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14 **(APPEARANCES CONTINUED ON NEXT PAGE)**

15 UNITED STATES DISTRICT COURT
 16 CENTRAL DISTRICT OF CALIFORNIA

17 UNITED STATES, THE STATES OF
 18 CALIFORNIA, DELAWARE,
 19 FLORIDA, ILLINOIS, INDIANA,
 20 NEVADA, NEW MEXICO, NEW
 21 YORK, and TENNESSEE, THE
 22 COMMONWEALTHS OF
 23 MASSACHUSETTS AND VIRGINIA,
 24 and THE DISTRICT OF COLUMBIA
 25 ex rel. JOHN HENDRIX,

26 Plaintiffs,

27 v.

28 J-M MANUFACTURING COMPANY,
 INC., d/b/a JM Eagle, a Delaware
 corporation, and FORMOSA
 PLASTICS CORPORATION, U.S.A.,
 a Delaware corporation,

Defendants.

Case No. ED CV-06-00055-GW(PJWx)

Hon. George H. Wu, U.S.D.J.
 Hon. Patrick J. Walsh, U.S.M.J.

To be considered: September 26, 2011
 Courtroom: 10
 Time: 8:30 a.m. (no appearance)

**OFFER OF PROOF WITH
 REGARD TO BENEFICIARY
 CLAIMS AGAINST FORMOSA
 PLASTICS CORPORATION, U.S.A.**

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1 **OFFER OF PROOF WITH REGARD TO PLAINTIFFS' BENEFICIARY**
2 **CLAIMS AGAINST FORMOSA PLASTICS CORPORATION, U.S.A.**

3 At the August 22, 2011 hearing on FPC's Motion to Dismiss the Fourth
4 Amended Complaint, the Court noted the recent holding by the Ninth Circuit,
5 *United States ex rel. Lee v. Corinthian Colleges*, No. 10-55037, 2011 U.S. App.
6 LEXIS 16618 (9th Cir. Aug. 12, 2011), and suggested that Relator address whether
7 the decision undermines Relator's position that FPC's "knowledge" may be pleaded
8 generally – *i.e.* by simply alleging that the requisite state of mind existed. (8/22/11
9 Tr. 6:6-11; 18:21-22.) The Court also afforded Relator the opportunity to submit an
10 offer of proof to provide specific facts with regard to FPC's knowledge regarding
11 the inadvertent submission of false claims. The Court suggested that the FRAC did
12 not plead sufficient "facts" to support the allegation of these elements. In the
13 interest of completeness, Relator identifies herein the *facts* set forth in the existing
14 FRAC and the additional *facts* in this Offer of Proof, leaving no doubt that the claim
15 is actionable under *Iqbal*, which requires only that such facts give rise to a
16 "plausible" inference that the elements are properly alleged.

17 **I. SUMMARY OF OFFER OF PROOF**

18 **A. ELEMENTS**

19 The "beneficiary provisions" of the various state false claims acts render
20 liable a person who: (a) is a beneficiary; (b) of an inadvertent submission of a false
21 claim; (c) who subsequently discovers the falsity of the claim; and (d) fails to
22 disclose the false claim to the government within a reasonable time. *See, e.g.*, Cal.
23 Gov't Code § 12651(a)(8).

24 **B. PROOF SUPPORTING EACH ELEMENT**

25 (1) **Beneficiary** – Relator alleges and J-M has admitted in its answer
26 to the Fourth Amended Complaint that FPC was a beneficiary of J-M's conduct.
27 (*See* J-M's Answer to the Fourth Amended Complaint, DKT No. 442, ¶ 378 (J-M
28

1 admits “that, prior to November 2005, it would transfer any surplus from its master
2 cash account to FPC-USA at the end of each business day.”). The Court has already
3 stated that it “would summarily reject FP’s argument that it cannot be seen as a
4 ‘beneficiary’ and that Relator has not plausibly pled that J-M profited (and therefore
5 passed along profits to FP) on its sales of the pipe in question.” 9/2/10 Tentative
6 Ruling at 25, n.22.

7 **(2) Inadvertent Submission of False Claims** – There are
8 voluminous *facts* alleged in the FRAC – and if the Court deemed it necessary they
9 easily could be supplemented – demonstrating that the claims submitted to the
10 government Real Parties were submitted by innocent third parties, such as
11 contractors, distributors, and developers. (*See* FRAC ¶¶ 11, 377, 380). In addition,
12 the Court has already held that the FRAC properly states a claim that “false claims”
13 were submitted, as it has already rejected J-M’s motion to dismiss on that basis,
14 therefore making these allegations far more than “plausible.”

15 **(3) Subsequent Discovery by FPC** – Numerous facts demonstrate
16 that FPC had knowledge of the false claims being submitted to government entities,
17 including the Real Parties.

18 (a) FPC knew that *all* J-M pipe was *incapable* of passing the UL
19 testing that was required, thereby making the “UL” stamp on every stick of
20 pipe “false.” (*See* FRAC ¶¶ 72, 82-84).

