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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STATE OF CALIFORNIA ex rel. AARON J. WESTRICK, Plaintiff and Appellant, v. ITOCHU INTERNATIONAL, INC., et al., Defendants and Respondents.	B223053 (Los Angeles County Super. Ct. No. BC386586)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ralph W. Dau, Judge. Reversed with directions.

Kohn, Kohn, & Colapinto, Stephen M. Kohn, Erik D. Snyder; Law Offices of Mark Allen Kleiman and Mark Allen Kleiman for Plaintiff and Appellant.

McDermott Will & Emery, Allan Schare, Gregory R. Jones; Bobby R. Burchfield and James G. Rizzo for Defendant and Respondent Itochu International, Inc.

Pillsbury Winthrop Shaw Pittman, Mariah L. Brandt; Thomas C. Hill and Daron T. Carreiro for Defendant and Respondent N.I. Teijin Shoji (U.S.A.), Inc.

Frisenda, Quinton & Nicholson and Frank Frisenda for Defendants and Respondents Barrday, Inc. and Barrday Corp.

Plaintiff and appellant State of California ex rel. Aaron J. Westrick, Ph.D. (Westrick), appeals a judgment of dismissal following the sustaining without leave to amend of demurrers interposed by defendants and respondents Itochu International, Inc. (Itochu), N.I. Teijin Shoji (U.S.A.), Inc. (Shoji), and Barrday Corporation and Barrday, Inc. (Barrday or the Barrday defendants) (collectively, defendants) to Westrick's second amended complaint.

Westrick filed this qui tam action[1] against defendants under the California False Claims Act (sometimes referred to as the Act) (Gov. Code, § 12650 et seq.)[2] to recover damages and civil penalties on behalf of the State of California for defective and falsely warranted "bulletproof" vests purchased by the state for use by law enforcement personnel.

The essential issues presented are: (1) whether Westrick pled his claims with sufficient specificity to withstand demurrer; (2) whether the pleading discloses the action is barred by the Act's three-year statute of limitations (§ 12654, subd. (a)); and (3) whether Westrick was an "original source" of the information, so that the action is not barred by the Act's public disclosure jurisdictional bar. (§ 12652, subd. (d)(3)(A).)

We conclude the second amended complaint (SAC) is well pled as to the first, second and fourth causes of action and reverse the judgment of dismissal with directions to reinstate those causes of action.[3]

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[1] " ' "*Qui tam*" is part of the longer Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who brings the action for the king as well as for himself." [Citations.]' [Citation.]" (*City of Hawthorne ex rel. Wohlner v. H&C Disposal Co*. (2003) 109 Cal.App.4th 1668, 1672, fn. 2 (*Hawthorne*).)

[2] All further statutory references are to the Government Code, unless otherwise indicated

[3] Westrick has appealed the trial court's dismissal only as to the first, second and fourth causes of action. The balance of the second amended complaint having been abandoned, our review is confined to these three causes of action.

LITIGATION OVERVIEW

In 1998, Congress enacted the Bulletproof Vest Partnership Grant Program (42 U.S.C. § 3796*ll*), under which the federal government undertook to reimburse state and local police departments for up to 50 percent of the cost of obtaining body armor for their police officers. This legislation led to a considerable expansion of the market demand for body armor. This case involves bulletproof vests made of Zylon, which vests were sold in large numbers in recent years to law enforcement agencies.

Zylon is a high-strength fiber manufactured by the Japanese textile company, Toyobo (not a party to this action). Toyobo sold and distributed Zylon fiber in the United States through two Japanese trading companies, Itochu and Shoji. The trading companies sold the Zylon fiber to various weavers, including Barrday, which wove the Zylon fiber into Zylon fabric. Thereafter, said fabric was utilized by manufacturers in the production of purportedly bulletproof vests. Tens of thousands of these vests were sold to law enforcement agencies throughout the United States. The vests were warranted to provide protection for at least five years, consistent with the standards promulgated by the National Institute of Justice (NIJ).

However, Zylon degrades rapidly over time when exposed to sunlight, heat and moisture, and therefore the "bulletproof" vests rapidly lose strength in the course of normal use by police officers. In June 2003, Officer Tony Zeppetella of Oceanside, California, was killed when his $766 Zylon vest failed to stop two bullets. That same month, a police officer in Pennsylvania was seriously wounded when a bullet pierced his Zylon vest. In August 2005, the NIJ decertified Zylon.

State Attorneys General in Massachusetts, Connecticut, Arkansas, Arizona, Minnesota, Pennsylvania and Texas, as well as various cities, police officers and citizens have filed numerous lawsuits against Zylon body armor manufacturers.

