UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

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

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

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

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

Before the Court is a motion for summary judgment filed by Defendant TruConnect Communications, Inc. ("Defendant"). *See generally* Dkt. # 130-1 ("*Mot.*").[1] Relators Melinda Zambrano ("Zambrano") and Regie Salgado ("Salgado") (collectively with Zambrano, "Relators") opposed. *See generally* Dkt. # 142 ("*Opp.*"). Defendant replied. *See generally* Dkt. # 148 ("*Reply*"). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the moving, opposing, and reply papers, the Court **GRANTS** Defendant's motion.

I. Background

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

In March 2015, Zambrano was hired as Vice President – Products. *See DSUF* ¶ 12; *Relators' Statement of Genuine Disputes*, Dkt. # 142-1 ("*RSGD*"), ¶ 12; Dkt. # 142-3, Ex. 1. The next month, Salgado was hired as Director of Inventory Operations. *See DSUF* ¶ 14; *RSGD* ¶ 14; Dkt. # 142-4, Ex. 4. Although the parties dispute whether Relators were employed by

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

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

Defendant or by third party Sage Telecom, Inc. ("Sage"), both of whom do business under the name "TruConnect," this dispute does not affect the outcome of the instant motion, as described below. *See DSUF* ¶¶ 10–12, 14, 16–18, 24–30; *RSGD* ¶¶ 11–12, 14, 16–18, 24–30. Brothers Nathan Johnson ("Nathan") and Matthew Johnson ("Matthew") are co-chief executive officers of both Defendant and Sage. *See DSUF* ¶ 5; *see also Declaration of Nathan Johnson*, Dkt. # 130-6 ("*N. Johnson Decl.*"), ¶¶ 8, 14.

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

On July 11, Salgado e-mailed Burgar, copying Zambrano and Jennifer Carter ("Carter"), describing his review of the subscriber call data and "encourag[ing] investigation into TOP." *See DSUF* ¶ 51; Dkt. # 130-4, Ex. 5 at 2. On July 13, Salgado e-mailed Sage's Chief Operating Officer Todd Wallace ("Wallace"), copying Zambrano, describing his concerns and recommending further investigation. *See DSUF* ¶ 56; Dkt. # 130-4, Ex. 5 at 1–2. The same day, Salgado sent several e-mails to Earl Peck ("Peck") regarding his concerns. *See DSUF* ¶¶ 57, 60–61; Dkt. # 130-4, Ex. 5 at 1.

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

Zambrano Depo. Excerpts 96:2–3. According to Zambrano, Burgar responded, "[k]eep your mouth shut, quit asking questions, I need this job." *Id.* 17:23–24.

Also in June 2015, Sage experienced significant market contractions and decided to implement reductions in force "in order to stay afloat." *DSUF* ¶¶ 34–37. On July 24, Relators were informed that their positions would be eliminated. *Id.* ¶ 109. Matthew and Nathan declare that (1) they made the decision to eliminate Relators' positions, (2) Sage's Chief Marketing Officer Eric Milhizer ("Milhizer") identified Relators as potential candidates for the reduction in force, and (3) they did not discuss their decision to eliminate Relators' positions with anyone except Milhizer, including Burgar, Wallace, or Peck. *N. Johnson Decl.* ¶¶ 20, 47, 51; *Declaration of Matthew Johnson*, Dkt. # 130-5 ("*M. Johnson Decl.*"), ¶ 7. They also declare that, prior to making the decision, they were not aware of any of Relators' complaints, reports, or concerns. *M. Johnson Decl.* ¶¶ 9–11, 16; *N. Johnson Decl.* ¶¶ 54–55, 59. Salgado also testified that he did not speak to Matthew, Nathan, or Milhizer regarding his concerns and was not aware that anyone he spoke about his concerns with relayed those concerns to Matthew, Nathan, or Milhizer. *See DSUF* ¶¶ 85, 87–88; *Salgado Depo. Excerpts* 191:4–8, 233:18–24, 234:6–13. Zambrano did not raise her or Salgado's concerns to any C-level executives of Sage or Defendant's. *See DSUF* ¶¶ 89, 91.