21 (b) There were specific discussions between John Hendrix and FPC
22 manager Norberto Torres informing FPC that *all* J-M pipe – not merely
23 “some” pipe, as FPC repeatedly claims – could not pass the required UL
24 testing. (*See* FRAC ¶¶ 82-84). Moreover, the allegation that the pipe was
25 incapable of passing the required UL testing was independently confirmed by
26 other J-M employees when they spoke with the United States Attorney during
27 the investigative phase of this case. (*See* Howard Daniels Presentation to JM
28

1 Eagle, DKT No. 128-7 pp. 7, 10, 13). All of this is in direct conflict with the
2 Court's observation in its Tentative Decision that Mr. Torres may not have
3 believed Mr. Hendrix. While FPC certainly can seek during discovery to
4 prove Mr. Torres did not believe the statements, or even seek to prove that J-
5 M did the required testing, the allegations that FPC knew of these facts are
6 plausible and well-supported. Discounting them at the motion to dismiss
7 stage would constitute an improper and unwarranted adverse inference or
8 factual finding.

9 (c) As to the issue of whether FPC knew that "government" customers
10 who are plaintiffs in this case had actually purchased J-M pipe that FPC knew
11 was not UL-compliant, there are voluminous facts that demonstrate it did
12 know these facts, both generally because it was integrally involved in J-M's
13 business and knew J-M's customer base, and specifically, because it knew the
14 names of at least some of the plaintiffs who had received false claims for J-M
15 pipe. (See FRAC ¶¶ 80, 81; *see also* FRAC Exhs. 61-63). Generally, as J-
16 M's parent, with an interlocking board of directors, and as one of the largest
17 manufacturers of pipe resin in the world, FPC was aware that the vast
18 majority of the end users of J-M's product were municipal water systems.
19 (See FRAC ¶¶ 5, 6, 80, 81; Exh. 61). But beyond this, and even without the
20 benefit of discovery, Plaintiffs proffer herein, as illustrations, two transactions
21 in extraordinary detail, one involving Plaintiff State of Nevada and one
22 involving Plaintiff Otay Water District.

23 (d) Each of those exemplar transactions, which happen to involve failed
24 pipe, demonstrate that FPC knew the specific identities of at least two of the
25 government plaintiffs in this case, knew that those entities had bought J-M
26 pipe, and also knew that the sale of this pipe was *necessarily based on a false*
27 *claim*, because FPC was aware that *none* of the J-M pipe, including the pipe
28

1 sold to these Plaintiffs, met the UL standard.¹ Thus, the *facts* alleged in the
2 Offer of Proof clearly demonstrate, “plausibly,” that the Relator has alleged
3 that FPC knew that *at least* two Real Parties directly bought J-M pipe that
4 was falsely marked as UL-compliant.

5 (e) It is therefore not surprising that FPC itself has conceded that
6 Relator has alleged at least some false claims. (*See* FPC Reply Brief, DKT
7 No. 441 p.8, n.11) (FRAC shows that FPC knew some, but not “all of the
8 alleged false claims”). On a motion to dismiss, the Relator need show no
9 more, and the Court has already declined to dismiss parts of any party’s
10 claim. Discovery will undoubtedly reveal more evidence of FPC’s general
11 and specific knowledge of J-M’s large, government-customer base.²

12 **(4) Failure to Notify Victims**

13 FPC has never suggested it notified any government victims that they had
14 received false claims, and this element has been properly pled in the FRAC. (*See*
15 *generally* DKT Nos. 333, 353, 423-1, 441).

16 **II. THE IMPACT OF CORINTHIAN COLLEGES**

17 The Ninth Circuit’s recent decision in *Corinthian Colleges* reaffirms the
18 principle of an earlier Ninth Circuit case, *Decker v. GlenFed, Inc. (In re GlenFed,*
19

20 ¹ The Court observed in its Tentative Ruling that the mere fact that Norberto Torres
21 was aware of claims by J-M customers does not necessarily mean that he knew that
22 J-M pipe was substandard. Plaintiffs need not rely on any such inference, however,
23 to support the allegation that FPC knew that J-M pipe was substandard (although we
24 believe the Court must draw that reasonable inference on a motion to dismiss). As
25 discussed above, FPC had direct knowledge that all J-M pipe was falsely marked
26 and failed to meet UL requirements because John Hendrix specifically told them so
27 in a conversation that is entirely “plausible.”

28 ² At the pleading stage, Plaintiffs need not provide the details about FPC’s
knowledge of every claim Plaintiffs intend to prove at trial.

1 *Inc. Sec. Litig.*), 42 F.3d 1541 (9th Cir. 1994), that scienter can be alleged “simply
2 by saying that scienter existed.” *Corinthian Colleges* first observes that “‘malice,
3 intent, knowledge, and other conditions of a persons [sic] mind,’ **including scienter,**
4 **can be alleged generally.**” 2011 U.S. App. LEXIS 16618, at *25 (citing Fed. R.
5 Civ. P. 9(b) (emphasis added)). Consistent with this standard, the Ninth Circuit
6 expressly found that the relators’ general allegations that the defendant “knew it was
7 not eligible to receive funds” and that “[d]efendants acted ‘knowingly’ or ‘in
8 deliberate ignorance or reckless disregard’” were sufficient to allege that the
9 defendants acted with scienter. *Id.* at *27. The Court applied the same standard to
10 missing allegations about the defendants’ knowledge of the “safe harbor” provision.
11 The Court required the Plaintiff to cure this “minor deficienc[y]” merely by
12 “formally alleg[ing]” that “Corinthian certified compliance with the [statute] while
13 knowing that it was in fact compensating recruiters based solely on their recruitment
14 numbers.” *Id.* at *28. That is precisely the sort of conclusory allegation that
15 *GlenFed Securities* held to be sufficient. Plaintiffs here have provided far more
16 **plausible facts** to support FPC’s knowledge than the Court required in *Corinthian*
17 *Colleges* or *GlenFed Securities*.