In 2009, the United States Department of Justice reached a $6.75 million settlement with Itochu, resolving claims under the federal False Claims Act regarding the defective bulletproof vests. The United States previously settled with five other participants in the Zylon body armor industry for over $47 million.

(http://www.justice.gov/opa/pr/2009/December/09-civ-1309.html [as of May 23, 2011].)

Westrick continues to prosecute a qui tam action he filed in federal court on behalf of the United States against Toyobo, the manufacturer of Zylon, and against Second Chance Body Armor, Inc. (Second Chance), his former employer, which manufactured and sold Zylon vests. The federal government has intervened in that action. In that proceeding, Toyobo filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), contending the government failed to plead fraud with specificity. On February 23, 2010, the district court denied Toyobo's motion to dismiss, ruling, inter alia: (1) the government properly alleged that Toyobo presented it with false claims; (2) *the government alleged fraud with requisite specificity*; (3) the government duly alleged Toyobo acted with knowledge in making fraudulent requests for payment; (4) the government properly alleged Toyobo caused false or fraudulent claims for payment to be made or approved; and (5) the government sufficiently pled Toyobo conspired with Second Chance to present false claims for payment. (*U.S. ex rel. Westrick v. Second Chance Body Armor, Inc.* (2010) 685 F.Supp.2d 129 (*Westrick*).)[4]

Against this backdrop, we now turn to the issues presented in the instant appeal relating to the sufficiency of Westrick's second amended state court complaint.

FACTUAL AND PROCEDURAL BACKGROUND

Westrick commenced this action on March 3, 2008. On August 20, 2009, the trial court sustained defendants' demurrer to the first amended complaint with leave to amend.

Westrick then filed the operative 147-page second amended complaint.

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[4] We note the same counsel represents Westrick in both the federal and California qui tam actions.

1. *Summary of pertinent allegations*.

a. *Parties and relationships*.

Westrick, the qui tam plaintiff, began his career as a police officer in Michigan. In 1982, he was shot by a fleeing burglar with a .357 Magnum from approximately five feet away. A Second Chance bulletproof vest, made of Kevlar, saved his life. Westrick subsequently obtained a Ph.D. in sociology and criminal justice. In 1996, Second Chance hired Westrick as its director of research.[5]

Itochu and Shoji are distributors of Zylon for Toyobo. They purchased the Zylon fiber, shipped it to the United States, and sold it to the weavers under contract. Shoji sold Zylon exclusively to Barrday; Itochu sold Zylon to the other weavers. The weavers wove the Zylon thread into Zylon fabric, which they sold to body armor manufacturers under contract. Each such contract conditioned the purchase of Zylon fabric on certification that the fabric conformed to the body armor manufacturers' specifications for durability and strength. The body armor manufacturers, including Second Chance, then sold the body armor to the State of California under contract. Each such contract conditioned the purchase of Zylon body armor on certification that the body armor met the applicable NIJ specifications. Each Zylon vest sold to the state under these contracts carried a warranty that guaranteed the vest would maintain its NIJ certification for five years.

b. *Defendants' alleged awareness and concealment of the defect*.

On July 5, 2001, Westrick, in his capacity as Second Chance's research director, obtained a copy of a July 5, 2001 letter from Toyobo stating "the strength of Zylon fiber decreases under high temperature and humidity conditions." Upon receiving this letter, Westrick immediately developed an age-related concern regarding Zylon. He was the first employee at Second Chance to develop this concern. Westrick believed that older vests sold by Second Chance should be pulled and

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[5] Before Westrick filed the instant lawsuit, Second Chance went bankrupt and therefore was not named as a defendant herein.

independently tested in order to determine whether heat and humidity would cause them to degrade. Within a week, Westrick raised his concerns with Ed Bachner, Richard Davis and Paul Banducci, his executive colleagues at Second Chance, and they decided to conduct "used vest" testing pursuant to the concerns raised in Toyobo's letter.

Westrick contacted the Longboat Key Police Department in Florida to ship older used vests back to Second Chance. The Longboat Key vests were well suited for testing due to the environmental conditions in the Florida Keys.

On December 13, 2001, Second Chance directly communicated the test results to Toyobo and to Itochu. "On that date, *Second Chance informed Itochu* that, as a result of the used vest testing, Second Chance had determined that Zylon body armor would not perform as required by the five-year warranties under which each vest was sold to police departments across the United States." (Italics added.) Thus, Westrick pled that by December 2001, Itochu received actual notice that Zylon would not perform as expected.