In 2016, Relators filed suit in this Court against Matthew, Nathan, and "TruConnect." *See generally* Dkt. # 1. After the United States and the People of the State of California declined to intervene in Relators' case, *see generally* Dkts. # 54, 58, the case was unsealed, *see generally* Dkt. # 59. In February 2021, Matthew, Nathan, and Defendant moved to dismiss the operative third amended complaint. *See generally* Dkt. # 82. The Court granted in part and denied in part the motion, dismissing several of Relators' claims for violations of the False Claims Act ("FCA") and the California False Claims Act ("CFCA"). *See generally* Dkt. # 87. Three causes of action remain:

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

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

II. Legal Standard

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

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

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

III. Evidentiary Objections

Defendant asserts several evidentiary objections along with its reply brief. *See generally* Dkts. # 148-1–148-3. Among other objections, Defendant objects to Relators' Exhibits 2 and 16 as improperly authenticated. *See* Dkt. # 148-1 at 1–5, 11–13.

Authentication is a "condition precedent to admissibility," and this condition is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). The Ninth Circuit has repeatedly held that courts cannot consider

unauthenticated documents in a motion for summary judgment. *See, e.g.*, *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002). A document may be authenticated through personal knowledge "by a witness who wrote it, signed it, used it, or saw others do so." *Id.* at 773–74 & n.8 (citing 31 Wright & Gold, Fed. Prac. & Proc.: Evid. § 7106, 43 (2000)).

Relators' counsel declares that "Exhibit 2 is an organizational chart prepared as a demonstrative aid from prior counsel created from the testimony of the parties and document production" and that "Exhibit 16 is an organizational chart of companies owned by Matthew and Nathan Johnson obtained by prior counsel from a website." *See Declaration of Brian Sanford*, Dkt. # 146-1, ¶ 2. Although he purports to have "personal knowledge of the matters set forth herein," *id.* ¶ 1, Plaintiffs' counsel does not declare that he created Exhibit 2 or retrieved Exhibit 16, witnessed their creation or retrieval, or otherwise show a basis for personal knowledge as to the origin or contents of either "organizational chart." Instead, he declares that unspecified "prior counsel" created the chart in Exhibit 2 based on uncited testimony and document production and that Exhibit 16 was retrieved by unspecified "prior counsel" from an unspecified website on an unspecified date. *See id.* ¶ 2. Because Relators have not laid sufficient foundation for their counsel's personal knowledge of the creation or contents of these documents, or proffered another method to authenticate them, the Court **SUSTAINS** Defendant's objections to Exhibits 2 and 16 and excludes these documents. *See Orr*, 285 F.3d at 773–74; *United States v. Real Property Located at 475 Martin Lane, Beverly Hills Cal.*, 298 F. App'x 545, 551 (9th Cir. 2008) (affirming exclusion of exhibits where declarant "did not state that he created or even reviewed the summary exhibits" and thus an insufficient foundation was laid as to his personal knowledge of the exhibits' creation).[3]

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

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

IV. Requests for Judicial Notice

Defendant requests that the Court take judicial notice of copies of (1) the answer filed by Relators in a suit in Texas state court and (2) three documents from the California Secretary of State website. *See generally* Dkt. # 130-3. Similarly, Relators ask that the Court take judicial notice of copies of several documents and business organizations inquiry results from the Texas Secretary of State website. *See generally* Dkt. # 142-2. The parties do not oppose each other's requests. Although many of these items are likely proper subjects for judicial notice, the Court does not find them necessary for deciding the instant motion and therefore need not take judicial notice of them.

V. Discussion

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

A. Violations of the Standing Order

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

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

> The separate statement of undisputed facts shall be prepared in a two-column format. The left hand column sets forth the allegedly undisputed fact. The right hand column sets forth the evidence that supports the factual statement. The factual statements should be set forth in sequentially numbered paragraphs. Each paragraph should contain a narrowly focused statement of fact. Each numbered paragraph should address a single subject as concisely as possible.

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

> [t]he opposing party's statement of genuine issues must be in two columns and *track the movant's separate statement exactly as*

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

Id. (emphases added). Additionally,

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

Id. § 6.c.2 (emphases added).

