No. _____

In The
Supreme Court of the United States

P. VICTOR GONZALEZ, QUI TAM PLAINTIFF, ON BEHALF OF HIMSELF, THE UNITED STATES OF AMERICA, & THE STATE OF CALIFORNIA,

Petitioner,

v.

PLANNED PARENTHOOD LOS ANGELES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, former chief financial officer of one of the respondent entities, filed suit under the False Claims Act (FCA), 31 U.S.C. §§ 3729, 3730, alleging respondents illegally overbilled the federal government hundreds of millions of dollars by unlawfully marking up reimbursement requests for drugs and devices. This violation was knowing, or at least reckless: federal and state law expressly forbade such mark-ups; state officials repeatedly and explicitly instructed respondents that such mark-ups were unlawful; and no government officials ever told respondents that such mark-ups were permitted. The Ninth Circuit nevertheless held that the *partial non-response* of *state* officials precluded scienter *at the pleadings stage*.

1. Did the Ninth Circuit err by applying the so-called "government knowledge defense" to bar an FCA complaint *as a matter of law at the pleadings stage*, in square conflict with the Fifth Circuit and the consistent practice of eight other circuits?

2. Did the Ninth Circuit err by holding, in square conflict with the Third Circuit and the consistent practice of eight other circuits, that under the "government knowledge defense" to an FCA suit the knowledge and partial inaction of *state* officials negated the *federal* liability of respondents for violating *federal* requirements?

3. Does *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), doom as not "plausible" a complaint that not only *alleges* facts showing sufficient scienter, but also attaches undisputed evidence sufficient to survive an adverse summary judgment motion and sufficient to support a trial verdict on the scienter element?

PARTIES

The petitioner is listed on the cover.

The respondents, defendants/appellees below, are Planned Parenthood Los Angeles; Planned Parenthood Shasta-Diablo; Planned Parenthood Mar Monte; Planned Parenthood San Diego & Riverside; Planned Parenthood Orange & San Bernardino; Planned Parenthood Pasadena; Planned Parenthood Santa Barbara, Ventura & San Luis Obispo; Planned Parenthood Six Rivers; Planned Parenthood Affiliates of California; Mary-Jane Waglé; Martha Swiller; Kathy Kneer; and Does 1 through 10.

Defendant Planned Parenthood Golden Gate, now Golden Gate Community Health (GGCH), filed for bankruptcy and was severed from the proceedings below. GGCH was not a party to the appeal from which this petition arises.

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JURISDICTION

The panel decision of the Ninth Circuit issued on July 22, 2014. The Ninth Circuit denied a timely petition for rehearing/rehearing en banc on Nov. 5, 2014. On Jan. 13, 2015, Justice Kennedy extended the time to petition for certiorari in this Court until Mar. 5, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The pertinent text of the False Claims Act, 31 U.S.C. § 3729, appears in the Appendix. Pet.App. D.

INTRODUCTION

The Ninth Circuit has rendered a decision that creates multiple circuit conflicts, and creates a significant enforcement obstacle, regarding the federal

False Claims Act (FCA). Along the way, the Ninth Circuit has badly distorted the *Iqbal* test for examining the factual sufficiency of pleadings. This Court should grant review.

The FCA targets misconduct that cheats the federal government. Sometimes the government has some awareness of the alleged misconduct while it is still happening. In such cases, the federal circuits have generally held that government knowledge of the misconduct can be relevant to, and possibly help disprove, the scienter – the mental state element – which the FCA requires for liability. This scienter defense is generally referred to as the "government knowledge defense," and because this defense goes to a necessary element of an FCA suit, it applies to both government and private enforcement under the FCA.

The overwhelming majority of the circuits, with the strong support of the federal Department of Justice, have recognized important limitations on this defense, viz., that the defense, being fact-dependent, applies only at summary judgment or trial, not at the pleadings stage; that the defense only applies where the government "knows and approves" of the misconduct; and that the defense, being a defense to federal liability, only applies to the knowledge of *federal* officials. *See infra* § I(B)(1). And while divided on the issue, the majority of circuits have also held that that the defense, because relevant to defendant's scienter, requires a showing, not just that the *government* knew of the misconduct, but that the *defendant* knew of and relied upon the government's knowledge and approval. *See infra* § I(B)(1)(e).

In sharp contrast, the Ninth Circuit here rendered a decision that gives conclusive defensive effect, *at the pleadings stage*, to *state* government officials'

knowledge and *partial inaction*. This decision directly conflicts with square holdings of the Third and Fifth Circuits, dramatically departs from the consistent practice of seven other circuits, flies in the face of the DOJ's repeated insistence upon the proper limits of the "government knowledge defense," and in the process turns this Court's *Iqbal* standard upside down. This Court should grant review.

STATEMENT OF THE CASE

1. The False Claims Act

"Since its enactment during the Civil War, the False Claims Act, 31 U.S.C. §§ 3729-3733, has authorized both the Attorney General and private *qui tam* relators to recover from persons who make false or fraudulent claims for payment to the United States." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 283 (2010). The FCA is the federal government's "primary litigative tool for combatting fraud." S. Rep. No. 99-345, at 2 (1986). *See also Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014* (DOJ Nov. 20, 2014)[1] ("The False Claims Act is the government's primary civil remedy to redress false claims for government funds").

Government and private enforcement of the FCA result in massive recoveries of taxpayer money and penalties. Fraud Statistics - Overview (DOJ Dec. 23,

[1]www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014.

2013)[2] (from 1987-2013, private *qui tam* suits brought in over $27 billion in settlements and judgment, including nearly $1 billion in cases where the government declined to intervene; government enforcement in non-*qui tam* suits recovered $11.7 billion).

The FCA provided, when this suit was filed,[3] that any person who

> (1) knowingly presents, or causes to be presented, to . . . the United States Government . . . a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or] (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C. § 3729(a) (1994). The FCA defines the scienter element, "knowingly," to include not just "actual knowledge" but also "deliberate ignorance" and "reckless disregard." 31 U.S.C. § 3729(b)(1).

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[2]www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf.

[3]The FCA was amended in 2009, Pub. L. 111-21, Fraud Enforcement and Recovery Act of 2009, but the scienter requirement was unchanged. The Patient Protection and Affordable Care Act also amended the FCA, but those amendments are not retroactive. *Graham Cnty.*, 559 U.S. at 283 n.1.

2. The Medicaid billing rules

Federal and state rules prevented respondents Planned Parenthood Los Angeles *et al.* (respondents or PP) from marking up above "acquisition cost" their requests for government reimbursement for drugs and devices. *See*, *e.g.*, 58 Fed. Reg. 27293, 27293 (proposed May 7, 1993) ("amount billed shall not exceed . . . actual acquisition cost"), *adopted*, 58 Fed. Reg. 34058 (June 23, 1993); 58 Fed. Reg. 68922, 68923 (proposed Dec. 29, 1993) ("amount billed may not exceed the entity's actual acquisition cost"), *adopted in pertinent part*, 59 Fed. Reg. 25110, 25112 (May 13, 1994) ("amount billed may not exceed the entity's actual acquisition cost for the drug");[4] Cal. Code Regs. tit. 22 § 51509.1(c)(3) ("[r]eimbursement . . . shall not exceed . . . drug ingredient cost" and "[n]o dispensing fee or markup shall be paid"); Cal. Bus. & Professions Code § 4063.7 (reenacted in 1996 as § 4183) (no dispensing fee). *See also* Medi-Cal Update, Medical Services Bulletin 353 (2003) (TAC ¶38) ("reminded" providers that "contraceptive supplies must be billed at cost"). Respondents admit that they consistently billed the government for reimbursement at marked-up amounts. Respondents have not argued in this case, and no court has held, that these mark-ups were lawful.

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[4]These federal regulations authorized states to add a "reasonable dispensing fee"; California declined to do so.

3. Chronology of PP's misconduct

a. Mark-ups California's Medicaid program, Medi-Cal (and its waiver program, FPACT), administered by the state's Department of Health Services (DHS), reimburses providers for birth control distributed to low-income persons.[5] *See Labotest, Inc. v. Bonta*, 297 F.3d 892, 893 (9th Cir. 2002). PP's practice from 1970 through the filing of the complaint was to bill DHS their "usual charges" for birth control drugs and devices, rather than at the significantly lower rate of acquisition cost. TAC Ex. 3d. DHS in turn sought reimbursement from the federal government.

The magnitude of the overbilling is illustrated by Exhibit 6 to the TAC. For example, the Euclid Avenue Center facility obtained birth control pills at a cost of $31,936.95, but added a mark-up of $154,990.05 – about five times the cost – thus receiving a total reimbursement from the state (and through it, the federal government) of $186,927.00. The Mission Valley Center facility obtained Plan B products at a cost of $9,423.90, but added a mark-up of $96,816.09 – more than ten times the cost – thus receiving a total reimbursement from the government of $106,239.99. Exhibit 4 to the TAC shows similarly massive mark-ups. For example, the Los Angeles affiliate (PPLA) obtained Levlen birth control pills at a cost of $19,154.07, but added a mark-up of $195,657.93 – over ten times cost – thus receiving a total government

[5]The overbilling proceeded through a fiscal intermediary, and, in turn, through either Medi-Cal or FPACT in conjunction with Medi-Cal, TAC ¶¶ 28, 32, 46. The details of the funding stream are not pertinent here. The federal government ultimately paid 90% of the charges at issue. TAC ¶ 32.

reimbursement of $214,812.00. PPLA obtained Ortho Novum 777 at a cost of $33,170.96, added a mark-up of $220,365.04 – roughly six or seven times cost – and thus grossed $253,536.00.

b. Instructions to respondents *not* to mark up charges In correspondence with Kathy Kneer, Executive Director of respondent Planned Parenthood Affiliates of California (PPAC), from May 1997 through January 1998, the California Department of Health Services (DHS) repeatedly and explicitly instructed PPAC that respondents may *not* seek reimbursement for drugs, specifically oral contraceptives, at mark-ups beyond actual acquisition cost. *E.g.*, TAC Ex. 2a (Boggess letter of May 5, 1997 to Kneer) (requirement that providers "bill at cost" is "long-standing Medi-Cal reimbursement policy"; hence, "[i]t is expected that reimbursement from Medi-Cal . . . medications . . . not exceed the actual purchase cost"). As another state official subsequently explained,

> Medi-Cal claims for any drug dispensed by physicians and clinics must be for "cost", not "usual and customary". The Department realizes some providers may have nominal or reduced pricing agreements with drug manufacturers or significantly reduced drug and supply prices . . . . It is the Department's expectation that these reduced costs be reflected in the Medi-Cal billing for these drugs or supplies.
>
> You have indicated that you were billing oral contraceptives at "usual and customary" based on your understanding of billing procedures for a "service". The [pertinent] billing code is not descriptive of a service . . . .

TAC Ex. 2b (Nixon letter of Oct. 3, 1997 to Kneer). PP responded by requesting DHS "to clarify the definition it is using for cost," TAC Ex. 2c (Kneer letter of Oct. 6, 1997 to Nixon). DHS responded:

> In our letter we advised you that providers who have nominal or reduced pricing agreements with drug manufacturers or significantly reduced drug and supply prices . . . must reflect these reduced costs when submitting billings for Medi-Cal reimbursement.

TAC Ex. 2d (Nixon letter of Jan. 9, 1998 to Kneer). Citing the so-called "Section 340B of the Public Health Service Act" and quoting (without citation) 59 Fed. Reg. 25112 (May 13, 1994), the DHS official reiterated that "the amount billed may not exceed the entity's actual acquisition cost for the drug," TAC Ex. 2d. The letter closed by advising Kneer whom to contact if she had any further questions, providing the phone number for a different state official. *Id*. Kneer, however, sent another letter to Nixon, contending that the "acquisition cost" rule should not apply to purchases made under "nominal pricing agreements." Doc.[6] 76 at 37-42 (Kneer letter of Jan. 14, 1998 to Nixon). DHS, of course, had already specifically taken the position that the "acquisition cost" rule applied to drugs purchased under nominal pricing agreements. TAC Exs. 2b, 2d. The record does not reflect what response, if any, state officials made to the final Kneer letter. Kneer herself subsequently admitted that the state "never responded in writing to this final letter" and that PP therefore "didn't have any documentation

[6]"Doc." refers to the district court docket entry number.

of an exception [to the acquisition cost rule] for Planned Parenthood or clinics that have nominal purchase prices." TAC Ex. 5a (Kneer email of Feb. 5, 2004).

In the letters to the state, PP repeatedly expressed its desire to "continue working with the Department on clarifying this issue," TAC Ex. 2c at 2, and to "resolve this issue as soon as possible," Doc. 76 at 6. Hence, it is not factually established that state officials had actual knowledge of, much less acquiesced in, PP's unstated plan to *defy* the explicit state instructions not to mark up its charges.

c. PP's overbilling In fact PP, despite the contrary state admonitions, continued with the illegal mark-ups,[7] making deliberate efforts to conceal this overbilling from state officials.[8] Such billing was conducted by the submission of raw numbers through a fiscal intermediary, TAC ¶¶ 46-50, and thus would not be flagged or otherwise facially identifiable to state (or federal) officials as having been "marked up" above the legal limit of acquisition cost.

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[7]"This has been the practice of all PP affiliates since the FPACT program was inaugurated in 1997," TAC Ex. 7 at 3.