Westrick further pled that by December 2001, Shoji and Barrday also had actual knowledge of the defect. Specifically, "As a result of its own testing and the data released by Toyobo, *Barrday's Chief Executive Officer, Mr. Michael Buckstein, sent a letter, dated December 4, 2001,* to Mr. Saito and Mr. Kuroki of Toyobo and *Takashi Yoshimura of Teijin Shoji. In that letter, Mr. Buckstein stated that 'tests indicate' that Zylon 'is no longer suitable for ballistic applications.' Barrday and Teijin Shoji thus had actual knowledge that Zylon body armor would not perform as required by the warranties under which it was sold.*" (Italics added.)

Despite defendants' knowledge of Zylon's defects, they concealed this information to avoid losing market share to Kevlar, which was a safe alternative to Zylon. The existence of the market for each defendant's product, whether imported Zylon thread (Itochu and Shoji) or woven Zylon fabric (Barrday) was wholly dependent on the existence of the market for Zylon body armor.

On December 13, 2001, executives from Itochu, Toyobo and Second Chance held a Zylon Crisis Meeting in Los Angeles to develop an industry-wide strategy for the continued sale of Zylon in North America. The meeting was attended, inter alia, by Kenichi Tsuji, Itochu's Zylon Project Marketing Manager. Because of Westrick's opposition to the continued sale of the Zylon vests and his strong opinions regarding recall and notification to police departments, he was not permitted to attend the Crisis Meeting. However, Richard Davis, president of Second Chance, who shared some of Westrick's concerns, informed Westrick of what occurred at the meeting. The result of the meeting was that Itochu brokered a new rebate agreement between Second Chance and Toyobo, which resulted in millions of dollars being paid to Second Chance in exchange for its commitment to continue to promote the use of Zylon body armor by law enforcement agencies.

c. *Statute of limitations allegations*.

With respect to the statute of limitations, Westrick pled, inter alia:
between March 3, 2005 (three years prior to commencing this qui tam action) and August 23, 2005 (one day before the NIJ decertified Zylon) the state purchased "several thousand" Zylon vests. The California Highway Patrol (CHP) alone purchased at least 1,300 Zylon vests.[6] The California Department of Corrections also made substantial purchases of Zylon body armor during this period. Itochu and Shoji together imported 100 percent of the Zylon used to manufacture body armor. Therefore, all the vests imported during this time frame were made with Zylon imported by Itochu and/or Shoji.

d. *Statutory claims*.

As pertinent to this appeal, based on the above allegations Westrick pled causes of action under the Act against Itochu, Shoji and Barrday for conspiracy to defraud the state (§ 12651, subd. (a)(3)) (first cause of action), benefiting from inadvertent

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[6] With respect to the CHP purchases, Westrick's pleading itemized the various purchase order numbers, dates and quantities.

submission of false claim (§ 12651, subd. (a)(8) (second cause of action) and causing the presentment of false claims to the state (§ 12651, subd. (a)(1) (fourth cause of action).

2. *Demurrers.*

Defendants demurred to the second amended complaint, contending, inter alia, Westrick's claims were barred by the Act's three-year statute of limitations; Westrick failed to plead fraud with specificity; and the qui tam action is barred because Westrick's claims were based on publicly disclosed allegations and Westrick was not the original source. (§ 12652, subd. (d)(3)(A).)

3. *Trial court's ruling on second amended complaint*.

The trial court overruled the demurrers of Shoji and Itochu on the statute of limitations ground, finding the qui tam complaint filed March 3, 2008 was timely as to Shoji and Itochu (but not Barrday). The trial court noted the second amended complaint "contains new allegations of purchases made by the California Highway Patrol from March 3, 2005 until August 23, 2005." Further, "for purposes of demurrer the line for discovery of facts that would lead the responsible public official to act under the circumstances is clearly and affirmatively shown to be July 1, 2005 – the date the United States intervened in the action entitled *United States ex rel. Westrick v. Second Chance Body Armor, Inc*. D.D.C. CV No. 04-0280 (RJN Exh. 38). Plaintiff's complaint in this action was filed within three years of that date." Therefore, as to Shoji and Itochu, for purposes of demurrer, the complaint was timely.

As for Barrday, the trial court sustained its demurrer on the statute of limitations ground without leave to amend, in that "Plaintiff now admits that Barrday stopped selling woven Zylon fabric in January, 2002."