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

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

Second, before responding to Defendant's uncontroverted facts, Relators' separate statement includes a two-page preamble titled "Statements of Genuine Disputes." *See RSGD* 2:5–4:4. To the extent this is an attempt to submit additional material facts in support of Relators' opposition, it fails to comply with the Court's Standing Order. The Standing Order requires an opposing party's additional material facts to follow the format described for the moving party's separate statement of uncontroverted facts—i.e., "in a two-column format" listing the allegedly undisputed fact in the left-hand column and the evidence in support of the proffered fact in the right-hand column. *Standing Order* § 6.c.1. Each proffered fact "should be set forth in sequentially numbered paragraphs," and the Standing Order reiterates that any additional material facts submitted by the opposing party "shall continue in sequentially numbered paragraphs" in the two-column format. *See id.* Relators' "Statement of Genuine Disputes" does not list proffered facts and their supporting evidence in a two-column format nor set forth the facts in sequentially numbered paragraphs. *See RSGD* 2:5–4:4. Not only does this violate the Standing Order, but it leaves no practical manner for Defendant to respond to each proffered fact or for the Court or Defendant to cite to such facts. As a result, the Court declines to consider the information listed in Relators' "Statement of Genuine Disputes," *RSGD* 2:5–4:4, as additional material facts.

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

deposition testimony, the Court will consider it. *See id.* § 6.c.2 (directing parties to submit only "the specific items of evidence or testimony necessary to support or controvert a proposed statement of undisputed fact"); *cf. Orr*, 285 F.3d at 775 ("[W]hen a party relies on deposition testimony in a summary judgment motion without citing to page and line numbers, the trial court may in its discretion exclude the evidence.").

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

B. Merits of Relators' Claims

Relators' remaining claims assert retaliation in violation of (1) the FCA and (2) the CFCA and (3) wrongful termination "consistent with California Labor Code § 1102.5 and *Tameny*." *TAC* ¶¶ 218–43. As an initial matter, the parties extensively dispute whether Relators were in an employment or agency relationship with Defendant rather than Sage. *See Mot.* 15:2–17:7; *Opp.* 12:1–13:27; *Reply* 7:24–10:7.[4] However, the Court need not reach this issue because, even assuming that Relators were Defendant's employees, contractors, or agents, their claims nonetheless fail on the merits. The Court addresses in turn Relators' (i) FCA and CFCA retaliation claims and (ii) wrongful termination claim.

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

i. Retaliation Claims

To establish an FCA retaliation claim under 31 U.S.C. § 3730(h), a plaintiff must prove that (1) he or she was "engaging in conduct protected under the Act," (2) the defendant "employer kn[ew] that the [plaintiff] was engaging in such conduct," and (3) the defendant discriminated against the plaintiff because of his or her protected conduct. *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1060 (9th Cir. 2011) (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996)). A CFCA retaliation claim under Cal. Gov't Code § 12653 requires proof of the same elements. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

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

Relators contend that they engaged in protected activity by investigating potentially fraudulent activity and reporting their concerns to Burgar and others at "TruConnect." *Opp.* 5:24–6:18. They point to the following evidence to support their reporting of suspicious activity. First, Salgado sent e-mails to someone named Luke Duval ("Duval") on June 25 and 26, 2015. *See generally* Dkt. # 142-6, Ex. 12. Second, Relators point to e-mails that Salgado sent to Burgar and Carter on July 11 and e-mails Salgado sent to Wallace and Peck on July 13, in which Salgado reported results from his investigation, identified some concerns, and recommended investigation into third-party vendor TOP. *See generally* Dkt. # 142-6, Ex. 10. Third, Relators testified that they met with Burgar on July 22 and reported concerns about one-second calls and potentially "ripping off the Government" but that Burgar dismissed their concerns. *See Zambrano Depo.* 16:12–15, 17:17–19:18; *see also Salgado Depo. II* 193:5–194:23, 199:2–25.