[8]The district court erroneously stated that plaintiff Gonzalez "admits that [PP] did not attempt to hide this practice but 'openly acknowledged engaging in this practice . . . .'" Pet.App. 34a (citing TAC ¶ 42, Ex. 3a). To the contrary, the complaint alleges that PP sought to conceal its overbilling. TAC ¶¶ 69, 70, 122. The "open acknowledge[ment]" only came *after* PP was caught red-handed. *See* TAC Ex. 3a (letter dated Aug. 9, 2004, months after the state's first audit visit on Jan. 26, 2004, TAC Ex. 5). While PP never *denied* its mark-up practice, TAC ¶ 124, this does not mean it *advertised* its noncompliance to state officials. In fact, PP only acknowledged its misdeeds after being caught in the act. *E.g.*, TAC ¶¶ 125-28 (admissions in 2004 and later).

d. PP gets caught Ultimately, on Jan. 26, 2004, the state commenced an audit of a PP affiliate and caught PP in the illegal overbilling. TAC Exs. 5, 6.

PP responded with behind-the-scenes political steps. Lilly Spitz, Chief Legal Counsel, California Planned Parenthood Education Fund, e-mailed PP affiliate CEOs and CFOs, including petitioner Gonzalez, to report that Kim Belshe of DHS "declined to halt the cost audit at this time." PPAC's Kneer forwarded the Spitz e-mail to Gonzalez and other PP staff, adding her own message. Kneer reported that "Kim" (Belshe) "did state that DHS legal office has advised her that the law requires us to bill at acquisition cost." Kneer opined that "we have a good chance to succeed on a policy basis to allow clinics to bill at usual and customary" rates, and that "[t]his change" would best be enacted through "trailer bill language." Continuing PP's *sub rosa* approach, Kneer added:

> At this time we are asking that no further public action be taken – quietly resolving this as a policy issue within the administration is the best strategy at this time.

TAC Ex. 10.

Petitioner Gonzalez then e-mailed PPLA's outside accountant, attaching a spreadsheet documenting the mark-ups. Gonzalez explained the problem of PPLA's "hefty markup over cost" being "proscribed by DHS regulations," with a consequent multi-million dollar impact. Gonzalez proposed the retention of "adequate legal counsel" and the "booking of a contingency at 50% of the $2m annual effect" for the new fiscal year. TAC Ex. 4. PPLA promptly fired Gonzalez. TAC ¶ 3.

On Nov. 19, 2004, the California DHS released its audit report for just two products over roughly a one-year period at one PP affiliate. The audit found that "PPH did not comply with the published billing requirements" because it billed at its "customary" rates rather than "at cost." The audit report found that this "[f]ailure to comply" resulted in overbilling at that particular affiliate for the audit period in the amount of $5,213,645.92. TAC Ex. 6.

e. The state declines to recoup the overcharges Accompanying the 2004 audit report was a letter from Stan Rosenstein, Deputy Director, Medical Care Services at DHS. While acknowledging "the audit results were correctly formulated," Rosenstein postulated a lack of clarity in the billing rules and stated that "it is the decision of DHS that no demand [for recovery of the $5 million-plus in overbilling] will issue pursuant to the audit of Planned Parenthood Associates for the cited period." Doc. 34-3, Ex. 3, at 2. No mention was made of the previously planned audits of all other PP affiliates in California.

4. The present suit

After duly notifying the Attorney General, petitioner Gonzalez filed suit under the FCA on December 19, 2005, in U.S. District Court for the Central District of California. The suit was filed under seal, as the FCA requires. 31 U.S.C. § 3730(b)(2). The district court had jurisdiction under 28 U.S.C. §§ 1331, 1345 and 31 U.S.C. § 3732(a).[9] After the United States declined to intervene, the district court unsealed the

[9]Gonzalez also sued under the state statutory counterpart to the FCA. That claim is not before this Court.

case on November 5, 2007. Gonzalez filed a First Amended Complaint on May 1, 2008.

a. First dispositive motion PP countered with the first of a series of four dispositive motions. This motion to dismiss argued a want of jurisdiction under the public disclosure provisions of the FCA. Doc. 33. On the merits, PP contended that the supposed ambiguity of the rule against billing above cost precluded the element of falsity and, at least according to PP's reply (Doc. 41 at 15), precluded the element of scienter as well. Notably, the United States (DOJ) filed an amicus brief specifically contesting PP's argument that ambiguity of the billing rule could preclude falsity. The DOJ did acknowledge circuit case law holding that ambiguity of the legal standard might be "relevant" to the scienter element. Doc. 39-2 at 3.

The district court granted the motion to dismiss on public disclosure grounds, without reaching the merits. Doc. 43, 2008 U.S. Dist. LEXIS 124674 (C.D. Cal. Oct. 30, 2008). The Ninth Circuit reversed, holding that Gonzalez was an "original source" entitled to bring the FCA claim. 392 Fed. App'x 524 (9th Cir. 2010).

b. Second dispositive motion On remand, PP filed an answer and moved for judgment on the pleadings. PP argued a lack of particularity under FRCP 9(b) as to some (not all) of the defendants and again argued that supposed ambiguity of the billing rules precluded scienter and falsity. PP also pressed a "government knowledge defense," contending that state officials knew of PP's mark-up practice and that this knowledge could be imputed to the federal government. Doc. 89 at 13-14.

Gonzalez opposed the motion. Doc. 93. Addressing the "government knowledge defense," Gonzalez argued, *inter alia*, that the defense was heavily fact-based and

therefore "not suitable for determination at the pleadings stage," *id*. at 8, and that in any event a *state* official could not forgive a *federal* debt, *id*. at 10.

The DOJ again filed an amicus brief disputing PP's legal contentions. Doc. 94-1. The DOJ once more denied that ambiguity in a billing standard could preclude falsity, *id*. at 3-7, and asserted that while ambiguity "can be relevant to scienter," it would not invariably preclude scienter, *id*. at 7. The DOJ specifically disagreed with PP's assertions about the "supposed" government knowledge defense. *Id*. at 2. Said the DOJ:

> Evidence of government knowledge can be relevant to whether a defendant submitted claims with the requisite scienter, but only if the evidence shows that:
>
> - the government was aware that the defendant had engaged in the conduct or practice at issue;
> - the government communicated to the defendant the government's agreement with or assent to the conduct or practice; and
> - in reliance on the government's agreement or assent, and without acting recklessly or with deliberate ignorance, the defendant in good faith concluded that its conduct or practice was proper and that the claims it thereafter submitted were not false.

Id. at 8-9. The DOJ added that the facts in this case suggested that the government "communicated . . . its disapproval" of PP's billing practice and that "it appears there are no facts . . . showing good faith reliance by defendants on any of [the state's]

communications with defendants." *Id.* at 9.[10]

The district court rejected PP's substantive defenses at the pleadings stage. Regarding the "government knowledge defense," the court said:

> Construing [the facts] in the light most favorable to Plaintiff, . . . the court cannot conclude at this stage that the . . . Defendants' *scienter* is negated as a matter of law. Indeed, some of the communications seem clearly to state that the government did *not* assent to Defendants' billing practices.

Pet.App. 24a. The Court therefore left that defense for reconsideration "on summary judgment or at trial, when the Court has a developed record before it," *id.* However, finding some lack of particularity in the complaint, the district court dismissed the FCA counts with leave for Gonzalez to replead. Pet.App. 26a-30a.

c. Third dispositive motion Gonzalez filed a Second Amended Complaint (SAC). Doc. 105. PP again answered, and again filed a motion for judgment on the pleadings, this time seeking to dismiss in part. PP again argued lack of particularity as to some (not all) defendants but no longer pressed a "government knowledge defense." Doc. 117. The parties stipulated to the submission of a Third Amended Complaint (TAC) "in an effort to address at least one of the SAC's claimed deficiencies as set forth in defendants' Motion" and "to save the Court the need to decide issues that can be obviated by voluntary amendment," Jt. Stip. Re:

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[10]Once PP stopped arguing the "government knowledge defense" and the "ambiguity precludes falsity/scienter" defense, *see infra*, the DOJ stopped filing amicus briefs in this case.

TAC, Doc. 120. The district court approved, Doc. 121, and Gonzalez filed the TAC, Doc. 122.

d. Fourth dispositive motion PP filed a motion to dismiss the TAC. Doc. 125. PP again did not press the "government knowledge defense," but did once more argue a lack of particularity as to some (not all) defendants. PPLA added a new argument, namely, failure to allege falsity. *See also* Order (denying attorney fees), Doc. 157 at 2 (describing falsity argument as "the new legal theory presented by Defendants in their motion to dismiss").

The district court granted the motion to dismiss, ruling that the TAC did not sufficiently allege the element of falsity, and that leave to amend should not be granted. Pet.App. C. The district court expressly did not reach the question whether the complaint lacked particularity as to any defendants under Rule 9(b), Fed. R. Civ. P., *see* Pet.App. 39a, and expressly did not rely upon what "the government knew about Defendants' billing," Pet.App. 48a n.8. The district court entered judgment for PP, and Gonzalez appealed.

e. Ninth Circuit ruling In the Ninth Circuit, Gonzalez pointed out that the district court's falsity ruling was inconsistent with a host of cases holding that illegal overbilling is a quintessential "false claim" under the FCA. *See*, *e.g.*, *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006) ("In an archetypal *qui tam* False Claims action, such as where a private company overcharges under a government contract, the claim for payment is itself literally false or fraudulent"); *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 674-75 (5th Cir. 2003) (en banc) ("claims for money or property to which a defendant is not entitled . . . are 'false' for purposes of the False Claims Act"). PPLA opposed this argument but did not

propose an alternative grounds for affirmance, and in particular did not argue the "government knowledge defense."

At oral argument, the Ninth Circuit panel *sua sponte* raised the question whether the complaint sufficiently alleged scienter and ordered supplemental briefing on the question. After the parties submitted their supplemental briefs, the Ninth Circuit issued an opinion affirming the judgment of dismissal.

The Ninth Circuit did not address the district court's rationale that the TAC failed to allege falsity. Pet.App. 6a ("even assuming that the third amended complaint sufficiently alleges falsity"). Instead, the Ninth Circuit rested its decision upon the proposition that the TAC failed plausibly to allege scienter. Specifically, the Ninth Circuit ruled that state officials' response, or partial non-response, to their knowledge of respondents' billing practices negated PPLA's scienter. Pet.App. 7a-9a. In other words, the Ninth Circuit applied the "government knowledge defense." *See also* Pet.App. 9a n.3 (state officials "seemed to tacitly approve [respondents'] billing procedures . . . after being told that [respondents were] not billing at acquisition cost but at usual and customary rates").

Gonzalez filed a petition for rehearing and rehearing en banc. The petition argued, *inter alia*, that the panel erred by applying the government knowledge defense "at the pleadings stage," Reh'g Pet. at 8, 13-14, and by relying upon the actions of *state* officials to waive liability for a *federal* obligation, *id*. at 20-21.[11]

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[11]The petition also faulted the panel for repeatedly referencing the required scienter as "knowing," while failing to acknowledge that no more than "reckless disregard" is required for liability under the FCA. Reh'g Pet. at 9-10.

The petition noted that "PP has yet to identify *any* government approval of its billing practices during the relevant period." *Id*. at 9 (emphasis in original).

The Ninth Circuit denied rehearing and rehearing en banc. Pet.App. E.

REASONS FOR GRANTING THE WRIT

The decision below creates a conflict in the circuits over the proper role of the "government knowledge defense" to FCA actions and creates a significant obstacle to both government and private enforcement of the FCA. The decision also inverts the *Iqbal* standard for the sufficiency of pleadings.

I. THE NINTH CIRCUIT'S DECISION DRAMATICALLY DEPARTED FROM THE CONSISTENT PRACTICE AND HOLDINGS OF EIGHT OTHER CIRCUITS REGARDING THE "GOVERNMENT KNOWLEDGE DEFENSE."

The decision of the Ninth Circuit in this case squarely conflicts with express holdings of the Third and Fifth Circuits and dramatically parts ways with every other circuit's treatment of the "government knowledge defense," thus creating splits in the circuits and imposing a significant obstacle to enforcement of the FCA both in government and private enforcement actions.

A. The nature of the "government knowledge defense"

It is important to distinguish, at the outset,

between two similar-sounding defenses to liability under the FCA. The **"government knowledge defense"** – at issue here – is a contemporary, lower-court *judge-made* defense to FCA suits brought *by both the government and by private qui tam plaintiffs*. The **"government knowledge bar,"** by contrast – not an issue here – was a *statutory* defense, only to private *qui tam* suits, which Congress subsequently removed from the FCA.

1. Government knowledge bar

As amended in 1943, the FCA precluded private enforcement actions predicated upon "'evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.'" *Graham Cnty.*, 559 U.S. at 294 (quoting statute). This requirement, which "came to be known as a Government knowledge bar," *id.* at 294, created an absolute defense to private *qui tam* suits whenever the federal government or its agents knew of the facts underlying the false claim.