18 **III. OFFER OF PROOF**

19 In order to place the “additional evidence” Relator offers below in context, it
20 is important to acknowledge what is required to be alleged and what has already
21 been alleged in the Fourth Amended Complaint. Thus, Relator includes both
22 references to the FRAC and other proof currently available, even prior to discovery,
23 that establish the plausibility of the allegations against FPC.

24 **(1) There were false claims.**

- 25 • Government entities acquired J-M pipe from a distributor, contractor, or
26 developer.
 - 27 ○ FRAC ¶¶ 4, 5, 6, 11, 12, 13

28

- 1 ○ *Nevada Example* ¶¶ 1-10, 12-13, 16
- 2 ○ *Otay Water District Example* ¶¶ 1-7, 10, 13, 15
- 3 • The distributor, contractor, or developer obtained the pipe from J-M.
- 4 ○ FRAC ¶¶ 4, 18, 19, 20
- 5 ○ *Nevada Example* ¶¶ 11, 13
- 6 ○ *Otay Water District Example* ¶¶ 4, 8
- 7 • The J-M pipe was represented as having been tested and manufactured in
- 8 compliance with industry standards.
- 9 ○ FRAC ¶¶ 9, 10, 197, 205, 206, 210, 310, 312, 351, 352, 368
- 10 ○ *Nevada Example* ¶¶ 11-13, 16
- 11 ○ *Otay Water District Example* ¶¶ 8-10
- 12 • These representations were false.
- 13 ○ FRAC, Sections V-IX *passim*
- 14 ○ *Nevada Example* ¶¶ 17-21
- 15 ○ *Otay Water District Example* ¶¶ 13-14, 16-21, 23
- 16 • The distributor, contractor, or developer demanded money, property, or
- 17 services from the government entity for the J-M pipe.
- 18 ○ FRAC ¶¶ 4, 11-14, 16 and Counts I-II, IV-IX, XI, XIII, XV-XVI,
- 19 and XVIII
- 20 ○ *Nevada Example* ¶ 14
- 21 ○ *Otay Water District Example* ¶ 11
- 22 • J-M caused these false claims to be made.
- 23 ○ FRAC ¶¶ 2, 11, 18, 19 and Counts I-II, IV-IX, XI, XIII, XV-XVI,
- 24 and XVIII
- 25 ○ *Nevada Example* ¶ 14
- 26 ○ *Otay Water District Example* ¶ 11

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- 1 • The government entity provided money, property, or services to the
- 2 distributor, contractor, or developer for the J-M pipe.
- 3 ○ FRAC ¶¶ 4, 11-14, 16 and Counts I-II, IV-IX, XI, XIII, XV-XVI,
- 4 and XVIII
- 5 ○ *Nevada Example* ¶ 15
- 6 ○ *Otay Water District Example* ¶ 12

7 **(2) The false claim was inadvertently submitted to a government entity.**

- 8 • The distributor, contractor, or developer did not know that the
- 9 representations on the J-M pipe were false.
- 10 ○ FRAC ¶¶ 11, 377
- 11 ○ *Nevada Example* ¶ 14
- 12 ○ *Otay Water District Example* ¶ 11
- 13 • Therefore, when the distributor or contractor demanded money, property,
- 14 or services for the J-M pipe from the government entity, the distributor or
- 15 contractor inadvertently submitted a false claim to the government entity.
- 16 ○ FRAC ¶¶ 377, 380
- 17 ○ *Nevada Example* ¶ 14
- 18 ○ *Otay Water District Example* ¶ 11

19 **(3) FPC subsequently discovered the falsity of the claim.**

- 20 • FPC knew that J-M used distributors to sell its water and sewer pipe to
- 21 developers, contractors, and end-users of J-M pipe.
- 22 ○ FRAC ¶¶ 11, 80, 81
- 23 ○ *Nevada Example* ¶¶ 23, 25
- 24 ○ *Otay Water District Example* ¶¶ 16, 24-25
- 25 • FPC knew that a primary end-user for J-M's water and sewer pipe was
- 26 government entities.
- 27 ○ FRAC ¶¶ 5, 6, 80, 81

28

- 1 ▪ FRAC Ex. 61 (FPC brochures referring to “municipal water
- 2 pressure pipe” subject to identified industry “Specifications
- 3 and Approvals”)
- 4 ▪ FRAC Ex. 62 (FPC VP Heinle email inquiring of J-M about
- 5 “upcoming municipal projects that would consume large
- 6 quantities of PVC pipe”)
- 7 ▪ FRAC Ex. 63 (Torres email to others at FPC about J-M
- 8 Claims, referring to a demand for payment by “the City”)
- 9 ○ *Nevada Example* ¶¶ 23, 25
- 10 ○ *Otay Water District Example* ¶¶ 16, 23-26
- 11 • FPC knew that distributors, contractors, and developers demanded money,
- 12 property, or services in exchange for the J-M pipe they provided to
- 13 government entities.
- 14 ○ FRAC ¶¶ 14, 80, 81
- 15 ○ *Nevada Example* ¶ 25
- 16 ○ *Otay Water District Example* ¶¶ 16, 23-26
- 17 • FPC knew that government entities provided money, property, or services
- 18 to distributors, contractors, and developers in exchange for the J-M pipe
- 19 they acquired.
- 20 ○ FRAC ¶¶ 80, 81
- 21 ○ *Nevada Example* ¶ 25
- 22 ○ *Otay Water District Example* ¶¶ 16, 23-26
- 23 • Government entities, developers, and contractors complained about
- 24 problems with J-M pipe they had acquired.
- 25 ○ FRAC ¶¶ 72
- 26 ○ *Nevada Example* ¶¶ 23-25
- 27 ○ *Otay Water District Example* ¶¶ 16-22
- 28