The trial court continued, "[t]his [mixed] ruling on the statute of limitations does not change the end result. [¶] As with the [first amended complaint], each cause of action of the SAC *fails to satisfy the standard for pleading fraud with specificity*, i.e., fails to state facts sufficient to constitute a cause of action of action. This is discussed at length at pages 8-9 of the court's order filed August 20, 2009

[sustaining demurrer to the first amended complaint] and the same defects remain in the SAC. The court concludes that plaintiff lacks the ability to cure this defect. Accordingly, the demurrers of Shoji, Itochu, and Barrday to each cause of action on the ground of failure to state facts sufficient to constitute a cause of action are sustained without leave to amend." (Italics added.)

On January 26, 2010, the trial court entered a judgment of dismissal.

Westrick filed a timely notice of appeal from the judgment.

CONTENTIONS

Westrick contends: he stated causes of action against defendants for: conspiracy to defraud California by getting it to pay on false claims in violation of section 12651, subdivision (a)(3); benefiting inadvertently from submission of a false claim and failing to inform California in violation of section 12651, subdivision (a)(8); and (3) knowingly causing others to present false claims to California in violation of section 12651, subdivision (a)(1). Westrick further contends his claims against Barrday are timely.

Defendants contend: the second amended complaint failed to plead facts with sufficient specificity to state a cause of action; the claims are barred by the Act's three-year statute of limitations; and the action is barred by the Act's public disclosure jurisdictional bar (§ 12652, subd. (d)(3)(A)).

DISCUSSION

1. *Overview of California's False Claims Act.*

The California False Claims Act, like the federal version, " 'ferrets out fraud on the government by offering an incentive to persons with evidence of such fraud to come forward and disclose that evidence to the government.' " (*State of California v. Pacific Bell Telephone Co*. (2006) 142 Cal.App.4th 741, 746 (*Grayson*).) The original federal False Claims Act, also known as Lincoln's Law, was enacted in 1863 " 'in order to strike back against the fraud of unscrupulous Civil War defense contractors.' " (*People ex rel. Allstate Ins. Co. v. Weitzman* (2003) 107 Cal.App.4th 534, 553.)

California's "False Claims Act was enacted in 1987 and is patterned largely on similar federal legislation (31 U.S.C. § 3729 et seq.). (*American Contract Services v. Allied Mold & Die, Inc*. (2001) 94 Cal.App.4th 854, 858.)" (*Hawthorne, supra*, 109 Cal.App.4th at pp. 1676-1677.) Insofar as the California False Claims Act is patterned on its federal counterpart (*Rothschild v. Tyco Internat. (US), Inc*. (2000) 83 Cal.App.4th 488, 494 (*Rothschild*)), it is appropriate to look to federal decisional authority for guidance in interpreting the California statutory scheme. (*Grayson, supra,* 142 Cal.App.4th at p. 746, fn. 3; *Hawthorne, supra*, at p. 1681; *City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 802 (*Pomona*).)

"The Act is designed to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities by authorizing private parties (referred to as qui tams or relators) to bring suit on behalf of the government. (*American Contract Services*, [*supra,* 94 Cal.App.4th] at p. 858.)" (*Hawthorne, supra,* 109 Cal.App.4th at p. 1677.) The Act provides a financial incentive for private whistleblowers by entitling a successful qui tam plaintiff to share in a percentage of the recovery in the case. (§ 12652, subd. (g); *Rothschild, supra,* 83 Cal.App.4th at p. 495.)

The "ultimate purpose of the Act is to protect the public fisc. [Citation.] To that end, the Act must be construed broadly so as to give the widest possible coverage and effect to its prohibitions and remedies." (*Hawthorne, supra*, 109 Cal.App.4th at p. 1677.)

The Act authorizes treble damages against one who, inter alia, "[k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval." (§ 12651, subd. (a)(1).) A "claim" within the meaning of the Act includes "any request or demand, whether under a contract or otherwise, for money, property, or services" which is presented to an officer, employee, or agent of the state or of a political subdivision. (§ 12650, subd. (b)(1)(A).) To be liable under the Act, a person must have actual knowledge of the information, or act in deliberate ignorance of the truth or falsity of the information, or act in reckless disregard of the truth or falsity of

the information. (§ 12650, subd. (b)(3); *Rothschild, supra*, 83 Cal.App.4th at pp. 494-495.) Proof "of specific intent to defraud is not required." (§ 12650, subd. (b)(3)(C).)