Concerned with the negative impact of the government knowledge bar upon the "volume and efficacy of *qui tam* litigation" under the FCA, *Graham Cnty.*, 559 U.S. at 294, Congress stepped in again: "in 1986, Congress replaced the so-called Government knowledge bar with the narrower public disclosure bar." *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S. Ct. 1885, 1894 (2011). This statutory change "eliminate[d] a defense to a *qui tam* suit – prior disclosure to the Government," *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 948 (1997), and so "allowed private parties to sue even based on information already in the Government's possession,"

Cook Cnty. v. U.S. ex rel. Chandler, 538 U.S. 119, 133 (2003). Like the previous government knowledge bar, the new "public disclosure bar" applied only to *qui tam* actions and not to government enforcement under the FCA.

2. Government knowledge defense

The "government knowledge defense," by contrast, is not a limitation confined to private *qui tam* suits.[12] Rather, it is an attempt to disprove an element – scienter – required for liability in *all* FCA cases, whether brought by the government or by private parties. The "government knowledge defense" takes the form of an assertion that because *the government knew* of the conduct in question *and acquiesced in or approved* that conduct, the defendants were not "reckless" or "knowing" when they engaged in said conduct. *E.g.*, *United States v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 263 (5th Cir. 2014). This defense is thus not part of any congressional "effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits," *Graham Cnty.*, 559 U.S. at 295. Instead, it is a judge-made defense applicable to FCA enforcement across the board.

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[12]Courts do not universally use the label "government knowledge defense." The Tenth and Third Circuits, for example, refers to the "government knowledge inference," *see Burlbaw* and *Arnold*, cited *infra*, and many decisions, like the decision below in this case, simply discuss the substance – the relevance of government knowledge of defendants' conduct to the scienter element of an FCA action – without using a particular label. *See generally infra* § I(B)(1).

B. The Circuit Split between the Ninth Circuit and the Other Circuits

1. Position of the other circuits

Aside from the Ninth Circuit decision below, the federal courts of appeals have (with the exception of point "e" below) uniformly observed certain key parameters for the "government knowledge defense" (parameters which the DOJ has urged, *see infra* § II).

a. The Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth circuits all recognize that government knowledge is **not a bar to liability but at most is an evidentiary factor** in assessing scienter. *United States v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 264 (5th Cir. 2014) ("the defense . . . serves simply as a factor weighing against the defendant's knowledge, as opposed to a complete negation of the knowledge element") (footnote omitted); *U.S. ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 951-52 (10th Cir. 2008); *U.S. DOT ex rel. Arnold v. CMC Eng'g*, 567 Fed. App'x 166, 170 n.9 (3d Cir. 2014) (quoting *Burlbaw*);[13] *U.S. ex rel. Ubl v. IIF Data Solutions*, 650 F.3d 445, 452-53 (4th Cir. 2011) ("relevant to the issue of [defendant's] intent"); *United States v. Guy*, 257 Fed. App'x 965, 968 (6th Cir. 2007) (per curiam) (relying upon *U.S. ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 454 n.21 (6th Cir. 2005)); *U.S. ex rel. Costner v. United States*, 317 F.3d 883, 887 (8th Cir. 2003); *U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d

[13]The Third Circuit noted that it had "not yet adopted" the government knowledge defense and "need not do so" in that case. 567 Fed. App'x at 170 n.9.

284, 288-89 (4th Cir. 2002); *Varljen v. Cleveland Gear Co.*, 250 F.3d 426, 430 (6th Cir. 2001); *U.S. ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 (7th Cir. 1999); *U.S. ex rel. Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1156-57 (2d Cir. 1993).

b. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth circuits apply the government knowledge defense, if at all, **not at the pleadings stage but rather at the summary judgment stage or at trial**. *E.g.*, *Bollinger Shipyards, Inc.*, 775 F.3d at 264 (5th Cir.) ("The government knowledge defense is not appropriate at the motion to dismiss stage[; i]t is more proper at the summary judgment or trial stage"); *Burlbaw*, 548 F.3d at 934 (10th Cir.) (summary judgment); *Arnold*, 567 Fed. App'x at 167 (3d Cir.) (summary judgment); *Ubl*, 650 F.3d at 448 (4th Cir.) (trial); *U.S. ex rel. Loughren v. Unum Group*, 613 F.3d 300, 301-02, 313-14 (1st Cir. 2010) (trial); *U.S. ex rel. Owens v. First Kuwaiti Gen. Trading & Contr. Co.*, 612 F.3d 724, 726 (4th Cir. 2010) (summary judgment); *U.S. ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 491 F.3d 254, 262-63 (5th Cir. 2007) (summary judgment); *Guy*, 257 Fed. Appx. at 966 (6th Cir.) (trial); *A+ Homecare,* 400 F.3d at 432 (6th Cir.) (trial); *Varljen*, 250 F.3d at 428, 430 (6th Cir.) (reversing dismissal of complaint); *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 671 (5th Cir. 2003) (summary judgment); *Costner*, 317 F.3d at 886 (8th Cir.) (summary judgment); *Becker*, 305 F.3d at 285 (4th Cir.) (summary judgment); *Durcholz*, 189 F.3d at 543 (7th Cir.) (summary judgment; noting "dependen[ce]" of typical FCA case "on its facts"); *Kreindler*, 985 F.2d at 1150 (2d Cir.) (summary judgment).

c. The First, Second, Third, Fourth, Fifth, Sixth,

Seventh, Eighth, and Tenth circuits apply the defense **only where the government "knows and approves"** of the conduct in question. *Durcholz*, 189 F.3d at 545 (7th Cir.) ("knows and approves"); *Loughren*, 613 F.3d at 314 (1st Cir.) (same); *Laird*, 491 F.3d at 263 (5th Cir.) (same); *Costner*, 317 F.3d at 887 (8th Cir.) (same); *Arnold*, 567 Fed. App'x at 170 n.9 (3d Cir.) (same); *Becker*, 305 F.3d at 289 (4th Cir.) (same); *id*. at 288 (followed federal agency "instructions"); *Guy*, 257 Fed. App'x at 968 (6th Cir.) ("modified agreement") (quoting *A+ Homecare*); *Owens*, 612 F.3d at 729 (4th Cir.) ("examined and approved"); *Ubl*, 650 F.3d at 452-53 (4th Cir.) (knew and was "pleased with" or "directed" the filing of the claim); *Kreindler*, 985 F.2d at 1157 (2d Cir.) (contract "modified" or "clarified"); *Burlbaw*, 548 F.3d at 952 (10th Cir.) (knows and "authorizes"); *Bollinger Shipyards, Inc.*, 775 F.3d at 263 (5th Cir.) ("working together . . . to reach a common solution") (internal quotation marks and footnote omitted).

d. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth circuits only apply the defense when the government knowledge is the knowledge of the **pertinent federal agency**. *Durcholz*, 189 F.3d at 543, 545 (7th Cir.) (naval center officials); *Kreindler*, 985 F.2d at 1156 (2d Cir.) (Army); *Becker*, 305 F.3d at 285, 288 (4th Cir.) (Department of Energy); *Costner*, 317 F.3d at 887 (8th Cir.) (EPA); *Laird*, 491 F.3d at 262 (5th Cir.) (NASA); *Owens*, 612 F.3d at 729 (4th Cir.) (State Department bureau); *Loughren*, 613 F.3d at 314 (1st Cir.) (Social Security Administration); *Ubl*, 650 F.3d at 453 (4th Cir.) ("an agency of the federal government," though which federal agency is not decisive); *Burlbaw*, 548 F.3d at 953 (10th Cir.) (Department of Education); *Bollinger*

Shipyards, Inc., 775 F.3d at 264 n.27 (5th Cir.) ("knowledge possessed by officials of the United States") (internal quotation marks and citation omitted); *compare Arnold*, 567 Fed. App'x at 170 n.9 (3d Cir.) (defense inapplicable where knowledge was of state agency, not federal government); *A+ Homecare,* 400 F.3d at 454 n.21 (6th Cir.) (defense inapplicable where "no evidence that [nongovernmental fiscal intermediary] had altered the understanding of what kind of expenses could be reimbursed").

e. The First, Fifth, Sixth, and Tenth circuits hold that **defendants must separately show that they knew of and relied upon the government's knowledge and approval**. *Burlbaw*, 548 F.3d at 953 (10th Cir.) ("relied upon" government "assurances and invitations"); *Loughren*, 613 F.3d at 314 (1st Cir.) (defendant cannot rely upon knowledge that government did not have *before* the claims were filed); *Bollinger Shipyards, Inc.*, 775 F.3d at 264 n.27 (5th Cir.) ("defendant's knowledge of the falsity of its claim . . . not automatically exonerated by any overlapping knowledge by government officials" as opposed to case where defendant "did merely what the [federal officials] bid it do"); *Laird*, 491 F.3d at 262 (5th Cir.) (lease undertaken pursuant to government guidance); *Guy*, 257 Fed. App'x at 968 (6th Cir.) (rejecting defense where defendant "could not reasonably believe the Government had agreed to pay" the overcharges). By contrast, opinions in the Fourth and Seventh Circuit indicate that the government knowledge *itself* suffices to vitiate defendants' scienter. *Durcholz*, 189 F.3d at 544-45 (7th Cir.); *Becker*, 305 F.3d at 289 (4th Cir.). *See also U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 496 (D.C. Cir. 2004) (per Roberts, J.) (dictum noting circuit conflict over this question).

2. The Ninth Circuit's ruling

In sharp contrast with the foregoing, the Ninth Circuit in this case applied the government knowledge defense to bar a complaint *at the pleadings stage*, based upon the actions and inactions of *state* officials, and *absent* any concrete, much less undisputed, showing of *government approval* of the illegal conduct. Each of these aspects of the decision below sets the Ninth Circuit at odds with the other circuits cited above.

Sharply illustrating the conflict is the Fifth Circuit's *Bollinger* decision. In *Bollinger*, as here, the district court had dismissed an FCA suit at the pleadings stage. 775 F.3d at 256. As here, the complaint alleged communications from which "one may reasonably infer that [defendant] acted in reckless disregard of the truth or falsity" of its submissions. *Id.* at 263 (internal quotation marks omitted). In fact, in the present case the identical "inference" is even easier: state officials repeatedly and expressly told PP that it was *not* allowed to do what it wished to do, namely, mark up its requests for reimbursement.

Turning to the "government knowledge defense," the Fifth Circuit in *Bollinger* analyzed the defendants' argument that because the government "continued to make payments and accept delivery" of the faulty products, there could be no scienter. *Id.* at 263. While not disputing the availability of the "inaptly named" defense in the abstract, *id.*, the Fifth Circuit held the defense inapplicable at the pleadings stage:

> The question is whether the government knowledge defense may be applied at the motion to dismiss stage. Research discloses only one district

> court case where it has been applied at this stage rather than at the summary judgment or trial stage. All circuit court authorities suggest that the defense should not be applied at this stage because it serves simply as a factor weighing against the defendant's knowledge, as opposed to a complete negation of the knowledge element.
>
> We agree with our sister circuits. The government knowledge defense is not appropriate at the motion to dismiss stage, which requires us to draw all inferences in favor of the United States. It is more proper at the summary judgment or trial stage as "a means by which the defendant can rebut the government's assertion of the 'knowing' presentation of a false claim."

Id. at 263-64 (footnotes omitted). The Ninth Circuit, by contrast, in this case invoked the knowledge of state government officials as a bar to the scienter element at the pleadings stage.[14]

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[14]Ironically, the Ninth Circuit was apparently the first federal appeals court to embrace the rule that it abandoned in the present case. *See U.S. ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) ("the knowledge possessed by officials of the United States" may help disprove scienter, but this defense "cannot be reached by mere inspection of Hagood's complaint. Only at the stage of trial or summary judgment will it be possible" for this defense to prevail). An unpublished Ninth Circuit decision applied that same rule shortly before the panel decision issued in the present case. *Berg v. Honeywell Int'l, Inc.*, 580 Fed. App'x 559, 560 (9th Cir. 2014) (reversing denial of leave to amend complaint) ("the so-called government knowledge defense to FCA liability" is "appropriate at the summary judgment stage or after trial, not at the motion to dismiss stage") (citation and internal quotation marks omitted). The Ninth Circuit's decision in this case came after *Berg* and, as a published

Aggravating the conflict is the Ninth Circuit's departure from the "know and approve" standard of the other circuits. As described above, nine other circuits embrace the requirement that the government "know and approve" the alleged false claims before scienter can be negated. Yet the Ninth Circuit upheld dismissal at the pleadings stage based on no more than its surmise that state officials "seemed to tacitly approve [respondents'] billing procedures," Pet.App. 9a n.3.[15]

Compounding the conflict further is the fact that the Ninth Circuit relied upon *state* officials to disallow

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decision, takes precedence. Gonzalez specifically alerted the court below to the conflict with *Hagood* in Gonzalez's petition for rehearing/rehearing en banc, indeed in his very first argument point. *See* Pet. for Reh'g at 8. The Ninth Circuit denied both panel and en banc rehearing, leaving the decision below as the authoritative circuit position on the availability of the "government knowledge defense" at the pleadings stage.

