... other efforts to stop 1 or more violations of [the FCA] ...’ 26 *Mooney*, 118 F.4th at 1091. 27 Here, Plaintiff alleges that he undertook various acts “to stop what he reasonably

believed 1 a) Investigated and documented a multi-year pattern of VMware licensing fraud by 2 Kaiser Aluminum, a defense-supply contractor.

3 b) Reported those findings to VMware Compliance and Senior Manager Neil Velasco, 4 who validated the audit. 5 c) Refused Manager Hoke's directive to process knowingly false self-reported license 6 counts, after warning Manager Brewster that doing so could implicate VMware in 7 wire-fraud felonies. 8 d) Informed Kaiser's procurement lead that the renewal could not proceed until 9 compliance issues were resolved.

10 e) After VMware management reviewed clear evidence of Kaiser's DFARS/NIST 11 noncompliance, refused to participate in further renewals that would perpetuate the 12 fraud. 13 Dkt. 1 ¶ 52. 14 Where, as here, a plaintiff alleges he undertook efforts to stop a FCA violation, to satisfy 15 the "protected conduct" requirement "an employee's efforts to stop 1 or more violations need not 16 lead to a lawsuit or to the distinct possibility of a lawsuit" and therefore "the employee should not 17 be required to be investigating matters which are calculated, or reasonably could lead, to a viable 18 FCA action." Mooney, 118 F.4th at 1091-92 (internal quotation marks, emphasis, and citations 19 omitted).

Accordingly, to the extent VMware's argument that Plaintiff was not engaged in 20 protected conduct because he was not "investigating" fraud (see Dkt. 17 at 9-10, 10-12) is 21 inconsistent with the present state of the law as expressed in Mooney, the Court rejects that 22 argument. 23 Instead, the Court applies the test articulated in Mooney for a situation where, as here, 24 Plaintiff alleges he was trying to stop a FCA violation.

Under that test, "an employee engages in 25 protected activity where (1) the employee in good faith believes, and (2) a reasonable employee in 26 the same or similar circumstances might believe, that the employer is possibly committing fraud 27 against the government." Mooney, 118 F.4th at 1091 (quoting Moore, 275 F.3d at 845).

In 1 to apply following the 2009 amendment" to the FCA. Mooney, 118 F.4th at 1092. 2 The Ninth Circuit has noted that "this test does not set a high bar." Id. The subjective 3 component requires only that the employee have a good faith belief "that the employer is possibly 4 committing fraud against the government," and "the employee need not know for certain that the 5 employer has committed fraud." Id. (emphasis in original, citation omitted).

The objective 6 component is satisfied where "a reasonable employee in the same or similar circumstances might 7 believe [] that the employer is possibly committing fraud against the government." Id. (emphasis 8 in original, citation omitted). 9 Although the applicable test for "protected conduct" "does not set a high bar," the 10 Complaint in this case fails to allege sufficient facts to clear the bar.

Plaintiff's claim for 11 retaliation under the FCA must give VMware "fair notice of what the claim is and the grounds 12 upon which it rests." *Layton v. Terremark No. Amer.*, No. 5:13-cv-03093-PSG, 2014 WL 13 2538679, at *7 (N.D. Cal. June 5, 2014); Fed. R. Civ. P. 8(a).² The Complaint does not do so 14 because it does not contain sufficient facts explaining why Plaintiff in good faith and reasonably 15 believed that VMware might be committing fraud against the government.

16 The Complaint alleges that in Kaiser's role as "a supplier of critical components for the F- 17 35 Joint Strike Fighter and other U.S. defense platforms," Kaiser "handles Controlled Unclassified 18 Information (CUI) and is subject to the federal data-handling requirements set forth in 32 C.F.R. 19 § 2002." Complaint ¶ 23.

The Complaint further alleges that Kaiser's IT systems "must comply 20 with the Defense Federal Acquisition Regulation Supplement (DFARS) 252.204-7012 and NIST 21 Special Publication 800-171." *Id.* 22 According to the Complaint, Kaiser licensed technology from VMware, and "VMware 23 assigned Plaintiff to manage the renewal and infrastructure modernization" for Kaiser.