If a qui tam plaintiff files a False Claims Act complaint, it shall be filed under seal and served on the Attorney General, together with a written disclosure of the material evidence and information possessed by the plaintiff. (§ 12652, subds. (c)(2), (c)(3).) If the state or political subdivision elects to proceed with the action, it has the primary responsibility for prosecuting the action, although the qui tam plaintiff has the right to continue as a party to the action. (§ 12652, subd. (e)(1).)[7] If no prosecuting authority decides to proceed with the action, the qui tam plaintiff has the right to do so, subject to the right of the state or political subdivision to intervene in certain circumstances. (§ 12652, subds. (c)(8)(D)(iii) & (f).) Regardless of who prosecutes the qui tam action, if it is successful, the qui tam plaintiff is entitled to a percentage of the recovery. (§ 12652, subd. (g)(2)-(5); *Rothschild, supra,* 83 Cal.App.4th at p. 495.)

2. *Standard of appellate review*.

In determining whether a plaintiff has properly stated a claim for relief, "our standard of review is clear: ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial

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[7] On August 27, 2008, the California Attorney General elected to decline intervention in this action. However, "[t]here is no reason to presume that a decision by the [government] not to assume control of the [qui tam] suit is a commentary on its merits. The [government] may have myriad reasons for permitting the private suit to go forward including limited prosecutorial resources and confidence in the relator's attorney." (*U.S. ex rel. Chandler v. Cook County, Ill.* (7th Cir. 2002) 277 F.3d 969, 974, fn. 5.)

court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Our review is de novo. (*Ibid*.)

3. *Trial court erred in holding the SAC fails to plead fraud with specificity; the particularity of the SAC notifies defendants of the nature of their liability*.

a. *General principles*.

As in any action sounding in fraud, the allegations of a False Claims Act complaint "must be pleaded with particularity. The complaint must plead ' "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." ' " (*Pomona, supra,* 89 Cal.App.4th at p. 803.)

However, merely because a defendant does not deal directly with the government does not enable the defendant to escape liability under the Act. The Act is intended to reach all types of fraud, without qualification, that might result in financial loss to the government, and its reach "extends to 'any person who knowingly assisted in causing the government to pay claims which were grounded in fraud.' " (*Pomona, supra,* 89 Cal.App.4th at p. 802.)

Pomona involved a qui tam action against manufacturers and suppliers of water distribution equipment and pipes that were sold to municipalities for carrying drinking water or to contractors for eventual use in municipal water systems. (*Pomona, supra,* 89 Cal.App.4th at p. 797.) The complaint alleged: the manufacturers made false claims in the catalogues and sales materials it provided to its distributors in the knowledge that the distributors would provide the parts to the city. By providing these false catalogue representations to the city, the manufacturers intended to and did induce the city to contract with the distributors for purchase of its parts. Had the city known the catalogue statements were false, it would not have made these contracts. Had the city known the parts did not conform to the descriptions in the catalogues, it would not have paid the distributors. (*Id*. at p. 800.)

Pomona held these allegations were sufficient to state a claim for violation of the Act. The complaint therein duly pled: the representations made in the catalogues were false; the city alleged it received catalogues and thus the representations were made to it; the manufacturers knew the representations were false; the false representations "induced the [c]ity, which requires water distribution parts to be made from 85 metal, to purchase over the course of several years . . . parts represented to be made of 85 metal but in fact made of 81 metal or 360 metal. This, coupled with allegations of the inferior durability of lesser metal fittings and the higher lead content of 81 metal parts, establishes the materiality of the representations. Finally, petitioners have alleged reliance on the false representations and the consequent payment of money." (*Pomona, supra,* 89 Cal.App.4th at p. 803.)

Pomona explained: "When [the manufacturers] supplied to the distributor corporation stops made of 81 metal and labeled J-1500, [the manufacturers] caused the distributor to submit to the [c]ity a false claim for payment." (*Pomona, supra*, 89 Cal.App.4th at p. 804.) The claim for payment was false because "the [c]ity's contract [with the distributor] was based on false information provided by [the manufacturers], but for which the [c]ity would not have made the contract." (*Ibid*.)

The district court's opinion in *Westrick, supra*, 685 F.Supp.2d 129 is in accord. There, the court held the actions of the manufacturer of Zylon fiber, namely, Toyobo, "may constitute the underlying fraudulent conduct leading to Second Chance's submission of false claims. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45, 63 S.Ct. 379, 87 L.Ed. 443 (1943) (finding several contractors liable because the language of the [False Claims Act] 'indicate[s] a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government')." (*Westrick, supra*, 685 F.Supp.2d at p. 138.)