[15]As previously noted, there is no evidence of this "tacit approval," and the communications attached to the TAC are all to the contrary. As the district court recently acknowledged, "no evidence or allegations suggest that [DHS] expressly approved or sanctioned this practice." Doc. 186 at 20 (C.D. Cal. Feb. 4, 2015). The DOJ likewise recognized in an amicus brief in this case that the TAC indicated that the state government "communicated . . . its disapproval" of PP's billing practice and that "it appears there are no facts . . . showing good faith reliance by defendants on any of [the state's] communications with defendants." Doc. 94-1 at 9. Respondent Kneer herself conceded that PP at best "assume[d]" their billing mark-ups were acceptable based upon a "lack of action" by the DHS. TAC Ex. 5a at 4. The Ninth Circuit essentially gave the complaint a reading most favorable to the defendants and made (strained) inferences in their favor. But a jury could certainly find PP's approach to constitute at least "reckless disregard" under the FCA.

a *federal* claim.[16] In every other circuit court case addressing the question whether government knowledge undermined a defendant's scienter, it was the *federal* government that had the supposed knowledge (except in *A+ Homecare* and *Arnold,* where the court disallowed the defense). As the Third Circuit held, "[b]ecause the FCA applies to false claims submitted to the federal government, the [government knowledge] inference would seem to be inapplicable to this case, where there may be evidence of [the state agency's] knowledge of the accuracy of [defendants'] submissions, but no evidence in the record concerning the federal government's knowledge." *Arnold*, 567 Fed. App'x at 170 n.9. Indeed, to allow state officials to immunize a defendant from FCA liability would not only elevate state authority over federal statutory remedies, but would shield situations where "the claimant was colluding with the government employee to submit a false claim," *Southland Mgmt.*, 326 F.3d at

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[16]Worse, the Rosenstein letter that the Ninth Circuit found so important, Pet.App. 4a, 7a-8a, *did not approve the overbilling* but merely declined to require repayment, and in any event *was written in August of 2004, after many years of overbilling*, and thus cannot possibly have been relied upon by PP retroactively to exonerate a mark-up practice dating back at least to 1997. That leaves only the partial inaction of state officials – the apparent absence of a *fourth* written letter, in response to Kneer's 1998 letter, Pet.App. 7a-8a, after state officials had already sent three letters telling PP it could not lawfully mark up the charges, *supra* pp. 7-8. While the Ninth Circuit placed considerable emphasis on the assertion that the final Kneer letter told the state something new – "explicitly described its billing practices and rationale," Pet.App. 7a; *id*. at 4a, 9a n.3, this is inaccurate. The state was already aware of PP's practice of billing at "usual and customary rates" and that PP thought its nominal pricing arrangements took it outside the "acquisition cost" billing limit. *Supra* pp. 7-8.

682 n.9 (Jones, J., joined by four others, concurring specially).[17]

This Court should grant review to resolve the conflict between the decision below and the decisions of other circuits on the role of government knowledge in FCA actions.

II. THE NINTH CIRCUIT'S DECISION CREATES AN OBSTACLE TO BOTH PRIVATE AND GOVERNMENT ENFORCEMENT OF THE FCA.

As noted *supra* § I(A)(2), the "government knowledge defense" applies to both private and government enforcement of the FCA. Any expansion of that defense cuts into FCA enforcement across the board. Unsurprisingly, then, the United States Department of Justice (DOJ) has taken an active interest in the scope of this defense, arguing repeatedly for judicial recognition of limitations consistent with a proper understanding of the defense. The circuit court decisions discussed above have basically followed the DOJ positions outlined below, but the Ninth Circuit's decision in the present case dramatically departs from those limitations. (And in fact, the DOJ, as amicus, already impugned use of the government knowledge defense in this very case. Doc. 94-1.)

The DOJ has regularly insisted, first, that the "government knowledge defense" is only properly considered a matter of **evidentiary relevance**, not a defense proper:

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[17]The *Southland* concurrence is frequently cited in other "government knowledge" cases.

> There is no statutory basis for the . . . conclusion that the FCA makes liability contingent on how the government reacts to the discovery of false statements or on what remedial measures, if any, the government elects to pursue. Although several courts of appeals have recognized a "government knowledge defense," *the defense is only relevant insofar as government knowledge may shed light on the defendant's state of mind.*

Reply Br. for Appellant United States, *United States v. Bollinger Shipyards*, 2014 U.S. 5th Cir. Briefs LEXIS 355 at *21 (June 30, 2014) (Stuart F. Delery, Assistant AG) [DOJ Bollinger Reply] (emphasis added). *Accord* Br. for Appellant United States, *United States v. Bollinger Shipyards*, 2014 U.S. 5th Cir. Briefs LEXIS 73 at *39 (Apr. 3, 2014) (Stuart F. Delery, Assistant AG) [DOJ Bollinger Br.]. In other words, "government knowledge" is distinct from the "state of mind of the defendants"; hence, "government knowledge," standing alone, cannot be a "complete defense to liability under the FCA." DOJ Bollinger Reply at *22. *Accord* Br. for Defendant-Appellee, *Alcatec v. United States*, 2012 U.S. Fed. Cir. Briefs LEXIS 72 at *56 (Mar. 15, 2012) (Stuart Delery, Acting Assistant AG) ("although Government knowledge may be relevant to a party's state of mind, it does not, standing alone, eliminate a party's scienter"); United States' Reply to the Responses of Toyobo Co. Ltd. et al. to the Trustee's Objection to the United States' Claim, *In re SCBA Liquidation*, 2004 U.S. Bankr. Ct. Motions 12515, at *38-*45 (Sept. 4, 2009) (Tony West, Assistant AG) (DOJ SCBA Reply) ("Evidence about government knowledge is only relevant under the FCA to the extent that it serves to negate a defendant's scienter").

Second, "states of mind are **not ordinarily amenable to resolution prior to fact-finding**. Thus, *only at the stage of trial or summary judgment can a factfinder apply the government knowledge defense; it cannot be analyzed by mere inspection of relator's complaint*." DOJ Bollinger Reply at *22 (emphasis added; internal quotation marks, editing marks, and citations omitted). *Accord* DOJ Bollinger Br. at *46; Mem. in Opp. to AT&T Mot. to Dismiss Cplt. in Intervention of U.S., *U.S. ex rel. Lyttle v. AT&T Corp.*, 2012 U.S. Dist. Ct. Briefs LEXIS 6033 at *51-*52 (May 31, 2012) (Stuart F. Delery, Acting Assistant AG) ("whether the government's alleged 'acquiescence' in a defendant's misconduct negates scienter is not a question that can be decided on a motion to dismiss" and thus assertion of this defense at pleadings stage is "both wrong and premature"); Plaintiffs' Joint Mem. In Opp. To Defendants' Joint Mot. To Dismiss The United States' Complaint In Intervention, *U. S. ex rel. Landis v. Hospice Care of Kansas*, 2006 U.S. Dist. Ct. Motions 851344 at *50-*51 (Sept. 15, 2010) (Tony West, Assistant AG) ("this argument . . . amounts to an affirmative defense outside the scope of the Complaint" and "[b]ecause this is obviously a fact-intensive inquiry, it would be an inappropriate basis upon which to dismiss a complaint").

Third, even as evidence of a lack of scienter, government knowledge is only relevant where the federal government **"knows about and approves"** the alleged false claims. DOJ Bollinger Br. at *41. Hence, this defense is only applicable where "the defendant discloses in full the particulars of the incorrect claims [a]nd . . . the government, with full knowledge of the falsity of a claim, decides to work

with the defendant and accept further claims for payment such that the defendant could not have known it was submitting a false claim to the government." *Id.* at *48. *E.g.*, *id.* ("following the government's explicit directions") (citation and quotation marks omitted); *id.* at *44 ("working together to reach a common solution") (same); *id.* at *53 (government "direct[ing]" defendant to file the claim); DOJ SCBA Reply at *41 ("affirmative act by the Government acquiescing in defendant's conduct"). As one DOJ brief put it, "Government knowledge as a limitation on scienter is *not premised upon the theory that the Government should have figured it out* or other people in other part of the Government had partial information." DOJ SCBA Reply at *44-*45 (emphasis added).

Fourth, even federal **contracting officers cannot waive FCA liability**. DOJ Bollinger Br at *39-*40 (citing authorities). That prerogative is reserved to the Attorney General. *Id. See also* 31 U.S.C. § 3711(b)(1). *A fortiori*, state officials cannot immunize a defendant against FCA liability. "The unauthorized actions of an agent of the Medicaid contractor or state cannot be imputed to the federal government to preclude suit under the FCA." DOJ Mot. for Summary Judgment, *United States v. Dynamics Research Corp.*, 2003 U.S. Dist. Ct. Motions 11965 at *17 (June 22, 2007) (Peter D. Keisler, Assistant AG) (quoting district court case; internal editing marks and citation omitted). Indeed, if the "acquiescence of a government employee" were a defense to FCA liability, "a contractor in cahoots with a government official would be insulated from a False Claims Act suit." *Id.* (quoting another district court case; internal quotation marks and citation omitted).

Fifth, even where the evidence *may* be relevant to scienter, the defendant must show that **the defendant knew of and relied upon** the government's knowledge and approval. DOJ Bollinger Br. at *53 (defense inapplicable absent *reliance* by defendant). Hence, government knowledge *after the fact* cannot retroactively exonerate a defendant. *Id*. at *52 ("government knowledge that comes 'too late' does not shed any light on the defendant's state of mind").

The Ninth Circuit's decision in this case disregards these limitations. Hence the decision below not only creates a circuit conflict, but creates a significant obstacle to both government and private enforcement of the FCA.

III. THE NINTH CIRCUIT DISTORTED THE *IQBAL* STANDARD BY HOLDING IMPLAUSIBLE A COMPLAINT THAT ATTACHED EVIDENCE SUFFICIENT TO SURVIVE SUMMARY JUDGMENT AND TO SUSTAIN A JURY VERDICT.

The point of the "plausibility" standard of *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), is to weed out factually implausible claims, i.e., cases where the legal allegations simply do not have plausible factual support. To invoke *Iqbal* to dismiss a complaint where the complaint attaches evidence sufficient to survive summary judgment and support a jury verdict, as the Ninth Circuit did here, profoundly distorts the *Iqbal* rule.

The level of evidence required of a plaintiff varies with the stage of proceedings:

> At the pleading stage, general factual allegations . . . may suffice . . . . In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (additional citations and internal quotation marks omitted).

In the present case, on the issue of PP's scienter, petitioner Gonzalez did more than allege that PP was told it could not mark up its charges; Gonzalez attached documentation showing as much, and showing that PP was ultimately audited when it failed to comply. This documentary evidence is more than is needed at the pleadings stage; indeed, it represents "specific facts" sufficient to defeat a defense motion for summary judgment. And assuming that the (thus far uncontested) documents are admitted into evidence, they would suffice to support a jury verdict that PP knew full well that its marked-up charges were "false claims" (i.e., claims to money to which PP was not entitled) and that PP never had official approval for such mark-ups, or at least was reckless in its disregard of express contrary instructions.

PP conceivably might later offer evidence that PP received some "implicit" or secret nod from the state. That the TAC is compatible with such a prospect means, at most, that there may be an evidentiary contest down the road on the element of scienter. But

to take that mere possibility, as the Ninth Circuit did, and use it conclusively to bar a complaint under the plausibility standard, is to turn *Iqbal* upside down: only a complaint that definitively negates all "plausible" alternatives would survive a motion to dismiss. Such a standard would disallow cases that would otherwise suffice to establish liability at trial, which makes no sense at all.

This Court should grant review to correct the Ninth Circuit's outlandish distortion of the *Iqbal* standard. In the alternative, this Court should summarily reverse.

CONCLUSION

This Court should grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

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March 5, 2015

APPENDIX

APPENDIX A

No. 12-56352

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

P. VICTOR GONZALEZ, Qui Tam Plaintiff, on behalf of the United States and State of California, Plaintiff-Appellant, v. PLANNED PARENTHOOD OF LOS ANGELES; PLANNED PARENTHOOD SHASTA-DIABLO, AKA Seal B; PLANNED PARENTHOOD GOLDEN GATE; PLANNED PARENTHOOD MAR MONTE, AKA Seal D; PLANNED PARENTHOOD RIVERSIDE AND SAN DIEGO COUNTIES, INC., AKA Seal E; PLANNED PARENTHOOD ORANGE AND SAN BERNARDINO COUNTIES, INC., AKA Seal F; PLANNED PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC., AKA Seal G; PLANNED PARENTHOOD SANTA BARBARA, VENTURA AND SAN LUIS OBISPO COUNTIES, INC., AKA Seal H; PLANNED PARENTHOOD SIX RIVERS, AKA Seal I; PLANNED PARENTHOOD AFFILIATES OF CALIFORNIA, AKA Seal J; MARY JANE WAGLE, AKA Seal K; MARTHA SWILLER, AKA Seal L; KATHY KNEER, AKA Seal M, Defendants-Appellees.

Appeal from the United States District Court for the Central District of California
D.C. No. 2:05-cv-08818-AHM-FMO
A. Howard Matz, District Judge, Presiding

Argued and Submitted June 5, 2014, Pasadena, California
Filed July 22, 2014

Before: Ronald M. Gould and N. Randy Smith, Circuit Judges, and Morrison C. England, Jr., Chief District Judge.* Opinion by Judge Gould.

OPINION

GOULD, Circuit Judge:

P. Victor Gonzalez, a former Chief Financial Officer of Planned Parenthood of Los Angeles, appeals from the dismissal of his *qui tam* action against Planned Parenthood, et al., ("Planned Parenthood") asserting claims under the False Claims Act ("FCA") and the California False Claims Act ("CFCA"). Gonzalez alleges that Planned Parenthood knowingly and falsely overbilled state and federal governments for contraceptives supplied to low-income individuals. The district court dismissed Gonzalez's claims under the FCA in his third amended complaint for a failure to sufficiently plead falsity and concluded that his state law claims were time-barred by the statute of limitations. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

Planned Parenthood is a participant in the Family Planning, Access, Care and Treatment program ("Family PACT"), which reimburses Planned

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*The Honorable Morrison C. England, Jr., Chief District Judge for the U.S. District Court for the Eastern District of California, sitting by designation.