- 1 • Such complaints usually made their way to the distributors of J-M pipe,
2 who then forwarded them to J-M.
- 3 ○ FRAC ¶¶ 73
4 ○ *Nevada Example* ¶ 23
5 ○ *Otay Water District Example* ¶ 16
- 6 • At J-M, the customer complaints were handled by the Product Assurance
7 Department, where Relator John Hendrix and others worked.
- 8 ○ FRAC ¶¶ 73, 74, 75
9 ○ *Nevada Example* ¶¶ 23-25
10 ○ *Otay Water District Example* ¶¶ 16, 24-26
- 11 • Standard operating procedure between J-M and FPC involved quarterly
12 reporting and review of complaint files by J-M with FPC of all customer
13 complaints having a value in excess of \$15,000.
- 14 ○ FRAC ¶¶ 70, 72, 76, 77, 80(a)-(f)
15 ○ *Nevada Example* ¶¶ 23-25
16 ○ *Otay Water District Example* ¶¶ 16, 24-26
- 17 • Those discussions and review of customer complaint files constituted one
18 way that FPC learned about government entities that had acquired J-M
19 pipe, as well as the details of the acquisitions they made, including the
20 demand for money, property, or services made upon them.
- 21 ○ FRAC ¶¶ 72, 76, 77, 78, 79, 80(a)-(f)
22 ○ *Nevada Example* ¶¶ 23-25
23 ○ *Otay Water District Example* ¶¶ 16, 24-26
- 24 • During that review process, Hendrix told FPC that all J-M pipe was unable
25 to pass required tensile strength testing and therefore did not comply with
26 the representations J-M made about its pipe.
- 27 ○ FRAC ¶¶ 72, 82, 83, 84, 85, 86
- 28

- 1 • J-M transferred the surplus from its master cash account to FPC every day.
 - 2 ○ FRAC ¶¶ 58, 378 (alleged and J-M admitted in its Answer)
- 3 • The more pipe J-M was able to manufacture and sell to Real Parties, the
4 more resin and compound J-M purchased from FPC.⁴
 - 5 ○ FRAC ¶ 379
- 6 • Therefore, FPC benefited from the inadvertent submission of false claims.

7 **(5) FPC failed to disclose the false claims within a reasonable time after**
8 **discovery.**

- 9 • Never disclosed by FPC (undisputed)
 - 10 ○ FRAC ¶ 382
 - 11 ○ *Nevada Example* ¶ 27
 - 12 ○ *Otay Water District Example* ¶ 28

13
14 **EXAMPLE #1: Allegations Pertaining to the Public Works Department**
15 **High-Desert Prison Project (aka Cold Creek State Prison) in Nevada**

16 1. On or about November 6, 1998 the State of Nevada Public Works
17 Board entered into a contract with Sletten Construction of Nevada, Inc. to
18 commence work on Project Nos. 95-G1 & 97-C1, Men's Prison No. 7 (Cold Creek
19 State Prison), Phase I. [DKT No. 253-2, Ex. NV6] The contract award amount of
20 this project was over \$83,000,000. *Id.* at 1.

21 2. Construction on Phase II commenced on October 11, 1999; this phase
22 of the project was known as Men's Prison No. 7 (High Desert State Prison), Phase
23 _____

24 ⁴ This allegation does not risk ensnaring J-M's other suppliers unless they, too,
25 discovered the falsity of J-M's representations about its pipe. Based on Plaintiffs'
26 knowledge, no such allegations could be made as to any supplier other than FPC.
27
28

1 II, Project No. 99-C1 (Phase I and Phase II collectively, the “High Desert Prison
2 Project”).

3 3. The High Desert Prison Project was an extensive public-works project
4 that included some 34,650 linear feet of PVC pressure pipe, serving as the main
5 waterline supply for a 3,000-bed prison.

6 a) Phase I of this project included the construction of all mass
7 earthwork, building pads, finish grading, associated site work, concrete
8 walkways, asphalt and/or gravel roadways, parking lot, and on-and off-
9 site utilities. Utilities included an extensive water distribution system,
10 three water storage tanks, and a gravity sanitary sewer system.

11 Construction also included Core Facilities that consisted of an Outside
12 Administration Building, Entrance Building, Security Administration
13 Building, Program Services Building, Inmate Services & Culinary
14 Building, Medical/Intake Building, and Maintenance/Central Plant
15 Building, four housing units, and the perimeter fencing. The contract
16 also included the relocation on-site and the monthly watering of 1,200
17 large Joshua & Yucca trees and 1,500 small cacti plants. See DKT No.
18 253-2, Ex. NV6 at 13.

19 b) Phase II included construction of four additional housing units,
20 four security towers, general warehouse/motor pool, lethal security
21 fence, and installation of site utilities for the Phase II works.

22 4. The construction specifications for the water systems for the High
23 Desert Prison Project included “water systems piping for potable water service and
24 fire protection service outside the building.” DKT No. 253-2, Ex. NV7 at 3.