Defendant argues that, even if Relators engaged in protected conduct and reported such conduct to Burgar and others, the individuals involved in the decision to terminate Relators were not aware of any such protected activity. *Mot.* 23:6–27. Nathan declares that Relators worked in Sage's marketing department under Milhizer, and Nathan and Matthew both declare that Milhizer identified Relators as potential candidates for the reduction in force. *N. Johnson Decl.* ¶¶ 26, 51; *M. Johnson Decl.* ¶ 7. Matthew and Nathan also declare that (1) they were the only decision-makers involved in the decision to eliminate Relators' positions and (2) they did not discuss this decision with anyone other than Milhizer, including Burgar, Wallace, Peck, or anyone else to whom Relators raised complaints. *M. Johnson Decl.* ¶¶ 5, 7; *N. Johnson Decl.*

¶¶ 46–47, 51. Matthew and Nathan also each declare that, prior to Relators' termination, they were not aware of any alleged complaints, concerns, or reports of fraud or other unlawful activity from Salgado or Zambrano. *M. Johnson Decl.* ¶¶ 9–12, 14, 16; *N. Johnson Decl.* ¶¶ 54–57, 59. Salgado also testified that he did not speak to Matthew, Nathan, or Milhizer about his concerns and was not aware whether anyone he spoke to about his concerns relayed those concerns to Matthew, Nathan, or Milhizer. *See DSUF* ¶¶ 85, 87–88; *Salgado Depo. Excerpts* 191:4–8, 233:18–24, 234:6–13. Similarly, Zambrano did not raise her or Salgado's concerns to any C-level executives of Sage or Defendant's. *DSUF* ¶¶ 89, 91.

Nonetheless, Relators contend that Wallace was involved in the decision to terminate them. *Opp.* 7:6–8:19. Relators point to Nathan's deposition testimony that he asked each department to recommend employees for the reduction in force, but they dispute Nathan's testimony that Milhizer was the person who recommended Relators' termination. *See Johnson Depo.* 63:1–64:9. For support, Relators point to their declarations, in which they each declare that Wallace was their department head at the time of their termination. *Zambrano Decl.* ¶¶ 21–22; *Salgado Decl.* ¶ 22. However, "uncorroborated and self-serving declarations" are insufficient to create a genuine dispute of material fact. *King v. United Parcel Serv.*, 152 Cal. App. 4th 426, 433 (2007); *see also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). Relators' uncorroborated and self-serving statements do not create a genuine dispute as to whether Wallace, rather than Milhizer, was Relators' department head. *See FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact."); *Khera v. United States*, No. EDCV 17-1827 JGB (KKx), 2019 WL 2610966, at *5–6 (C.D. Cal. May 10, 2019) (finding general statements in declaration, without detailed facts or supporting evidence, insufficient to raise a genuine dispute). And even if Relators' uncorroborated declarations were enough to raise a genuine dispute, Relators provide no evidence that Wallace made the recommendation to terminate them, was involved in the decision, or disclosed any of Relators' protected conduct to any of the decision-makers. And although Relators also provide an e-mail thread between Wallace, Matthew, and others discussing the reduction in force, the e-mail provides no indication that Wallace was involved in the decision to terminate Relators specifically. *See generally* Dkt. # 154-2, Ex. 13.

Relators also contend that "[a] reasonable jury could also determine that Peck . . . and Burgar . . . were also involved as decisionmakers." *Opp.* 8:19–22. They each declare that "[i]t is reasonable to infer that Burgar was one of the decisionmakers in my termination and that he spoke to the Johnsons about my concerns of fraud." *Zambrano Decl.* ¶ 27; *Salgado Decl.* ¶ 20. Similarly, Zambrano declares that "Burgar constantly communicated with TruConnect

leadership and the Johnsons who had the power to terminate me and it was likely that [Burgar] did" communicate to others at TruConnect that Relators should be terminated. *Zambrano Decl.* ¶ 25. But "[t]o survive summary judgment, a plaintiff must set forth non-speculative evidence of specific facts, not sweeping conclusory allegations" and must do more than establish that a "set of events could conceivably have occurred." *Cafasso*, 637 F.3d at 1061. Relators' speculation is insufficient to create a genuine dispute that Burgar was involved in the decision to terminate them or communicated their concerns to Matthew, Nathan, or Milhizer. *See id.* at 1060–61 (affirming grant of summary judgment in defendant's favor on FCA retaliation claim where the official who eliminated relator's position testified that he did not know about her allegedly protected conduct at the time of the decision and relator merely speculated that other officials who knew about her conduct may have influenced the decision-maker); *Brazill v. Cal. Northstate Coll. of Pharmacy, LLC*, 949 F. Supp. 2d 1011, 1024–25 (E.D. Cal. June 5, 2013) (granting summary judgment for defendant on FCA retaliation claim where plaintiff failed to provide any non-speculative evidence that the decision-maker knew about his protected activity and thus did not rebut the showing that the decision-maker did not know about the activity when he terminated plaintiff).