Parenthood for contraceptives that Planned Parenthood gives to low-income individuals. Family PACT is a program within California's Medicaid program ("Medi-Cal") providing family planning drugs and services to individuals under the poverty line. Family PACT has been jointly funded by the federal and state governments since 1999. Before then it was entirely funded by the State of California.

To participate in Family PACT, each California branch of Planned Parenthood signed a Provider Agreement, in which they agreed to "comply with all federal laws and regulations governing and regulating providers." The Provider Agreement also binds participants to "comply with all of the billing and claims requirements set forth in the Welfare and Institutions Code." The term "at cost" for billing is found only in the Family PACT billing manual, not in the Welfare and Institutions Code.

Because Planned Parenthood has agreements in place with manufacturers, it buys contraceptives at a discounted rate. From 1997 to 2004, when Planned Parenthood billed Family PACT and Medi-Cal for contraceptives given to low-income individuals, it quoted its "usual and customary rates" for reimbursement rather than its acquisition costs. The "usual and customary rates" represented what Planned Parenthood would charge an average patient for contraceptives, a price lower than the market cost to an individual, but higher than Planned Parenthood's acquisition cost for those contraceptives.

On May 5, 1997, the California Department of Healthcare Services ("CDHS") began exchanging letters with Planned Parenthood's executive director

and later president, Kathy Kneer, telling her that claims made to Family PACT and Medi-Cal should be made "at cost." This letter exchange continued, and Kneer sent a letter dated January 14, 1998, responding to CDHS by stating that Planned Parenthood "clinics are billing" at the "usual and customary rate," not at acquisition costs. There was no response from CDHS after that letter, no advice to the contrary or objection. Planned Parenthood kept billing at its "usual and customary rates" until 2004, when CDHS conducted an audit of Planned Parenthood and found that Planned Parenthood had not complied with the billing practices outlined in the Family PACT manual. According to the audit, Planned Parenthood's noncompliance with the billing manual resulted in overcharges of $5,213,645.92 during the audit period. On November 19, 2004, the same day as the audit's release, CDHS sent a letter to Planned Parenthood stating that "no specific definition of 'at cost' is contained in [the billing manual]" and that "[i]n researching [the at cost] issue DHS has became [sic] concerned that, with regard to the definition of 'at cost,' conflicting, unclear, or ambiguous misrepresentations have been made to providers." For these reasons, CDHS did not seek reimbursement from Planned Parenthood.

Gonzalez was hired on December 9, 2002 as the CFO of Planned Parenthood of Los Angeles. He participated in early stages of the audit, but was fired on March 9, 2004. *Id.* On November 18, 2005, almost a year after the audit concluded, Gonzalez urged the United States Attorney General to address the "fraudulent billing" practices of Planned Parenthood. Gonzalez filed a *qui tam* suit under the FCA and CFCA on December 19, 2005. The United States

declined to intervene on November 1, 2007. Gonzalez filed a series of amended complaints culminating in the third amended complaint, which the district court dismissed with prejudice. That dismissal is now appealed.

II

We review *de novo* a district court's dismissal of a complaint under Rule 9(b), *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 996 (9th Cir. 2010), as well as the district court's dismissal of a claim based on a statute of limitations, *Johnson v. Lucent Techs., Inc.*, 653 F.3d 1000, 1005 (9th Cir. 2011). We review the district court's denial of leave to amend a complaint for abuse of discretion. *Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2010).

III

When Gonzalez filed his complaint, the FCA imposed liability on a person or organization who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1) (amended 2009). Gonzalez contends that the district court erred in dismissing his third amended complaint with prejudice under the FCA for a failure to adequately plead falsity under Federal Rule of Civil Procedure 9(b).

We affirm the district court on the alternate ground that the complaint did not state plausible

claims for relief.[1] We apply the plausibility requirement described in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to FCA claims. *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054-55 (9th Cir. 2011). We need not reach the issue of whether Planned Parenthood made false claims because, even assuming that the third amended complaint sufficiently alleges falsity, it did not satisfy Federal Rule of Civil Procedure 8(a), which here requires a plausible claim that Planned Parenthood knowingly made false claims, with the statutory scienter. The FCA specifically takes aim at knowing falsity, not at negligent misrepresentation. *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996) ("Innocent mistakes, mere negligent representations and differences in interpretations are not false certifications under the Act."). "The statutory phrase 'known to be false' does not mean scientifically untrue; it means a lie." *Hagood v. Sonoma Cnty. Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996) (internal quotation marks and citation omitted). Here, Gonzalez's claims failed to plausibly make this requisite allegation of "knowing" scienter in the total circumstances alleged by the third amended complaint.

Although we normally treat all of a plaintiff's factual allegations in a complaint as true, we "need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see Slater v. A.G. Edwards & Sons,*

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[1]We may affirm the district court on any basis supported by the record. *United States v. Gonzalez-Rincon*, 36 F.3d 859, 866 (9th Cir. 1994).

Inc., 719 F.3d 1190, 1196 (10th Cir. 2013) ("And if those documents [incorporated by reference into the complaint] conflict with allegations in the complaint, we need not accept those allegations as true."); *Kaempe v. Myers*, 367 F.3d 958, 963, 361 U.S. App. D.C. 335 (D.C. Cir. 2004) ("Nor must we accept as true the complaint's factual allegations insofar as they contradict exhibits to the complaint or matters subject to judicial notice."); *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) (quoting *Sprewell*); *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998) ("[W]e are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint."). To survive review under Rule 8(a), the "factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011); *see Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995 (9th Cir. 2014).

Here, Gonzalez did not plausibly state a claim under the FCA because his assertion that Planned Parenthood knowingly submitted false claims for reimbursement is compellingly contradicted by a series of letters he attached to his complaint. In the first exchange of letters, from 1997 to 1998, the CDHS expressed concern over Planned Parenthood's billing practices, but remained silent when Planned Parenthood explicitly described its billing practices and rationale. Then on November 19, 2004, the same day as the release of the State of California's audit of Planned Parenthood's billing practices, the State acknowledged in a letter to Planned Parenthood that

"no specific definition of 'at cost' is contained in [the billing manual]" and that "[i]n researching [the at cost] issue DHS has became [sic] concerned that, with regard to the definition of 'at cost,' conflicting, unclear, or ambiguous misrepresentations have been made to providers." The State did not even pursue money owed by Planned Parenthood, let alone suggest that Planned Parenthood had made knowingly false claims.

These attachments fatally undercut Gonzalez's allegations of knowing falsity to the point where he cannot state a plausible claim under the FCA, and we affirm the district court's dismissal of his third amended complaint. Stated simply, even if bills sent by Planned Parenthood were false in portraying its costs, one cannot plausibly conclude that there was knowing falsity on the part of Planned Parenthood given the explicit statements addressing this subject made by the State of California through CDHS and the State's silence after being told what procedures Planned Parenthood was following.[2]

The letters attached to Gonzalez's complaint show the "obvious alternative explanation" that Planned Parenthood lacked the scienter required by the FCA. *See Twombly*, 550 U.S. at 567; *Somers v. Apple, Inc.*, 729 F.3d 953, 965 (9th Cir. 2013) (affirming dismissal

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[2]Gonzalez claims knowing falsity based only on Planned Parenthood's alleged breaches of the California Family PACT billing regulations. As such, the State of California's interpretation of those regulations is persuasive in our determination that there was no knowing falsity under the FCA. *Anton*, 91 F.3d at 1267-68 (reasoning that California's administration of the regulations surrounding the State's school funding program was determinative of FCA falsity).

of antitrust claim in part due to an obvious alternative explanation for music pricing); *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (affirming dismissal of plaintiff's claim under Securities Act where plaintiff's allegations were "merely consistent with both their explanation and the defendants' competing explanation"); *Cafasso*, 637 F.3d at 1056. Here, Gonzalez's allegation that Planned Parenthood knowingly submitted false claims is only "merely *possible* rather than plausible," *Century Aluminum*, 729 F.3d at 1108, and he cannot overcome the plausible and obvious explanation that Planned Parenthood did not knowingly submit false claims.[3]

The district court did not abuse its discretion in denying Gonzalez leave to amend his third amended complaint. "Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). And the district court's discretion in denying amendment is "particularly broad" when it has previously given leave to amend. *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004) (quoting *Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002)) (internal quotation marks omitted). Because Gonzalez's own complaint attachments defeat the

[3]Contrary to Gonzalez's assertions in the supplemental briefing, the letters distinguish this case from *United States v. Bourseau*, 531 F.3d 1159 (9th Cir. 2008) because they show that Planned Parenthood did not "fail[] to make simple inquiries" as to the proper billing methods. *Id*. at 1168 (citation omitted). Rather, Planned Parenthood actively engaged with CDHS officials, who themselves seemed to tacitly approve Planned Parenthood's billing procedures by ending the correspondence without objection after being told that Planned Parenthood was not billing at acquisition cost but at usual and customary rates.

plausibility of his allegations, and because he had already amended his complaint several times, the district court did not abuse its discretion in denying him further leave to amend.

IV

Finally, the district court correctly concluded that Gonzalez's claims under the CFCA were time-barred. Claims under the CFCA must be brought within "three years after the date of discovery by the official of the state or political division charged with responsibility to act in the circumstances." Cal. Gov't Code § 12654(a) (amended 2009, 2012). "Discovery" means "the discovery by the aggrieved party of the fraud *or* facts that would lead a reasonably prudent person to *suspect* fraud." *Debro v. L.A. Raiders*, 112 Cal. Rptr. 2d 329, 336 (Cal. Ct. App. 2001). Here, the correspondence between Planned Parenthood and CDHS beginning in 1997 gave information to the State that would lead a reasonably prudent person to suspect fraud if it was essential for disbursements to be billed at acquisition cost rather than at Planned Parenthood's usual and customary rates. Gonzalez did not file his complaint until 2005. His claims under the CFCA are time-barred by the three-year statute of limitations.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
CV 05-8818 AHM (FMOx)
P. VICTOR GONZALEZ, *et al.* v. PLANNED PARENTHOOD OF LOS ANGELES, *et al.*

June 26, 2012

A. HOWARD MATZ, U.S. DISTRICT JUDGE

Proceedings: IN CHAMBERS (No Proceedings Held)

This matter is before the Court on the motion for judgment on the pleadings filed by defendants Planned Parenthood[1], Mary Jane Waglée, Martha Swiller, and Kathy Kneer's (collectively "Defendants"). For the reasons set forth below, the Court GRANTS the motion in part and DENIES it in part.[2]

I. INTRODUCTION

In this case, *qui tam* plaintiff P. Victor Gonzalez ("Plaintiff") alleges that nine Planned Parenthood entities in California defrauded the federal government and the state of California by overbilling for contraceptives provided through the state's Family Planning, Access, Care and Treatment ("FPACT") program. FPACT is a program jointly funded by the

[1]Although the nine Planned Parenthood entities named as defendants are separate nonprofit organizations, the Court will refer to them generically as "Planned Parenthood."

[2]Docket No. 89.

federal and state governments that funds health care services to low-income men and women. Planned Parenthood acquires contraceptives at a significant discount from manufacturers, but seeks reimbursement from FPACT in amounts greater than it paid. In essence, Plaintiff contends that Planned Parenthood violated federal and state laws by billing the state at its "usual and customary" charges, instead of "at cost."

Plaintiff was the Chief Financial Officer of Planned Parenthood of Los Angeles (PPLA) from December 2002 to March 2004. He first notified the federal government of the allegations contained in his complaint in a letter dated November 18, 2005. He filed this action on December 19, 2005, alleging violations of the federal False Claims Act, among other claims. Defendants are nine regional Planned Parenthood organizations within California, including PPLA; Planned Parenthood Affiliates of California (PPAC), an umbrella organization based in Sacramento; Mary Jane Waglé and Martha Swiller, officers of PPLA; and Kathy Kneer, President of PPAC.

On November 1, 2007, the United States filed a notice of non-intervention. On May 1, 2008, Plaintiff filed a First Amended Complaint ("FAC"), alleging twelve counts. On July 9, 2008, Defendants filed a motion to dismiss based on Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Defendants sought dismissal of all twelve claims in the FAC. They sought dismissal of Plaintiff's claims under the federal False Claims Act (FCA) (Counts I to III) on the ground that Plaintiff was not a whistleblower under the FCA, 31 U.S.C. §

3730(e)(4)(A). They also contended that Plaintiff failed to state a claim for relief under the FCA because the rule that he alleged they violated is ambiguous. Defendants next sought dismissal of Plaintiff's claims under various federal criminal statutes (Counts IV-VII) for lack of jurisdiction and dismissal of Count XII (unjust enrichment) for lack of standing. Plaintiff did not oppose dismissal of Counts IV-VII and Count XII. Finally, Defendants sought dismissal of Plaintiff's claims under the California False Claims Act (Counts VIII-XI). Defendants argued the state claims should be dismissed because the California FCA contains jurisdictional limitations identical to those of the federal FCA claims.