25 5. The water main to be constructed was both for potable water and for
26 fire suppression, specifically including a sprinkler system. The specifications
27 incorporate the drawings and general provisions of the contract, “including General
28

1 and Supplementary Conditions and Division 1 Specification Sections.” *Id.*; DKT
2 No. 253-2, Ex. NV8 (State Public Works Board’s General and Supplementary
3 Conditions). The construction specifications require PVC pipe to meet “AWWA
4 C900; Classes 150 and 200” standards. DKT No. 253-2, Ex. NV7 at 5.

5 6. Further, the specifications require compliance “with standards of
6 authorities having jurisdiction for fire protection systems,” which, in this case, was
7 the Nevada Fire Marshal. DKT No. 253-2, Ex. NV7 at 4; *see also* DKT No. 253-2.
8 Ex. NV8 at 8 (“The Laws of the State of Nevada and the applicable rules and
9 regulations of its departments, agencies and institutions shall govern the Project and
10 the Work.”).

11 7. Per the fire marshal’s codes and requirements as described above, the
12 pipe used for this project was required to comply with NFPA 24, UL, and/or FM
13 standards. As described above, J-M Pipe could meet such standards only through its
14 claimed compliance with UL 1285 (and sometimes FM 1610/1612).

15 8. As with all public works projects in the State, pursuant to NRS 339.025
16 the State required the contractor for the High Desert Prison Project to post a
17 performance bond in the sum of the contract amount to assure, *inter alia*, that funds
18 would be available to correct any failure by the contractor to complete the project in
19 accordance with the specifications.

20 9. Pursuant to the statutory requirement and the General Conditions of the
21 Contract (DKT No. 253-2, Ex. NV8 at 24), the contractor for this project posted a
22 performance bond for the contract award price of over \$83,000,000. DKT No. 253-
23 2, Ex. NV6 at 8.

24 10. Only upon inspection to confirm that the project was completed in
25 accordance with specifications would the project be accepted, final payment made to
26 the contractor, and water and water maintenance services provided pursuant to the
27 project. Subsequently, upon completion of the project, the performance bond would
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1 be released, provided that the State did not discover during that time any failure by
2 the contractor to complete the project in accordance with the specifications.

3 11. J-M's material specifications and other important information,
4 commonly known as "cut sheets," were submitted by the contractor to the Nevada
5 State Public Works Board for review and approval. The approved "cut sheets"
6 submitted by the contractor in the High Desert Prison Project identify J-M as a
7 manufacturer of the PVC pipe to be installed in the project. The J-M cut-sheets are
8 for its C900 "Blue Brute" and C905 "Big Blue" pipe. The cut-sheets are replete
9 with representations that the pipe "meets AWWA C900," is "Underwriters
10 Laboratories and NSF Listed, Factory Mutual Approved," "are listed for critical use
11 in firelines and water mains and are F/M approved," and "Meets Accepted
12 Standards AWWA C905, Underwriters Laboratories." DKT No. 253-2, Ex. NV9.

13 12. The State, through its retained consultant, accepted and authorized the
14 acquisition of J-M Pipe in the High Desert Prison Project based upon review,
15 inspection, and approval of the contractor's submittal of J-M C900/905 pipe, and
16 upon a State employee's inspection of the J-M Pipe as installed.

17 13. All told, some 34,650 linear feet of J-M pipe was shipped to the High
18 Desert Prison Project, and the pipe was installed beginning in late 1999 or early
19 2000. The project utilized both J-M C900 and C905 pipe in several different sizes.

20 14. The contractor demanded payment from the State of Nevada in the total
21 amount of \$2.2 million in connection with the Project site utilities, which included
22 the acquisition and installation of the waterline using J-M pipe and related sewer
23 work. At the time the contractor demanded payment from the State of Nevada, the
24 contractor did not know that the representations on the "cut sheets" and stamped on
25 the pipe itself were false. Therefore, the contractor inadvertently submitted one or
26 more false claims to the State of Nevada. J-M caused each of these false claims to
27 be presented to the State of Nevada.

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1 15. The State of Nevada paid the contractor \$2.2 million in connection with
2 the Project site utilities, which included the acquisition and installation of the
3 waterline using J-M pipe and related sewer work.

4 16. The State Public Works Board accepted the water-system work
5 completed by the contractor and issued Certificates of Substantial Completion,
6 effective June 6 and June 7, 2000. DKT No. 253-2, Ex. NV10 - copies of the
7 certificates. The State issued these certificates with the understanding, and pursuant
8 to the representation, that the waterlines were installed in conformance with
9 specifications and requirements, and that the contractor had fulfilled all contractual
10 obligations.

11 17. The water system was placed into service in approximately September
12 2000. During the one-year warranty period after completion of the water main for
13 the High Desert Prison Project (approximately June 2000 to June 2001), the
14 contractor made three repairs to the pipeline.

15 18. From April 2005 to August 2005, the installed J-M pipe failed five
16 more times, specifically on May 27, 2005, July 13, 2005, July 18, 2005, July 20,
17 2005, and August 8, 2005. At that point, the State notified J-M of the failures.

18 19. Thereafter, the J-M Pipe failed at least another four times – on
19 September 26, 2005, March 3, 2006, March 22, 2006, and April 10, 2006. DKT No.
20 253-2, Ex. NV11 (photos).