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

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

ii. Wrongful Termination Claim

"A California wrongful termination in violation of public policy claim 'requires a showing that there has been a violation of a fundamental public policy embodied in statute.'" *Moreno v. UtiliQuest, LLC*, 29 F.4th 567, 575 (9th Cir. 2022) (quoting *Merrick v. Hilton Worldwide, Inc.*, 867 F.3d 1139, 1150 (9th Cir. 2017)). Here, Relators' third amended complaint appears to base their wrongful termination claim on the public policies embodied by California

Labor Code § 1102.5, California Penal Code § 484(a), or California Civil Code § 1572. *See TAC* ¶¶ 232–236. As described above, Labor Code § 1102.5 prohibits retaliation against employees "for disclosing information . . . to a government or law enforcement agency,'" among other protected activities. *See Kelly*, 846 F.3d at 336 (quoting Cal. Lab. Code § 1102.5(b)). Under Penal Code § 484(a), "[e]very person who . . . shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property . . . is guilty of theft." Civil Code § 1572 "pertains [to] fraud in connection with a contract." *See Montano v. Wash. Mut. Bank, F.A.*, No. SACV 09–1242 DOC(ANx), 2010 WL 11520162, at *3 (C.D. Cal. Jan. 21, 2010) (citing Cal. Civ. Code § 1572).

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

The only argument Relators provide as to their wrongful termination claim is that "[s]upporting claims under the [FCA] should be sufficient to support claims under California's parallel state laws: the [CFCA] and wrongful termination in violation of public polic[y]." *Opp.* 11:20–25. But, as described above, Relators' FCA and CFCA claims do not survive summary judgment. As such, to the extent Relators' wrongful termination claim is based on violations of the FCA or CFCA, it also fails. *See Kelly*, 846 F.3d at 336 (finding determination that defendant did not violate Labor Code § 1102.5 foreclosed *Tameny* claim based on a violation of § 1102.5 as a matter of law).

Finally, although Relators' third amended complaint appeared to base their wrongful termination claim in part on a violation of Labor Code § 1102.5, Relators' opposition does not indicate as much. *See Opp.* 11:20–22 (merely arguing that proving their FCA claims should suffice to prove their wrongful termination claim). Moreover, under the burden-shifting framework that applies to § 1102.5 whistleblower retaliation claims, a plaintiff must first

"demonstrate by a preponderance of the evidence 'that retaliation for [his or her] protected activities was a contributing factor in a contested employment action.'" *Wiele v. Del. N. Cos., Inc.*, No.: 2:21-cv-07271-SB-AS, 2022 WL 714392, at *6 (C.D. Cal. Mar. 4, 2022) (quoting *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703, 718 (2022)). To establish a prima facie case under § 1102.5, the plaintiff must show that (1) he or she engaged in a protected activity, (2) he or she was subjected to an adverse employment action, and (3) "a causal link between the two." *Moreno*, 29 F.3d at 575. "Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in protected activity." *Wittenbrock v. Sunovion Pharms. Inc.*, No. EDCV 19-342 JVS (SHKx), 2019 WL 4453719, at *5 (C.D. Cal. May 20, 2019) (quoting *Morgan v. Regents of Univ. of Cal.*, 88 Cal. App. 4th 52, 69–70 (2000)). Here, as described above, Relators provide no evidence that the individuals involved in decision to terminate them were aware of any of their protected conduct. As such, Relators cannot show that retaliation was a contributing factor for their termination for purposes of a § 1102.5 claim or a wrongful termination claim premised on § 1102.5.

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

VI. Conclusion

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

IT IS SO ORDERED.

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