See 24 Complaint ¶ 23; see also *id.* ¶ 17. Plaintiff alleges that in the course of this work, he discovered 25 26 2 Complaints alleging a FCA violation are generally subject to the heightened pleading standards of Federal Rule of Civil Procedure 9(b), but those heightened pleading requirements do not apply 27 to retaliation claims under the FCA. *U.S. ex rel.*

Campie v. Gilead Scis., Inc., 862 F.3d 890, 907 1 that Kaiser "was still running production workloads on legacy infrastructure" and had deployed 2 "ROBO licenses" to more sites than authorized by "VMware's usage restrictions." *Id.* ¶ 25. 3 The Complaint elaborates that more than the authorized number of "ROBO licenses" were 4 deployed at Kaiser's Trentwood data center (*id.*), that "[t]he same facility housed an idle \$2 5 million VMware Cloud Foundation (VCF) on VxRail system ... left unused while Kaiser 6 continued operating on mislicensed architecture" (*id.* ¶ 27), and that "[t]he Trentwood facility is 7 where aluminum components for the F-35 Joint Strike Fighter are manufactured" (*id.* ¶ 28).

8 According to the Complaint: 9 The VCF system in that facility included NIST-compliant security controls and 10 automated compliance validation, yet remained idle. Despite having more than twice 11 the required capacity. Kaiser continued to run F-35 production workloads on ROBO-licensed hosts with no equivalent safeguards—placing Controlled Unclassified 12 Information (CUT) at heightened risk.

13 *Id.* Plaintiff alleges that he "uncovered" other "vulnerabilities" in Kaiser's F-35 manufacturing 14 systems." *Id.* ¶ 29. The Complaint also refers repeatedly to alleged "wire fraud." As one 15 example, it alleges that "Plaintiff further identified a pattern of interstate wire fraud" in which 16 "Kaiser transmitted false license counts" to VMware. *Id.* ¶ 30.

17 Plaintiff alleges that he “flagged fraudulent licensing, cybersecurity gaps, and SEC- 18 relevant disclosure issues” to his supervisor and escalated his findings within VMware when his 19 supervisor did not act. Id. ¶ 32.

After further communications within VMware (id. ¶¶33-35), 20 Plaintiff told Kaiser that a standard renewal of its license was not possible because Kaiser was not 21 in compliance and sent his “audit master-map” to Kaiser. Id. ¶ 36.

The Complaint sums up this 22 series of events as follows: 23 Plaintiff refused [VMware manager] Hoke’s directive to accept Kaiser’s self-reported 24 license counts because submitting data he knew to be false – while systems handling F- 25 35 data remained exposed – would constitute wire fraud and potentially false claims and fraud against the United States.

With Kaiser subject to DFARS requirements for 26 handling Controlled Unclassified Information (“CUI”), knowingly falsifying compliance data exposed all participants to potential federal criminal liability. 27 Id. ¶ 37. 1 The Complaint attempts to link Kaiser’s license from VMware to Kaiser’s F-35 program, 2 in an apparent attempt to link Kaiser’s “license fraud” on VMware to some type of government 3 claim, but fails to adequately allege such a connection.

At most, Plaintiff’s allegations show that 4 he undertook various actions within VMware because he was concerned that Kaiser, a government 5 contractor that is subject to various federal requirements for the handling of Controlled 6 Unclassified Information, was not complying with the terms of its license from VMware and was 7 using outdated VMware technology at a facility involved with Kaiser’s F-35 production activities.

8 The allegations of the Complaint fail to connect the dots between Kaiser’s alleged “licensing 9 fraud” on VMware (see Complaint ¶ 52) and any false claim made to the government by anyone, 10 much less by VMware. Accordingly, the Complaint does not set forth sufficient facts to satisfy 11 Mooney’s test for “protected conduct,” which requires facts showing that (1) Plaintiff had a good 12 faith belief that his employer —VMware—was possibly committing fraud against the 13 government” and that (2) “a reasonable employee in the same or similar circumstances might 14 believe [] that the employer is possibly committing fraud against the government.” See Mooney, 15 118 F.4th at 1092 (emphasis in original).

16 2. VMware’s knowledge of protected activity by Plaintiff 17 VMware argues that Plaintiff fails to plausibly allege that VMware knew that he had 18 engaged in protected activity. Dkt. 17 at 10-13. As explained in the preceding paragraph, Plaintiff 19 has not plausibly alleged that he was engaged in protected conduct, and it follows that he has also 20 failed to plausibly allege VMware’s knowledge of any protected conduct by Plaintiff.

21 3. Conclusion on first cause of action 22 Accordingly, the first cause of action for retaliation in violation of the FCA is 23 DISMISSED. Because it is not clear that the Complaint’s deficiencies

cannot be cured by 24 amendment, the Court grants Plaintiff LEAVE TO AMEND. *Eminence Capital, Inc.*, 316 F.3d at 25 1052. 26 C. Other causes of action 27 The Court has focused on Plaintiff's FCA cause of action because Plaintiff takes the 1 that cause of action and that the other claims are subject to supplemental jurisdiction under 2 28 U.S.C. § 1367(a).