21 20. In September 2005, J-M sent samples of some of the pipe that failed in
22 the High Desert Prison Project to CRT Laboratories for testing. One of the tests
23 CRT conducted was a longitudinal tensile strength test per ASTM D638 and ASTM
24 D1784. *See* DKT No. Ex. 253-3, NV12 at 6. The industry standards UL 1285, FM
25 1612, and AWWA C900 and C905, which standards were incorporated into the
26 contracts and requirements of the High Desert Prison Project, require that the
27 longitudinal tensile strength of the pipe equal or exceed 7,000 psi. The lab tested
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1 five specimens for tensile strength, and each and every specimen failed to meet the
2 minimum of 7,000 psi. The average tensile strength of the specimens was only
3 6,349 psi, substantially below the 7,000 psi minimum required. Id.

4 21. By May 2007, the J-M pipe in the ground from the High Desert Prison
5 Project had failed a total of at least 17 times. At least one of the water-main breaks,
6 which occurred on April 27, 2007, caused the Nevada Department of Corrections to
7 shut-off the water supply to the 3,000-bed prison for two days, requiring water to be
8 hauled in on 8,000-gallon water trucks. The Department of Corrections faced the
9 prospect of no water at this desert facility during summer months, and paid to repair
10 the numerous breaks to the line. DKT No. 253-3, Ex. NV13.

11 22. After these and other failures, the Nevada State Public Works Board
12 decided to replace the water line completely and abandon the existing J-M pipe
13 pipeline in the ground. The State entered into a contract to replace the line for a
14 contract price of \$630,000, which new waterline was ultimately installed. DKT No.
15 253-3, Ex. NV14.

16 23. In 2005, the State of Nevada Public Works Department complained to
17 J-M's distributor, Standard Wholesale Supply, about failures of J-M pipe related to
18 the High Desert Prison Project. The distributor informed a J-M salesperson of the
19 complaints, who referred the matter and the name of the Nevada contact person
20 (Dan Howerton) to the Product Assurance Department. J-M's Product Assurance
21 Department opened a customer claims file, assigned number Q04-H-23, for the High
22 Desert Prison Project in 2005. Both relator John Hendrix and his colleague in the
23 Product Assurance Department, Mai Huynh, discussed this claim file with FPC
24 during 2005. During those discussions with Mr. Torres, Mr. Hendrix and Mr.
25 Huynh talked about the specifics of the claim (including the amount and type of J-M
26 pipe used in the Project), who else was supplied by the affected waterline in addition
27 to the prison, whether there were alternative sources to get water to the prison, test
28

1 reports related to external and internal testing of pipe from the Project,
2 recommendations from personnel at the plant and at Headquarters concerning how
3 to handle the claim, and the various internal reports in the claims file.

4 24. These conversations about the High Desert Prison Project pipe failures,
5 involving J-M C900 and C-905 pipe, took place after FPC learned from Hendrix, as
6 corroborated by other sources, about J-M's tensile strength problems with its C-900
7 and C-905 pipe that rendered the pipe non-compliant with the certifications J-M
8 claimed to be met. *See* FRAC ¶ 87.

9 25. Through these conversations with Mr. Hendrix and Mr. Huynh, FPC
10 learned that: (a) the State of Nevada had installed J-M pipe in the High Desert
11 Prison Project; (b) the State of Nevada had paid its primary contractor, Sletten
12 Construction of Nevada, for such J-M pipe; (c) J-M used its distributor, Standard
13 Wholesale Supply Co., to sell pipe to the installing contractor, Acme Underground,
14 for use in the High Desert Prison Project; (d) the State of Nevada had experienced
15 multiple failures involving J-M pipe used in the High Desert Prison Project; (e) the
16 J-M pipe used at the High Desert Prison Project was the same type of pipe that
17 Hendrix had previously informed FPC suffered from tensile strength problems; and
18 (f) the State of Nevada had suffered damages in connection with the failures of J-M
19 pipe.

20 26. Acme Underground inadvertently submitted false claims to the State of
21 Nevada related to J-M pipe, and the State of Nevada paid those claims. Acme
22 Underground paid J-M's distributor, Standard Wholesale Supply Co., for the pipe
23 that Acme Underground sold to the State of Nevada. The distributor paid J-M for
24 the pipe that it sold to Acme Underground. J-M transferred its excess cash to FPC
25 on a daily basis. Therefore, FPC benefitted from Acme Underground's inadvertent
26 submission of one or more false claims to the State of Nevada.

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1 27. FPC never disclosed to the State of Nevada that the contractor had
2 inadvertently submitted one or more false claims to the State of Nevada in
3 connection with the High Desert Prison Project.

4
5 **EXAMPLE #2: Allegations Pertaining to the Otay Water District**
6 **Project in Chula Vista, California**

7 1. The Otay Water District, a publicly owned water and sewer service
8 agency, provides water to approximately 6,000 homes and businesses, serving the
9 needs of approximately 191,000 people in a service area of approximately 125
10 square miles. It also owns and operates a wastewater collection and treatment
11 system.

12 2. In early 2000, the Otay Water District entered into an agreement with
13 Archer Western Contractors, Ltd. (“Archer Western”), a contractor, for construction
14 of the Otay Water District’s “Otay Lakes Road and Telegraph Canyon Road 16 inch
15 Recycled Water Mains Phases 1, 2, 3, 4 Paseo Ranchero 10 inch Recycled Water
16 Main” project in Chula Vista, California (the “Project”). The contract award
17 amount was \$3,600,000.