This Court determined it lacked subject matter jurisdiction over the federal FCA claims because the allegations or transactions giving rise to those claims were previously publicly disclosed other than by plaintiff. Because the California FCA contains a similar jurisdictional provision, the Court granted the motion, and dismissed the action with prejudice.

Plaintiff filed a motion to alter or amend judgment, which the Court denied. Plaintiff appealed and the Ninth Circuit Court of Appeals reversed and remanded, on the basis that this Court erred in holding that there had been prior public disclosures. Seven claims remain at issue on remand[3]:

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[3]Plaintiff's Opposition p. 2, n.l ("Only Counts I-III and VIII-XI remain in this case.").

Claim	Description
I	Submission of False Claims (31 U.S.C. § 3729(a)(1))
II	Use of False Statements or Records or Statements (31 U.S.C. § 3729(a)(2))
III	Conspiracy to Get False Claims Paid (31 U.S.C. § 3729(a)(3))
VIII	Submission of False Claims (Cal. Gov't Code § 12651(a)(1))
IX	Use of False Statements or Records (Cal. Gov't Code § 12651(a)(2))
X	Inadvertent Submission of False Claims (Cal. Gov't Code § 12651(a)(8))
XI	Conspiracy to Submit False Claims (Cal. Gov't Code § 12651(a)(3))

Defendants now move for judgment on the pleadings under Fed. R. Civ. P. 12(c).

II. LEGAL STANDARDS GOVERNING RULE 12(c) MOTIONS

After the pleadings are closed but early enough not to delay the trial, any party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c). The standard applied on a Rule 12(c) motion is essentially similar to that applied on Rule 12(b)(6) motions; a judgment on the pleadings is appropriate when, even if all the allegations in the complaint are true, the moving party is entitled to judgment as a matter of law. *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1042

(9th Cir. 2005). When deciding a motion for judgment on the pleadings, the Court should assume the allegations in the Complaint are true and construe them in the light most favorable to the plaintiff. *McGlinchey v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). The movant must clearly establish that no material issue of fact remains to be resolved. *Id*. However, "conclusory allegations without more are insufficient to defeat a motion [for judgment on the pleadings]." *Id*.

As with Rule 12(b)(6) motions, "[g]enerally, a district court may not consider any material beyond the pleadings[.] . . . However, material which is properly submitted as part of the complaint may be considered." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted); WILLIAM W. SCHWARZER, ET AL., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL ("RUTTER GUIDE") § 9:339.1 (2011). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss[,]" or on a Rule 12(c) motion, without converting the motion into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998). "The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading." 5C WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1363 (3d ed. 2010).

III. DISCUSSION

Defendants raise numerous arguments in support of their motion for judgment on the pleadings. First, Defendants argue Plaintiff's claims fail as a matter of law because the relevant regulations are ambiguous, which they claim precludes a finding of falsity and knowledge. Second, Defendants argue Plaintiff's claims fail as a matter of law because Defendants were open with state and government officials about their billing practices, which they claim precludes a finding of falsity and knowledge. Third, Defendants argue Plaintiff's state law claims are time-barred. Finally, Defendants argue Plaintiff has failed to plead his claims with particularity as required by Federal Rule of Civil Procedure 9(b). The Court addresses these arguments in turn.

A. Ambiguity In the Applicable Rules and Regulations

Defendants argue Plaintiff's claims fail as a matter of law because the state agency responsible for administering FPACT, the California Department of Health Services ("CDHS"), determined that the FPACT rules and regulations governing Planned Parenthood's billing practices were ambiguous. The FAC and the instant motion both generally refer to "FPACT rules and regulations" but it appears that the specific "rule or regulation" at the heart of this case is the requirement that drugs and supplies dispensed by the Family PACT provider must be billed 'at cost'." This statement — which Plaintiff characterizes in the FAC as an "unambiguous proscription" (¶ 8) — appears in the excerpts of the "FPACT MANUAL August 2001" attached to the FAC. Exhibit 1a at p. 65. The FAC also

cites several other laws in support of this "at cost" billing requirement, although none of these is specifically addressed in Defendants' motion. *E.g.* FAC ¶¶ 9-13.

Defendants argue that the meaning of billing "at cost" is ambiguous. Defendants' motion cites to a November 19, 2004 letter from CDHS to the Vice-President of Planned Parenthood of San Diego and Riverside counties and attached to the FAC at Exhibit 7, p. 139. The letter states that "no specific definition of 'at cost' is contained in [the FPACT Policies, Procedures and Billing Instructions (PPBI) manual] other than a general statement that 'at cost' means 'the cost to the provider'" and that "DHS has became [sic] concerned that, with regard to the definition of 'at cost', conflicting, unclear, or ambiguous representations have been made to providers." *Id.* at 140.

Defendants rely on this November 19, 2004 letter from CDHS as proof of the alleged ambiguity. According to Defendants, "when, as here, a relator alleges an FCA violation based upon failure to comply with certain regulations, ambiguity in those regulations will preclude liability as a matter of law." Defendants' Memorandum of Points and Authorities ("MPA") p. 7. Although Defendants cite a number of cases in support of this argument, they rely primarily on two Ninth Circuit Court of Appeals decisions: *U.S. ex rel. Oliver v. Parsons Company*, 195 F.3d 457 (9th Cir. 1999) ("*Parsons*") and *Hagood v. Sonoma Cnty. Water Agency*, 81 F.3d 1465 (9th Cir. 1996) ("*Hagood II*"). The other cases Defendants cite are either out-of-circuit authority or district court decisions from within this Circuit, and hence not binding on this

Court, however persuasive they might otherwise be.

In *Hagood II*, a former Army Corps of Engineers employee alleged that the Sonoma County Water Agency ("the Water Agency") presented a false claim in connection with the construction of the Warm Springs Dam in northern California. 81 F.3d at 1467. The Water Agency "agreed to repay the United States for the water supply component of the cost of building the dam. . . ." *Id*. Hagood alleged "that [the Water Agency] fraudulently induced the United Stated to underbill it" by not submitting an updated and accurate cost allocation regarding the water supply component of the project. *Id.* at 1467, 1468-69. This "reverse false claim" allegedly resulted in the Water Agency owing the United States less money than it otherwise would have. *Id.* at 1467. The district court granted summary judgment in favor of the Water Agency on the cost allocation claim. *Id*.

On appeal, the Ninth Circuit affirmed the district court's judgment. *Id.* at 1479. In order to survive summary judgment, the relator in a *qui tam* action must produce sufficient evidence to support both an inference of falsity and an inference of knowing fraud.[4] *Id.* at 1477. As to falsity, the Ninth Circuit held:

How precise and how current the cost allocation

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[4] *Hagood II*, *Parsons*, and nearly every other case cited by Defendants in support of their argument are inapposite here insofar as they all address motions for summary judgment. The courts in these cases not only applied a different legal standard than this Court must apply to the present motion, they also did so with the benefit of developed evidentiary records. This Court does not have such a record before it.

> needed to be in light of the statute's imprecise and discretionary language was a disputed question within the Corps. Even viewing Hagood's evidence in the most favorable light, that evidence shows only a disputed legal issue; that is not enough to support a reasonable inference that the allocation was *false* within the meaning of the False Claims Act.

Id.

As to knowledge of falsity, the Ninth Circuit held:

> Hagood's evidence does not suggest that the Water Agency lied; it suggests only that the Water Agency knew that *the Corps'* responsibility with regard to allocating costs was not clear, and that the Corps might exercise its authority in a number of ways.
>
> At most, Hagood has shown that the Water Agency took advantage of a disputed legal issue. This, as we have previously held, is not enough.

Id. at 1478-79.

In *Parsons*, the plaintiff was an accountant for The Parsons Company ("TPC") which she accused (along with several related companies) of knowingly violating accounting standards in order to overcharge the government in connection with TPC's contract with the State of California Bureau of Automotive Repairs. 195 F.3d at 460-61. The district court granted summary judgment in favor of defendants, "because Parsons employed a 'reasonable interpretation' of the applicable regulations and because the facts alleged failed to meet the scienter requirement." *Id.* at 460. On appeal, the

Ninth Circuit reversed. *Id.* Interpreting *Hagood II*, upon which the district court relied, the Ninth Circuit stated:

> *Hagood* does not stand for the proposition that a 'reasonable interpretation' of a regulation precludes falsity . . . . In *Hagood*, the statute itself granted discretion in deciding the cost allocation that the plaintiff claimed was false. . . . Unlike *Hagood*, this case involves regulations that, while unquestionably technical and complex, are not discretionary. Their meaning is ultimately the subject of judicial interpretation, and it is Parsons' compliance with these regulations, as interpreted by this court, that determines whether its accounting practices resulted in the submission of a 'false claim' under the Act. . . . Thus, while the reasonableness of Parsons' interpretation of the applicable accounting standards may be relevant to whether it knowingly submitted a false claim, the question of 'falsity' itself is determined by whether Parsons' representations were accurate in light of applicable law.

Id. at 463. The Ninth Circuit further held that there was sufficient evidence to create a genuine issue of fact as to the question of scienter. *Id.* at 465.

This Court concludes that, at least in the Ninth Circuit, ambiguity in the rule or regulation supposedly violated does not necessarily preclude FCA liability as a matter of law. The FPACT rules and regulations at issue here are not "discretionary," unlike the Water Supply Act concerning allocation of costs at issue *Hagood II*. 81 F.3d 1465, 1477 ("The language of the Water Supply Act . . . provides the relevant

government officials with fairly wide discretion . . . ."). Instead, as the Ninth Circuit held concerning the accounting standard at issue in *Parsons*, the meaning of the FPACT rules and regulations ultimately is the subject of judicial interpretation, as is whether Defendants complied with the rules and regulations. This Court will not, on the limited record before it and in the context of a motion for judgment on the pleadings, determine the meaning of billing "at cost" and whether, in light of that meaning, Defendants knowingly submitted a false claim.

Defendants attempt to distinguish *Parsons* on the basis that in *Parsons* the Ninth Circuit observed in a footnote that "the agency to which the allegedly false claim was submitted has not taken any position regarding any of the issues in this case, and thus no question of *Chevron* deference is presented." 195 F.3d at 463 n.2. Here, Defendants point to the CDHS letter and argue that the agency *did* take a position — namely, that the rules and regulations are ambiguous.[5] Defendants argue that this Court should defer to that determination. As the Government points out in its *amicus* brief, however, "even where deference is owed, deference applies only where the agency's interpretation is based on a 'permissible' or 'reasonable' construction of the statute or regulation at issue." United States' *Amicus Curiae* Brief p. 6. Again, the Court cannot — without converting this motion into a motion for summary judgment — make an informed determination regarding the permissibility or reasonableness of what may have been the CDHS's

[5]The November 19, 2004 letter is not nearly so authoritative for the proposition that CDHS took that position.

construction of the FPACT rules and regulations.

B. The "Government Knowledge" Defense

Defendants argue Plaintiff's claims fail "because Defendants were open with state and federal officials about the billing practices that form the crux of Gonzalez's Complaint" and that such government knowledge contradicts both the falsity and the scienter elements of FCA liability, such that Plaintiff cannot prove those elements at trial. Defendants' MPA pp. 11-12.

The FCA does not define "false." In the Ninth Circuit, the government's knowledge of the falsity of a claim does not preclude a finding of falsity. Rather, "the question of 'falsity' . . . is determined by whether [a defendant's] representations were accurate in light of applicable law." *Parsons*, 195 F.3d at 463; *United States v. Bourseau*, 531 F.3d 1159, 1164 (9th Cir. 2008) ("[C]ourts decide whether a claim is false or fraudulent by determining whether a defendant's representations are accurate in light of applicable law.").

Scienter is a different matter. It may be that evidence of the government's knowledge of Defendants' billing practices is at odds with a finding that Defendants knowingly submitted false claims, but even evidence of such knowledge does not necessarily preclude liability as a matter of law. In *United States ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929 F.2d 1416 (9th Cir. 1991) ("*Hagood I*"), the Ninth Circuit reversed the district court's holding that the Army Corp of Engineers' knowledge of inaccurate cost allocations precluded a finding of fraudulent intent on the part of the Water Agency. In reaching this

conclusion, the Ninth Circuit stated:

> [T]he knowledge possessed by officials of the United States may be highly relevant. Such knowledge *may* show that the defendant did not submit its claim in deliberate ignorance or reckless disregard of the truth. But this comforting conclusion for the Water Agency cannot be reached by mere inspection of Hagood's complaint. *Only at the stage of trial or summary judgment* will it be possible for a court to say, for example, that the Water Agency did merely what the Corps bid it do . . . .

929 F.2d at 1421 (emphasis added). The Ninth Circuit discussed *Hagood I* in a later case, concluding:

> *Hagood* does state . . . that the Army's knowledge of the underlying facts is not automatically a complete defense when that knowledge appears only as an allegation on the face of a complaint under the FCA. Nevertheless, *Hagood* left open the possibility that *at the summary judgment stage or after trial*, the extent and the nature of the government knowledge may show that the defendant did not 'knowingly' submit a false claim and so did not have the intent required by the post-1986 FCA.

U.S. ex rel. Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 327 (9th Cir. 1995) ("*Butler*") (emphasis added).

Here, Defendants argue the government's knowledge of and assent to Defendants' billing practices is demonstrated through various communications attached as exhibits to the FAC.