We now turn to the allegations in the instant case.

b. *SAC pled with fraud with specificity.*

The SAC contains the following pertinent allegations:

(1) *Defendants made representations concerning the integrity of their products.*

Each weaver, including Barrday, conditioned its purchase of each shipment of Zylon thread from the importers, Itochu or Shoji, on the importer's certification that the shipment conformed to the weaver's specifications for durability and strength. Itochu and Shoji provided a Zylon certificate of analysis, or similar documentation, with each shipment of Zylon thread, certifying the Zylon met the required specifications.

The weavers, including Barrday, then sold woven Zylon fabric to body armor manufacturers. Each such contract conditioned the purchase of Zylon fabric from the weaver on the weaver's certification the fabric conformed to the body armor manufacturer's specifications for strength and durability. Each weaver did actually certify that each shipment of Zylon fabric was in compliance.

The body armor manufacturers then sold the Zylon vests to the state under contract. Each Zylon vest sold to the state carried a warranty guaranteeing the vest would retain its NIJ certification for five years.

(2) *Defendants knew their representations regarding Zylon were false, in that by December 2001 they had actual knowledge of Zylon's accelerated deterioration due to heat and humidity.*

The SAC alleged that on December 4, 2001, *Barrday's Chief Executive Officer, Michael Buckstein, sent a letter to Takashi Yoshimura of Shoji*, stating " 'tests indicate' that Zylon 'is no longer suitable for ballistic applications.' " (Italics added.)

The SAC also alleged that on December 13, 2001, at the Crisis Meeting in Los Angeles, Second Chance informed Kenichi Tsuji, Itochu's Zylon Project Marketing Manager, that as a result of the used vest testing, Second Chance had determined that Zylon body armor would not perform as required by the five-year warranties under which each vest was sold to police departments across the United States.

Thus, the SAC adequately pled that Barrday, Shoji and Itochu all knew by December 2001 that Zylon body armor would not perform as required by the warranties under which it was sold. However, despite defendants' actual knowledge that Zylon would not perform as required, the production and sale of Zylon vests to the state continued until the NIJ decertified Zylon in August 2005.

(3) *Materiality of the representations*.

The vests carried an express warranty they would provide protection for at least five years, consistent with the standards promulgated by the NIJ for the ballistic rating at which they were sold. The warranties were material because the contracts between the state and the body armor manufacturers conditioned the purchase on certification the product met the NIJ specifications.

(4) *Reliance by the state and the consequent payment of money*.

The state relied on the underlying representations regarding the integrity and reliability of the Zylon vests. Absent a certification by the vendor that the Zylon vests met NIJ specifications, the state would not have purchased the vests. Further, each Zylon vest purchase by the state, and each payment by the state for the vests, were induced by the fraudulently represented five-year warranty.

(5) *Conclusion re specificity of allegations*

We conclude Westrick had pled fraud with the requisite specificity. With the above allegations in the SAC, Westrick had pled fraudulent conduct by defendants with "sufficient particularity such that [defendants are] more than able to 'defend against the charge[s] and not just deny that [they] ha[ve] done anything wrong.' " (*Westrick, supra,* 685 F.Supp.2d at p. 137; accord *Armenta ex rel. City of Burbank v. Mueller Co*. (2006) 142 Cal.App.4th 636, 645 [qui tam pleading adequately "notified[d] defendants of the nature of their liability"].)

4. *The face of the SAC does not indicate the action is time-barred; no merit to defendants' contention in that regard.*

As indicated, in ruling on the SAC, the trial court held that as against Itochu and Shoji, the action filed March 3, 2008 is not barred by the Act's three-year statute of limitations. (§ 12654.) However, it held that as to Barrday, the action is untimely. Unlike the trial court, we conclude the action is also timely with respect to Barrday.

a. *General principles.*

The controlling statute, section 12654, states at subdivision (a): "A civil action under Section 12652 may not be filed *more than three years after the date of discovery* by the Attorney General or prosecuting authority with jurisdiction to act under this article or, in any event, not more than 10 years after the date on which the violation of Section 12651 was committed." (Italics added.)

As to each allegedly false claim, the limitations period " 'begins to run on the date the claim is made, or, if the claim is paid, on the date of payment.' " (*U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp*. (2d Cir. 1993) 985 F.2d 1148, 1157 (*Kreindler*).)

b. *At a minimum, the instant action is timely with respect to false claims arising out of sales which occurred on or after March 3, 2005.*

As a preliminary matter, it is the discovery by the Attorney General or prosecuting authorities, not discovery by Westrick, which commences the running of the three-year statute of limitations. (§ 12654, subd. (a).)

Assuming arguendo that more than three years before Westrick filed suit, California officials discovered defendants had committed various violations of the False Claims Act, such discovery does not enable defendants to avoid liability for false claims based on later sales which occurred on or after March 3, 2005.