Complaint ¶¶ 4-5.3 However, Plaintiff's third cause of action for civil 3 conspiracy and fourth cause of action for wrongful termination refer to the FCA as well as state 4 law. See, e.g., *id.* pp. 20, 22; *id.* ¶¶ 84, 90.

The Court has therefore considered whether those 5 causes of action, to the extent such claims are legally viable,⁴ might create an independent basis 6 for federal question jurisdiction. The Court concludes that to the extent these other causes of 7 action derive from Plaintiff's FCA retaliation claim, they are insufficient for the reasons discussed 8 in section III.B. as to why the underlying FCA claim is deficient.

See *United States v. Wal-Mart 9 Stores East, LP*, 858 Fed. App'x 867, 879-80 (6th Cir. 2021) (holding that FCA claims failed to 10 meet the relevant pleading standards "which means [the] conspiracy claim fails as well"); 11 *Sneddon v. ABF Freight Sys.*, 489 F. Supp. 2d 1124, 1131 (S.D. Cal. 2007) ("plaintiff's cause of 12 action for wrongful termination in violation of public policy fails because it is derivative of 13 plaintiff's statutory claim" that the court found inadequate).

14 If, following amendment, Plaintiff is unable to state a claim arising from federal law, the 15 Court will decline to exercise supplemental jurisdiction over the state law claims. See 28 U.S.C. 16 § 1367(c) ("The district courts may decline to exercise supplemental jurisdiction over a claim 17 [brought under supplemental jurisdiction] if ... the district court has dismissed all claims over 18 which it has original jurisdiction").

Accordingly, the Court at this time does not reach the 19 Defendants' arguments for dismissal of the second, third, and fourth causes of action. If Plaintiff 20 21 3 The Complaint does not invoke diversity jurisdiction under 28 U.S.C. § 1332. Given Plaintiff's pro se status, the Court has sua sponte considered whether diversity jurisdiction may exist but 22 concludes it does not.

Plaintiff alleges that he is an Austrian citizen and U.S. permanent resident who resides in California. Complaint ¶ 7. The Complaint's allegations indicate that several of the 23 Defendants would also be considered citizens of California for purposes of diversity jurisdiction. See *id.* ¶ 8 (stating that VMware has its principal place of business in California); *id.* ¶¶ 10, 12 24 (stating that Defendants Brewster and Mills reside in California).

Accordingly, the requirement for complete diversity of citizenship is not met. See 28 U.S.C. § 1332(a)(2) ("the district courts 25 shall not have original jurisdiction under this subsection of an

action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State”).

See, e.g., *Vasile v. Flagship Financial Grp., LLC*, No. 2:12-cv-02912-KJM-CKD, at *4 (E.D. Va. 1/11/13) (files a First Amended Complaint containing those causes of action, Defendants can reassert their existing arguments regarding the state law claims as appropriate).
IV. CONCLUSION
For the reasons discussed above, the Court ORDERS as follows:
1. VMware’s motion to dismiss is GRANTED WITH LEAVE TO AMEND as to the first cause of action for retaliation in violation of the False Claims Act.

2. To the extent the third cause of action for civil conspiracy and fourth cause of action for wrongful termination in violation of public policy are based on Plaintiff’s deficient FCA claim, VMware’s motion to dismiss those causes of action is GRANTED WITH LEAVE TO AMEND.

The remaining arguments for dismissal in the motions to dismiss at Dkt. 17, 18, and 24 are DENIED WITHOUT PREJUDICE to Defendants’ ability to renew those arguments in response to a First Amended Complaint filed by Plaintiff. 4. If Plaintiff has a proper basis to believe that amendments will address the deficiencies identified in this order, he may file a First Amended Complaint (“FAC”) no later than December 31, 2025.

The FAC must attach as an exhibit a redline comparing the FAC to the original complaint. 5. Defendants must file a response to the FAC no later than fourteen (14) days after the FAC is filed. 6. If any Defendant responds by filing a motion to dismiss the FAC, the normal briefing schedule of Civil Local Rule 7-3 will apply.

The Court will inform the Parties if a hearing is necessary. 7. The Court informs Plaintiff that the Federal Pro Se Program at the San Jose Courthouse provides free information and limited-scope legal advice to pro se litigants in federal civil cases.

The Federal Pro Se Program is available by appointment and on a drop-in basis. The Federal Pro Se Program is available at Room 2070 in the United States Courthouse in San Jose (Monday to Thursday 9:00 a.m. to 5:00 p.m.); a handbook free of charge; a copy may be downloaded from <https://cand.uscourts.gov/pro-se-handbook/> or obtained from the Clerk’s Office. SO ORDERED.

Dated: November 25, 2025
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SUSAN VAN KEULEN United States Magistrate Judge