Defendants' Reply p. 16. Construing the content of these letters in the light most favorable to Plaintiff, however, the Court cannot conclude at this stage that the letters demonstrate government knowledge such that Defendants' *scienter* is negated as a matter of law. Indeed, some of the communications seem clearly to state that the government did *not* assent to Defendants' billing practices. *See, e.g.*, FAC Ex. 2a ("It is expected that reimbursement . . . not exceed the actual purchase cost . . . ."); Ex. 2b ("Medi-Cal claims for any drug dispensed . . . must be for 'cost', not 'usual and customary'."). On the other hand, the Court acknowledges that there also is evidence that could be construed to support Defendants' argument. *E.g.*, FAC Ex. 7 at 140 ("DHS has became [sic] concerned that, with regard to the definition of 'at cost', conflicting, unclear, or ambiguous representations have been made to providers."). It may be that on summary judgment or at trial, when the Court has a developed record before it, the "extent and the nature of government knowledge may show that the defendant did not 'knowingly' submit a false claim." *Butler*, 71 F.3d at 327.

C. The Statute of Limitations on Plaintiff's State Law Claims

Plaintiff and Defendants agree that the applicable statute of limitations under the relevant California False Claims Act ("CFCA") is within "three years after the date of discovery by the official of the state or political subdivision charged with responsibility to act in the circumstances . . . ." Cal. Gov't Code § 12654(a) (1996). Further, the parties agree that "discovery" is defined to mean "the discovery by the aggrieved party of the fraud *or* facts that would lead a reasonably

prudent person to *suspect* fraud." *Debro v. L.A. Raiders*, 92 Cal. App. 4th 940, 950, 112 Cal. Rptr. 2d 329 (2001). "It is not necessary that all of the facts be discovered for the limitations period to commence. Section 12654, subdivision (a) merely requires that the responsible government officials be placed on notice of the facts giving rise to the claim. . . ." *Id.* at 955.

Defendants argue that they "notified CDHS of their billing practices in a series of letters exchanged in 1997 and 1998." Defendants' MPA p. 16. This is eight years prior to Plaintiff filing this action. Plaintiff disagrees with Defendants' characterization of these letters, claiming they "provide nothing more than information about past practices of the Planned Parenthood clinics, requests for clarification about the proper application of state laws, and responses to those requests by DHS." Opp. p. 14. Plaintiff claims these letters did not "put DHS on notice that defendants would *continue* to engage in improper billing practices. . . ." *Id.* (emphasis added).

Perhaps, construed in the light most favorable to Plaintiff, the letters could be deemed not to trigger the running of the statute of limitations because they did not proclaim a specific intent to continue the challenged practices. As Defendants point out, however, Plaintiff only addresses four letters attached as exhibits to the FAC. Plaintiff does not mention the letter from defendant Kathy Kneer, CEO of PPAC, which Defendants attached as an exhibit to their answer.[6] Ms. Kneer writes, for example, "We hope to

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[6]This letter is properly before the Court because it was attached to a pleading (Defendants' answer) as an exhibit. *Buraye v. Equifax*, 625 F. Supp. 2d 894, 897 (C.D. Cal. 2008) (Morrow, J.)

clarify that in fact, our clinics *are* billing correctly for oral contraceptives purchased under nominal pricing agreements." Answer Ex. A (emphasis added). Plaintiff alleges overbilling from "at least 1997" and this letter, dated January 14, 1998, specifies Planned Parenthood clinics *are* billing in the manner that forms the basis of Plaintiff's allegations. *E.g.* FAC ¶ 95. Thus, Plaintiff's argument regarding a lack of notice of "continuing" improper billing practices falls flat. The contents of this January 14, 1998 letter, in conjunction with the other letters attached to the FAC, were sufficient to "put responsible government officials on notice to inquire about a possible false claim." *Debro*, 92 Cal. App. 4th at 954-55. Accordingly, Plaintiff's state law claims are time barred.

D. Failure to State a Claim Under Rule 9(b)

Defendants argue that Rule 9(b) applies to claims brought under the FCA and CFCA and that Plaintiff has failed to plead his claims with the required particularity. *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) ("[W]e hold that complaints brought under the FCA must fulfill the requirements of Rule 9(b). . . ."); *Cnty. of Santa Clara v. Astra U.S., Inc.*, 428 F. Supp. 2d 1029, 1036-37 (N.D. Cal. 2006) (applying Rule 9(b) to CFCA claims). Specifically, Defendants argue: 1) Plaintiff "lumps together" eight of the 13 named defendants and the Doe defendants and "has not made a single allegation of specific

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("In deciding the motion [for judgment on the pleadings], the court may consider only the pleadings, that is, the complaint, the answer, and any written instruments attached as exhibits." (quotation marks omitted)). Regardless, the FAC incorporates the letter by reference.

conduct as to any of them"; 2) Plaintiff fails specifically to allege any false claim or statement in connection with the overbilling fraud; 3) Plaintiff "fails to tie any given claim, record, or statement to a specific government-funded program"; and 4) Plaintiff fails "to allege when the overbilling occurred and in what amounts." Defendants' MPA pp. 17, 21, 22, 24.

1. Lumping Defendants together

"Rule 9(b) does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (quotation marks omitted). The Court agrees with Defendants that the FAC does not sufficiently differentiate allegations between the various defendants. Although "there is no absolute requirement that. . . the complaint must identify *false statements* made by each and every defendant", the complaint in this case must contain more detail regarding the circumstances of the alleged conduct of the individual named defendants listed on p. 18 of Defendants' MPA. *Id.* at 764. As the FAC stands, it merely alleges "defendants" as a whole engaged in particular behavior, and is deficient in that respect. The Court agrees with Plaintiff, however, that no further detail is needed regarding the Doe defendants.

2. Failure to allege specific false claim or statement and failure to allege specific dates and amounts

"[A]llegations that all claims submitted during an almost four year period were fraudulently submitted is insufficient particularity to satisfy the 9(b) pleading standard. While the Court is not suggesting that Rule 9(b) requires precise details pertaining to each of the . . . claims submitted, the Ninth Circuit requires some specifics, such as the time, place, nature [sic] of the false statement. . . ." *U.S. ex rel. Serrano v. Oaks Diagnostics, Inc.*, 568 F. Supp. 2d 1136, 1143 (C.D. Cal. 2008) (Lew, J.) (citing *Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007)).

In his Opposition, Plaintiff does not bother to point out a single paragraph in the FAC that provides some "specifics" regarding the alleged false claims or statements. Instead, Plaintiff merely concludes that "the details of the misconduct suffice to give notice, and there are more than enough reasonable indicia that false claims were actually submitted." Opp. p. 18. The FAC does not contain sufficient detail regarding the alleged false statements, which he claims took place from "at least 1997" through the filing of his complaint in 2008. *E.g.* FAC ¶ 70. To be sure, Plaintiff need not state each and every claim in exacting detail, but there must be something more than the mere blanket assertion that defendants submitted false claims. He must at least plead the "who, what, when, where, and how" of the alleged false claims with sufficient particularity. *See Frazier ex rel. U.S. v. Iasis Healthcare Corp.*, 392 Fed. Appx. 535, 537 (9th Cir. 2010) ("Although it is not mandatory that Frazier provide representative examples, such examples would

go a long way in providing the necessary particularity under Rule 9(b).").

3. Failure to tie alleged overbilling claim, record, or statement to a specific government-funded program

Finally, Defendants argue that Plaintiff has failed to link the alleged false claim to a specific government-funded program. This is not the case. As Plaintiff states in his Opposition, 'the FAC and its exhibits expressly point to overbilling in the Family PACT program for serving Medi-Cal recipients. (Defendants did not bill the federal government directly.)" The issue of "which claims, if any, were allegedly in noncompliance with Family PACT" (Reply p. 21) has been addressed above regarding the lack of detail as to alleged false claims.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the motion for judgment on the pleadings in part and DENIES it in part. The seven claims remaining in the FAC are dismissed. Plaintiff argues that Defendants' motion, even if granted, should not result in the dismissal of the FAC because the motion "challenges only one particular theory of false claims, namely, defendants' illegal marking up of claims for government reimbursement for birth control drugs and devices." Opp. p. 2. This argument is meritless. Plaintiff failed to raise any other "particular theory" of liability in opposition to Defendants' first motion to dismiss, or in Plaintiff's motion to amend the judgment after the Court granted that motion to dismiss, or on appeal to the Ninth Circuit. To the extent there was

ever any basis for theories of liability *other* than "marking up of claims for government reimbursement for birth control drugs and devices," Plaintiff has abandoned such claims.

The federal law claims (Claims I - III) are dismissed for failing to comply with Rule 9(b) and the state law claims (Claims VIII - XI) are dismissed as time-barred. Plaintiff is granted leave to amend as to Claims I - III only.[7] If Plaintiff chooses to amend, the second amended complaint must be filed no later than 21 days from the date of this order.

No hearing is necessary. Fed. R. Civ. P. 78; L. R. 7-15.

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[7] "Although Rule 12(c) does not mention leave to amend, courts have discretion to grant a Rule 12(c) motion with leave to amend (and frequently do so where the motion is based on a pleading technicality)." RUTTER GUIDE § 9:341.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
CV 05-8818 AHM (FMOx)
P. VICTOR GONZALEZ, *et al.* v. PLANNED PARENTHOOD OF LOS ANGELES, *et al.*

June 26, 2012

A. HOWARD MATZ, U.S. DISTRICT JUDGE

Proceedings: IN CHAMBERS (No Proceedings Held)

Plaintiff P. Victor Gonzalez brings this *qui tam* action against Defendants Planned Parenthood, Mary Jane Wagle, Martha Swiller, and Kathy Kneer for violation of the federal False Claims Act ("FCA"). Before the Court is Defendants' motion to dismiss and strike Plaintiff's third amended complaint ("TAC").[1] The Court finds that Plaintiff has failed to allege falsity, a required element of the FCA, and therefore GRANTS the motion to dismiss the TAC.[2] The motion to strike the state claims previously dismissed with prejudice is also GRANTED.[3] Finding that any further amendment of the complaint would be futile —

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[1]The TAC names nine regional Planned Parenthood entities in California as well as Planned Parenthood Affiliates of California, an umbrella organization based in Sacramento. One of the Defendants, Golden Gate Community Health, is no longer affiliated with Planned Parenthood and has been severed from this action as a result of its bankruptcy. (Dkt. 116.)

[2]Dkt. 125.

[3]Dkt. 125.

Plaintiff has now filed four complaints — the Court dismisses this action with prejudice.

I. FACTS

The key facts as alleged in the TAC are as follows. Plaintiff was the Chief Financial Officer of Planned Parenthood of Los Angeles ("PPLA") from December 2002 to March 2004. PPLA and several other Planned Parenthood regional affiliates operating in California are the Defendants. For purposes of clarity, the Court will refer to all these affiliates as "Planned Parenthood," since several are accused of conspiring with each other and all are accused of independently engaging in the same conduct.

During the relevant time period, Planned Parenthood was a participant in the Family Planning, Access, Care and Treatment program ("FPACT") and Medi-Cal programs that reimbursed Planned Parenthood for contraceptives it provided to low-income individuals. (TAC ¶¶ 1, 22-23.) Medi-Cal is California's Medicaid program that provides health services for low income individuals and is jointly funded by the federal and state governments. (TAC ¶ 27.) FPACT is a special program within Medi-Cal that provides family planning drugs and services to individuals under the poverty level. It has been jointly funded by the federal and state governments since 1999. (TAC ¶¶ 28, 45.) Prior to late 1999, FPACT was funded 100% by the state of California. (TAC ¶ 44.)

Each of the Planned Parenthood Defendants signed a Provider Agreement with FPACT, agreeing to "comply with all federal laws and regulations governing and regulating Providers." (TAC ¶ 36, Exh.

1(b), "Provider Agreement," ¶ 2.) The Planned Parenthood affiliates also agreed to "comply with all of the billing and claims requirements set forth in the Welfare and Institutions Code." The Provider Agreement went on to state, "Refer to the Family PACT *Policy, Procedures, and Billing Instruction* manual for diagnosis code and method indicators that are distinctive to the Family PACT program." (TAC ¶¶ 35-36, Exh. 1(b), "Provider Agreement," ¶ 20.)

Planned Parenthood acquires contraceptives from manufacturers at a significant discount. (TAC ¶ 26.) Plaintiff alleges that federal and state regulations,[4] as well as the FPACT manual, required Planned Parenthood to bill FPACT and Medi-Cal for reimbursement of contraceptives "at cost" — not at the "usual and customary rates" charged to the general public. (TAC ¶¶ 33-34, 37, Exh. 1(a).) Nonetheless, from 1997-2004, Planned Parenthood submitted reimbursement claims based on "usual and customary rates." (TAC ¶ 52.) Plaintiff alleges Defendants defrauded the federal government by overbilling California's FPACT and Medi-Cal programs during that time period. (TAC ¶ 4.)

On May 5, 1997, the California Department of Health Services started exchanging a series of letters with Kathy Kneer, then the Executive Director of the Planned Parenthood Affiliates of California, informing her that claims made to FPACT and MediCal for reimbursement were to be billed "at cost." (TAC ¶¶ 56, 72, 85, 91, 97, 102, 107, 112, 117, 122, Exhs. 2(a)-2(b).)