Here, the SAC pled that between March 3, 2005 (three years prior to commencing this qui tam action) and August 23, 2005 (one day before the NIJ decertified Zylon) the state purchased "several thousand" Zylon vests. Itochu and Shoji together imported 100 percent of the Zylon used to manufacture body armor.

Therefore, all the vests imported during this time frame were made with Zylon imported by Itochu and/or Shoji. These averments are sufficient to allege the action is timely as against Itochu and Shoji. We agree with the trial court in this regard.

As for Barrday, the trial court held the action is untimely, citing an allegation in the SAC that Barrday *stopped* selling woven Zylon fabric in January 2002. However, the trial court overlooked a subsequent allegation that Barrday later *resumed* its sale of woven Zylon fabric to Second Chance, including an order filled on January 22, 2004. (SAC, para. 807.) We find the complaint does not disclose on its face that no Zylon vests containing Barrday fabric were sold to the state within the limitations period. Therefore, the trial court erred in sustaining Barrday's demurrer on statute of limitation grounds.[8]

In sum, as to sales made, or false claims presented, on or after March 3, 2005, the action filed March 3, 2008 is clearly timely. (§ 12654, subd. (a).)

As for false claims which occurred *prior to* March 3, 2005, whether suit on those claims is time-barred depends on the date that California officials discovered those violations. To the extent public officials did not discover those false claims prior to March 3, 2005, suit on those earlier false claims is timely.[9]

c. *The parties' arguments re timeliness.*

(1) *The impact of the government's knowledge of earlier violations.*

Defendants contend Westrick's allegations reveal that prior to March 3, 2005, California officials had reason to suspect wrongdoing, so as to commence the running of the three-year statute of limitations, rendering the March 3, 2008 complaint time-

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[8] If, as Barrday and Shoji contend, they did not present any false claims within the limitations period (§ 12654, subd. (a), that is a factual issue which cannot be resolved on demurrer.

[9] As for false claims made prior to March 3, 2005, the date California officials *discovered* those violations (§ 12654, subd. (a)) is a question of fact which cannot be resolved on demurrer.

barred. Defendants cite, inter alia, Westrick's allegation that he ensured California officials were made aware of the false claims prior to 2004.

However, the government's knowledge of false claims prior to 2004 has no bearing on the timeliness of Westrick's lawsuit with respect to later sales and later violations of the False Claims Act. As discussed, as to each false claim, the limitations period " 'begins to run on the date the claim is made, or, if the claim is paid, on the date of payment.' " (*Kreindler, supra,* 985 F.2d at p. 1157.) Thus, the government's knowledge of earlier violations, while it would render suit on earlier violations time-barred, does not preclude suit on defendants' later violations of the False Claims Act. Therefore, at a minimum, the instant action filed March 3, 2008, is timely with respect to sales occurring on or after March 3, 2005.

(2) *Westrick's reliance on the "last overt act" doctrine is misplaced.*

Westrick seeks to recover for *all* false claims made by defendants, not merely for violations occurring in the three years preceding the March 3, 2008 complaint. Westrick relies on the "last overt act" doctrine applicable to civil conspiracies, i.e., "the statute of limitations does not begin to run on any part of a plaintiff's claims until the 'last overt act' pursuant to the conspiracy has been completed." (*Wyatt v. Union Mortgage Co*. (1979) 24 Cal.3d 773, 786.)

To interpret section 12654 in the manner being proposed by Westrick would be to rewrite the statute. To reiterate, as to each violation, the limitations period " 'begins to run on the date the claim is made, or, if the claim is paid, on the date of payment.' " (*Kreindler, supra,* 985 F.2d at p. 1157.) The limitations period is "*three years after the date of discovery* by the Attorney General or prosecuting authority with jurisdiction to act under this article *or, in any event, not more than 10 years after the date* on which the violation of Section 12651 was committed." (§ 12654, subd. (a), italics added.) The limitations period is *not* discovery by public officials *plus the last overt act* in furtherance of the conspiracy.

(3) *The relationship of the 10-year period to the 3-year period.*

Westrick contends so long as suit is filed within 3 years of discovery, the suit can recover for *all* false claims occurring in the *10 years* preceding the filing of the action.

Westrick's argument misconstrues the statute. "A civil action under Section 12652 may not be filed *more than three years after the date of discovery* by the Attorney General or prosecuting authority with jurisdiction to act under this article or, in any event, not more than 10 years after the date on which the violation of Section 12651 was committed." (§ 12654, subd. (a), italics added.)