18 3. The public works Project primarily consisted of the installation of
19 20,000 linear feet (LF) of 16” reclaimed water PVC pipe. The 16” PVC pipe would
20 be installed in Phases I through IV and 10” PVC diameter pipe would be installed in
21 Phase IV.

22 4. On or about March 6, 2000, Archer Western entered into an agreement
23 with U.S. Filter Distribution Group, Inc. (“U.S. Filter”), a national pipe supplier, for
24 the purchase of PVC pipe. [JMM 121391]. In February 2000, U.S. Filter placed an
25 order for all of the requisite PVC pipe for the Project from J-M. [FRAC Ex. 56,
26 FPCUSA0025338-25343].

1 5. The construction specifications for the Project incorporated Otay Water
2 District's specifications, including the Otay Water District Standard Specifications
3 for Water, Sewer and Reclaimed Facilities, which required that the reclaimed water
4 pipe was manufactured per AWWA C900 and AWWA C905.

5 6. As with all public works projects in the Otay Water District, the
6 District required the contractor for the Project to post a performance bond in the sum
7 of the contract amount to assure, inter alia, that funds would be available to correct
8 any failure by the contractor to complete the project in accordance with the
9 specifications.

10 7. Only upon inspection to confirm that the project was completed in
11 accordance with specifications would the project be accepted, final payment made to
12 the contractor, and water and water maintenance services provided pursuant to the
13 project. Subsequently, upon completion of the project, the performance bond would
14 be released.

15 8. J-M's material specifications and other important information,
16 commonly known as "cut sheets," were submitted by the contractor to Otay Water
17 District for review and approval. The approved "cut sheets" submitted by the
18 contractor in the Project identify J-M as a manufacturer of PVC pipe to be installed
19 in the project. The J-M cut sheets are for its C900 "Blue Brute" and C905 "Big
20 Blue" pipe. The cut sheets are replete with representations that the pipe "meets
21 AWWA C900," "are listed for critical use in firelines and water mains and are F/M
22 approved," "meets the requirements of AWWA C905," "and "Meets Accepted
23 Standards AWWA C905, Underwriters Laboratories."

24 9. Otay Water District accepted and authorized the acquisition of J-M
25 pipe in the Project based upon review, inspection, and approval of the contractor's
26 submittal of J-M C900/C905 pipe, and upon its inspector's witnessing the
27 installation process and the pressure testing of the J-M pipe as installed.

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1 10. All told, over 20,000 LF of J-M pipe from the Pueblo, CO and Fontana,
2 CA plants was shipped directly to the job sites at Otay Lakes Road and Fenton
3 Street. [FRAC Ex. 56, FPCUSA0025338-25343]. The project utilized both J-M
4 C900 and C905 pipe in different diameters.

5 11. Archer Western demanded payment from Otay Water District in
6 connection with the J-M pipe. At the time Archer Western demanded payment from
7 Otay Water District, Archer Western did not know that the representations on the
8 “cut sheets” and stamped on the pipe itself were false. Therefore, Archer Western,
9 the contractor, inadvertently submitted one or more false claims to Otay Water
10 District. J-M caused each of these false claims to be presented to the Otay Water
11 District.

12 12. Otay Water District paid Archer Western \$ 4.7 million in connection
13 with the J-M pipe that was installed in the Project.

14 13. Nearly four miles of J-M pipe was installed, buried underground, and
15 the road was paved over. [JME00104536]. The pressure-line was hydrotested in
16 accordance with Otay Water District’s Standard Specifications and 45 leaky joints
17 were discovered. These leaks were discovered at various pressures and various
18 locations along the water main. [JME00104536]. Crew leaders at the job site cut
19 out the leaky joints and took them to the yard for examination and testing.
20 [JME00104536]. A repair joint was then installed for the leaky joint.
21 [JME00104536].

22 14. As a result, Archer Western, and thus Otay Water District, incurred
23 substantial additional costs to excavate in order to acquire access to the J-M pipe,
24 labor and materials to replace the J-M pipe, and backfilling operations. [FRAC Ex.
25 56, FPCUSA0025271].

26 15. Otay Water District formally accepted the water-system work
27 completed by Archer Western.

28

1 16. John Orkish of DOT Sales, the outside sales representative for J-M, and
2 the distributor, U.S. Filter, became aware of the joint leaks. J-M was notified by J-
3 M's distributor, U.S. Filter, of the joint leaks on or about December 4, 2000 and
4 opened a customer claims file, assigned number Q00-L-02, for the Project. This
5 claim, including the resulting litigation, was discussed between J-M's Product
6 Assurance Department and FPC from 2001 to 2005.

7 17. On December 6, 2000 three leaky joints were brought to the Fontana,
8 CA plant for analysis. [JME00104536]. The joints were disassembled and cleaned.
9 [JME00104536]. After being cleaned, one joint was reassembled and withstood a
10 pressure test. [JME00104536].

11 18. In a December 20, 2000 letter to U.S. Filter, J-M stated that
12 “[s]ubsequent to the testing conducted at our Fontana facility on December 6th, it is
13 apparent that the results were not enough to fully address the multiple leaks
14 encountered with the 16” DR25 pipe in this project.” [JME00104534].

15 19. In January 2001, two leaky joint samples were sent to Exponent
16 Laboratories for evaluation. [JME00104536]. Both of the joint samples failed
17 pressure testing and leaks were observed. [JME00104536].

18 20. Between February 14 and 15, 2001, a J-M representative met with
19 representatives from Archer Western and observed joint sample testing at the
20 Fontana, CA plant and at the job site. In a report to Barry Lin, J-M's Director of
21 Production, the J-M representative noted that at Fontana he observed “seeps
22 develop” and that “there [were] visible leaks in other areas.” [JME00180084].
23 Further, the J-M representative also observed a leak at the job site. [JME00180084].

24 21. In an April 17, 2001 letter to U.S. Filter, J-M referenced a test report
25 from Hauser Laboratories and stated “[a]ll *re-tests with the joints cleaned and re-*
26 *assembled passed.*” [JME00104535]. The letter did not point out that each sample
27 leaked when tested in an “as received” condition.

28

1 22. Archer Western filed a complaint for negligence and breach of contract
2 against U.S. Filter on June 11, 2001 claiming over \$2 million dollars in damages
3 and costs. U.S. Filter subsequently filed a cross-complaint for indemnification
4 against J-M on or around September 17, 2001.

5 23. In a July 30, 2002 email from Terry J. Allen of Paul Hastings Janofsky
6 & Walker LLP, the law firm representing J-M in the lawsuit, to J-M's insurance
7 carrier, with a copy to Norberto Torres of FPC, Mr. Allen wrote that "[s]ix of the 10
8 joints were tested. They were tested first in an 'as is' condition and 4 of the 6
9 leaked. They were then disassembled, cleaned up, and reassembled – they all
10 passed with no leaks." [FPCUSA0025327].

11 24. FPC managed the insurance coverage aspect of the Archer Western
12 litigation for J-M. On multiple occasions J-M employees in the Product Assurance
13 Department, including John Hendrix and Kaushal Rao, discussed the Archer
14 Western litigation with Mr. Torres of FPC. During the discussions with Mr. Torres,
15 Mr. Hendrix and Mr. Rao spoke about the identity of the ultimate claimant being the
16 Otay Water District, the amount of the claim, negotiations with the parties about the
17 claims (including the identities of the persons involved in the negotiations), the
18 merits of the claim from J-M's point of view, and the responses of Archer Western
19 to J-M's positions. Some of these conversations about the Project's 45 pipe leaks,
20 involving J-M pipe, took place after FPC learned from Hendrix, as corroborated by
21 other sources, about J-M's tensile strength problems with its C-900 and C-905 pipe
22 that rendered the pipe non-compliant with the certifications J-M claimed to be met.

23 25. Through its management of the insurance aspect of the Archer Western
24 litigation and its conversations with J-M's Product Assurance personnel, FPC
25 learned that: (a) Otay Water District had contracted for the installation of J-M pipe
26 in the Project; (b) Otay Water District had paid its contractor, Archer Western, for
27 such J-M pipe; (c) J-M used DOT Sales as an outside sales representative to sell

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1 pipe to J-M's distributor, U.S. Filter, to provide to the contractor, Archer Western,
2 for use in the Otay Water District; (d) Otay Water District had experienced
3 numerous joint leaks involving J-M pipe used in the Project; and (e) Otay Water
4 District suffered damages in connection with the joint leaks experienced with the J-
5 M pipe.

6 26. FPC was aware that the J-M pipe installed in the Otay Water District
7 had suffered a number of joint leaks and was involved in the matter for several
8 years, as evidenced by:

- 9 a. An undated letter to FPC from its insurer, AIG, stating that after
10 reviewing the documents exchanged in discovery the "documents
11 indicate that all or most of the damages being sought from J-M arose
12 out of and were attributable solely to the repair and/or replacement of
13 PVC pipe allegedly manufactured and supplied on the project by J-M."
14 [FRAC Ex. 56, FPCUSA0025255].
- 15 b. An April 22, 2003 letter from AIG to FPC pointing out that "[i]n the
16 underlying Complaint, Archer Western has asserted . . . claims against
17 U.S. Filter based upon U.S. Filter allegedly '...providing pipes which
18 were not "fit" for the intended purpose and which leaked.'" [FRAC
19 Ex. 56, FPCUSA0025266].
- 20 c. A November 5, 2004 email from FPC to Kaushal Rao, J-M's Assistant
21 Direct of Production, stating: "As per our conversation we are working
22 very diligently with AIG to have this matter [Archer Western – Unpaid
23 Bills] resolved by the end of the year." [FRAC Ex. 56,
24 FPCUSA0025303].
- 25 d. A June 16, 2005 email from J-M to AIG, copying FPC, stating: "As
26 you are well aware, Norberto Torres currently serves in that capacity
27 [Risk and Insurance Manager] at the Formosa level and to this point
28

1 has handled all the insurance matters for subsidiaries of FPC operating
2 in the U.S.” [JME00291466].

3 27. The contractor, Archer Western, inadvertently submitted false claims to
4 Otay Water District related to J-M pipe and Otay Water District paid those claims.
5 Archer Western paid J-M’s distributor, U.S. Filter, for the pipe that the contractor
6 sold to Otay Water District. J-M transferred its excess cash to FPC on a daily basis.
7 Therefore, FPC benefitted from Archer Western’s inadvertent submission of one or
8 more false claims to Otay Water District.

9 FPC never disclosed to Otay Water District that Archer Western had
10 inadvertently submitted one or more false claims to Otay Water District in
11 connection with the Project.

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