In other words, to be timely, a civil action must be filed within three years of discovery of the violation, but in any event, not more than 10 years after the date of the violation. That is to say, if the violation is not discovered within 10 years, the violation is not actionable. The 10-year period is the outside limit for suing on any given violation.

5. *No merit to defendants contention the complaint is demurrable under the public disclosure jurisdictional bar.*

a. *Jurisdictional requirements of section 12652.*

Section 12652 of the Act contains various procedural and jurisdictional requirements. Defendants invoke the statute's public disclosure jurisdictional bar (§ 12652, subd. (d)(3)(A), which is " 'intended to bar parasitic or opportunistic actions by persons simply taking advantage of public information without contributing to or assisting in the exposure of the fraud.' [Citations.]" (*Hawthorne, supra*, 109 Cal.App.4th at p. 1678.)

The public disclosure jurisdictional bar states: "No court shall have jurisdiction over an action under this article *based upon the public disclosure of allegations* or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the Senate, Assembly, auditor, or governing body of a political subdivision, or by the news media, unless the action is brought by the Attorney General or the prosecuting authority of a political subdivision,

or the person bringing the action is an original source of the information." (§ 12652, subd. (d)(3)(A), italics added.)

The Act defines an original source as follows: " '*[O]riginal source' means an individual who has direct and independent knowledge of the information on which the allegations are based*, who voluntarily provided the information to the state or political subdivision before filing an action based on that information, *and whose information provided the basis or catalyst for the investigation*, hearing, audit, or report that led to the public disclosure as described in subparagraph (A)." (§ 12652, subd. (d)(3)(B), italics added.)

To "qualify as an original source, plaintiff must demonstrate he has ' "direct and independent knowledge of the information on which the allegations are based," [citations], "voluntarily provided the information to the Government before filing" his or her *qui tam* action, [citation], and "had a hand in the public disclosure of allegations that are a part of [his or her] suit," [citation].' [Citation.] The statutory 'original source' requirement was enacted to prevent parasitic lawsuits, those that do not sound the alarm, but echo it. [Citation.] It seeks to reward whistleblowers 'brave enough to speak in the face of a "conspiracy of silence" and not their mimics.' [Citation.] The [Act] precludes ' "*qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." ' [Citation.]" (*Grayson, supra,* 142 Cal.App.4th at pp. 755-756.)

b. *Westrick's allegations are sufficient to withstand the public disclosure jurisdictional bar; Westrick pled sufficient facts to show he qualifies as an original source.*

Westrick pled sufficient facts to indicate he was an original source. Westrick alleged, inter alia, as director of research at Second Chance, he was the first employee at the company to develop a concern regarding the accelerated degradation of Zylon vests. Upon receiving the July 5, 2001 letter from Toyobo stating "the strength of Zylon fiber decreases under high temperature and humidity conditions," Westrick determined that older vests sold by Second Chance should be pulled and independently

tested in order to determine whether heat and humidity would cause them to degrade. Within a week, Westrick raised his concerns with Ed Bachner, Richard Davis and Paul Banducci, his executive colleagues at Second Chance, and they decided to conduct "used vest" testing pursuant to the concerns raised in Toyobo's letter. Westrick contacted the Longboat Key Police Department in Florida to ship older used vests back to Second Chance. The Longboat Key vests were well suited for testing due to the environmental conditions in the Florida Keys. The testing revealed Zylon body armor would not perform as required by the five-year warranties under which each vest was sold to police departments across the United States.

Thus, the pleading indicates that due to Westrick's position at Second Chance as Director of Research, he had direct and independent knowledge of the accelerated deterioration of Zylon, and of defendants' role in the industry. Upon receiving the July 5, 2001 alert from Toyobo that Zylon would not perform as expected, Westrick commenced an investigation into the durability of Zylon body armor and determined it would degrade and would not meet the five-year warranty under which it was sold. With respect to Itochu, Westrick learned from his boss what had transpired at the December 13, 2001 "Crisis Meeting," at which Itochu was present. With respect to Shoji and Barrday, respectively, Westrick knew those entities were importing and weaving Zylon and were causing false claims to be presented to the state. Further, Westrick disclosed to the California Attorney General all the information he possessed prior to filing suit. Westrick clearly " 'had a hand in the public disclosure of allegations that are a part of [his] suit.' " (*Grayson, supra,* 142 Cal.App.4th at p. 755.)

We conclude Westrick sufficiently pled he qualifies as an original source within the meaning of the statute.

DISPOSITION

The judgment of dismissal is reversed with directions to reinstate the first, second and fourth causes of action of the second amended complaint. Westrick shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.