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[4]The specific regulations cited by Plaintiff are 22 Cal. Code of Reg. ("CCR") Section 51509.1(c)(3), 58 Fed. Reg. 27293, 58 Fed. Reg. 34058, 58 Fed. Reg. 68922, and 59 Fed. Reg. 25112.

Years later, in 2004, the California Department of Health Services ("DHS") notified several Planned Parenthood offices in California that it would conduct an audit of their overbilling practices. (TAC ¶ 57.) Defendant Wagle, the CEO of PPLA, asked Plaintiff to perform an assessment of the impact of Defendants' overbilling practices. The assessment revealed that PPLA had profited $2,144,313.17 from the practice in just one year. (*Id*.) In November 2004, the DHS issued a report of the audit and found that PPLA had failed to comply with the billing practices outlined in the FPACT manual. (TAC Exh. 6.)

Based on the 1997 correspondence and the DHS audit,[5] Plaintiff alleges that all Defendant entities of Planned Parenthood were put on notice as of 1997 that their billing practices were not in compliance with the law. (TAC ¶¶ 56-57.) Despite this knowledge, Defendants continued to submit claims at the "usual and customary rate" until at least the end of 2004. (TAC ¶¶ 60, 80, 87, 93, 99, 104, 109, 114, 119, 128.) Plaintiff admits that Defendants did not attempt to hide this practice but "openly acknowledged engaging in this practice in order, as they claimed, to subsidize other services provided by them for which they believed they were 'under-reimbursed.'" (TAC ¶ 42, Exh. 3(a).)

II. PROCEDURAL HISTORY

Plaintiff initiated this action on December 19,

[5]At the hearing on the instant motion, Plaintiff's counsel noted that various federal and state billing directives, regulations, and statutes, which he did not specify, also put Defendants on notice that they were not in compliance. (TAC ¶ 41.)

2005. (Dkt. 1.) Nearly two years later, the United States filed a notice of non-intervention. (Dkt. 26.) Subsequently, Plaintiff filed a First Amended Complaint alleging claims under the FCA, the California False Claims Act, and other state laws. The Court dismissed the federal and California FCA claims for lack of subject matter jurisdiction, finding that the facts alleged were previously disclosed to the public and that Plaintiff was not an original source of the allegations. (Dkt. 43.) The other state claims were dismissed for lack of standing.

The Ninth Circuit reversed this Court's dismissal of the federal and state FCA claims, holding that Gonzalez qualified as an original source. *Gonzalez v. Planned Parenthood of Los Angeles*, 392 F.App'x. 524, 528 (9th Cir. 2010). On remand, Defendants moved for judgment on the pleadings. This Court dismissed the California claims with prejudice for being time-barred and dismissed the federal FCA claims with leave to amend on the grounds that they were not pled with the specificity required by Fed. R. Civ. P. 9(b). The Court also found that (1) the ambiguity of the words "at cost" did not necessarily preclude FCA liability and (2) the government's knowledge of Defendants' billing practices did not necessarily preclude a finding of falsity or scienter. (Dkt. 104.)

Plaintiff filed a Second Amended Complaint but stipulated to withdrawing it after Defendants moved again for a judgment on the pleadings. (Dkt. 120.) On August 25, 2011, Plaintiff filed the TAC, alleging three claims under the federal FCA for (1) Submission of False Claims (31 U.S.C. § 3729(a)(1)), (2) Use of False Statements or Records or Statements (31 U.S.C. § 3729(a)(2)), and (3) Conspiracy to Get False Claims

Paid (31 U.S.C. § 3729(a)(3)). (Dkt. 122.) Plaintiff also alleged the four previously dismissed state FCA claims, clarifying that the claims were being "[r]etained by [r]elator for purposes of appeal."

III. LEGAL STANDARD

A. Motion to Dismiss for Failure to State a Claim

A complaint may be dismissed for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (internal quotation marks and ellipsis omitted).

The plausibility standard articulated in *Twombly* and *Iqbal* requires that a complaint plead facts demonstrating "more than a sheer possibility that a defendant has acted unlawfully. Where a complaint

pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 129 S.Ct. at 1949 (internal quotation marks and citation omitted). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has not shown that the pleader is entitled to relief. *Iqbal*, 129 S.Ct. at 1950 (internal citation, alteration, and quotation marks omitted); *see Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) ("[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the pleader to relief.") (citing *Iqbal*, 129 S.Ct. at 1949).

To determine whether a complaint states a claim sufficient to withstand dismissal, a court considers the contents of the complaint and its attached exhibits, documents incorporated into the complaint by reference, and matters properly subject to judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). The court must accept as true all factual allegations contained in the complaint. That principle, however, "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S.Ct. at 1950. A complaint filed *pro se*, however, is "to be liberally construed," and "however inartfully pleaded, must be held to less stringent standards than formal pleadings

drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted).

B. Motion to Strike

Pursuant to Federal Rule of Civil Procedure 12(f), "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "Immaterial" matters are those which have no essential or important relationship to the claim for relief; "impertinent" matters are statements that do not pertain and are not necessary to the issues in question. *See Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *overruled on other grounds*, 510 U.S. 517 (1994). "Motions to strike on the grounds of insufficiency, immateriality, irrelevancy, and redundancy are not favored . . . and will usually be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties." *Bianchi v. State Farm Fire & Cas. Co.*, 120 F. Supp. 2d 837, 841 (N.D.Cal. 2000) (quoting *Dah Chong Hong, LTD. v. Silk Greenhouse, Inc.*, 719 F. Supp. 1072 (M.D. Fla. 1989)).

IV. DISCUSSION

Defendants argue that Plaintiff has failed to state a claim under the FCA because the TAC does not

adequately plead "falsity," and thus the entire action must be dismissed. Even if Plaintiff has pled falsity, Defendants argue that (1) Plaintiff has again failed to satisfy the Rule 9(b) standard of pleading against several Defendants and (b) that Plaintiff's claims are limited to those based on injury to FPACT from 1999 to 2004. Because the Court agrees that Plaintiff has not adequately pled "falsity," the Court declines to consider these other arguments.

A. Plaintiff Has Failed to Plead Falsity under the Federal FCA

The FCA prohibits a party from knowingly presenting to the federal government a false or fraudulent claim for payment. *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996); *see also* 31 U.S.C. § 3729.[6] "The archetypal *qui tam* FCA action is filed by an insider at a private company who discovers his employer has overcharged under a government contract." *Hopper*, 91 F.3d at 1266. Where the basis of the FCA claim is not that the claim for payment itself was explicitly false, a party may still be

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[6]When Plaintiff initiated this action, the False Claims Act provided, in relevant part, "(a) Any person who (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person ." 31 U.S.C. § 3729(a) (1994).

liable under a theory of "false certification." *Hendow v. University of Phoenix*, 461 F.3d 1166, 1171 (9th Cir. 2006). Under a "false certification" theory, a person who submits a claim for payment that in itself contains no explicit inaccuracies or misrepresentations may still be liable under the FCA if that person falsely certified that he was in compliance with a government regulation that was a material condition to receiving government payment. *Id*. The phrase "false certification" has no "talismanic significance" but is simply another way of describing a false statement made to the government. *Id.* at 1172.

Defendants argue that because Plaintiff does not allege that Defendants submitted claims that were "factually false" (e.g., that Defendants billed for services that were not actually provided), Plaintiff must proceed on a theory of "false certification." (MTD 9.) Plaintiff argues that he need not resort to a false certification theory because this is an "archetypal *qui tam* False Claims action" alleging that "the claim for payment itself is literally false or fraudulent." (Opp. 6.) The Court finds that under either theory, Plaintiff has failed to plead falsity.

1. False or Fraudulent Claim for Payment

Plaintiff describes this action as merely one where "a private party overcharges the government, rendering the claim for payment itself false or fraudulent." (Opp. 5.) If that is the crux of his legal theory, it is deficient. No case creates or imposes FCA liability merely where one overcharges the government — the overcharging must be committed in conjunction with a false statement that is a lie. *See Hagood v. Sonoma Cnty. Water Agency*, 81 F.3d 1465, 1478 (9th

Cir. 1996) (citations omitted) ("[T]he statutory phrase 'known to be false' . . . means a lie."); *accord Hopper*, 91 F.3d at 1267 ("For a certified statement to be "false" under the Act, it must be an "intentional, palpable lie.").

To the extent that Plaintiff's theory is that Defendants' claims for reimbursement contained factually false statements, Plaintiff has failed to specifically identify any such statement. Plaintiff does not allege, for example, that Defendants misrepresented their "usual and customary" rates as "actual acquisition" costs. At the hearing, Plaintiff's counsel clarified that Plaintiff's primary allegation of falsity is that Defendants "hid" their billing practices: that in 1997, Planned Parenthood was told it was not in compliance with FPACT billing policies; that in spite of this, Planned Parenthood continued to violate those policies; and that it was not until the 2004 audit that Planned Parenthood openly argued that it should be permitted to bill at usual and customary rates. While Plaintiff does allege in the TAC that certain Defendants conspired with each other "to shield the scheme from detection and correction by government authorities." (TAC ¶ 70), Plaintiff fails to support this conclusory allegation with a single factual allegation specifying how any Defendant tried to hide its billing practices. In fact, elsewhere in the TAC, Plaintiff alleges the opposite — that "[a]t no time did any of the Defendants, either in response to the correspondence advising Planned Parenthood of its obligation to seek reimbursement 'at cost,' or in response to the state audit of PPH, . . . state that [Defendants] . . . (i) deny the uniform practice of affiliates marking up birth control drugs and devices for reimbursement from the state government (and in turn, the federal

government) or (ii) profess that they did not understand to which claims the at-cost billing rules and over-billing allegations applied." (TAC ¶ 124.) Plaintiff then cites multiple examples of Defendants admitting in reports and statements to government officials that they had been submitting claims for reimbursement at their "usual and customary" rate. (TAC ¶¶ 124-128.) For example, in 2004, Defendant Wagle wrote an email on behalf of Planned Parenthood entities saying, "California Planned Parenthood Affiliates have been charging . . . based on a Usual and Customary fixed rate . . . [which] passes on some of the reduced cost . . . but not all and it clearly marks up the medicines to the FPACT defaulted bill rate. This has been the practice of all PP affiliates since the FPACT program was inaugurated in 1997 . . . ." (TAC ¶ 126.)

Defendants' consistent candor and truthfulness puts this case at odds with *United States v. Halper*, 490 U.S. 435 (1989), the "archetypal" FCA case cited by Plaintiff. In that case, the defendant was found to have "mischaracterized the medical service performed by New City [Medical Laboratories], demanding reimbursement at the rate of $12 per claim when the actual service rendered entitled New City to only $3 per claim. Duped by these misrepresentations, Blue Cross overpaid New City a total of $585; Blue Cross passed these overcharges along to the Federal Government." *Id*. at 437. Similarly, in *Oliver v. Parsons Co.*, 195 F.3d 457, 461 (9th Cir. 1999), the plaintiff alleged that defendants had intentionally represented certain labor costs as "other direct costs" instead of "direct labor costs" in order to increase the rate it could bill the government.

Although Defendants have previously argued that

the phrase "at cost" may be legally interpreted to mean "usual and customary rates," Plaintiff does not allege that Defendants ever made a factual representation that the amounts they were billing for were at acquisition cost. Indeed, unlike in *Halper* and *Parsons*, Plaintiff does not even allege that any such factual mischaracterizations or misrepresentations were made by Defendants. The facts in the TAC merely amount to allegations that Defendants knowingly violated FPACT and Medi-Cal billing policies. They do not support a plausible inference that Defendants *misrepresented* what they were billing or claimed that the amounts requested were the amounts Defendants paid for the contraceptives. Thus, to the extent that Plaintiff is proceeding on a theory of factual falsity, Plaintiff has failed to state a claim.

2. Falsity Arising from Certification of Compliance with the Law

It appears, however, that notwithstanding Plaintiff's statement that this is an "archetypal" FCA action based on literal falsity (Opp. 6), Plaintiff is pursuing a different theory of "falsity" — that the "falsity" consists of Defendants's failure to comply with FPACT and Medi-Cal's alleged requirement that Defendants seek reimbursement at the actual acquisition cost. Plaintiff argues that he has properly pled falsity by virtue of alleging that Defendants violated those billing laws — "Defendants were obligated to comply with the law governing billing whether or not they certified that they would comply." (Opp. 6.) Defendants argue that this theory fails to state an FCA claim because Plaintiff must explicitly allege that Defendants falsely certified or stated that they were in compliance with those laws. Defendants

are correct.

The Ninth Circuit has held, "Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." *Hopper*, 91 F.3d at 1266. Contrary to Plaintiff's contention, the absence of an allegation that a false certification was submitted is a "fatal defect" to an FCA claim. *See id.* at 1267.

To state a claim for false certification, a plaintiff must show: "(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." *Hendow*, 461 F.3d at 1174. False certifications may be express or implied. *Ebeid v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). "Express certification simply means that the entity seeking payment certifies compliance with a law, rule or regulation as part of the process through which the claim for payment is submitted. Implied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a certification of compliance is not required in the process of submitting the claim." *Id*.

Plaintiff does not allege that each time Defendants submitted a claim for reimbursement, they stated that they were complying with billing laws. Instead, Plaintiff merely alleges that Defendants agreed to comply with those billing laws when they signed provider agreements with FPACT. (TAC ¶ 36.) Thus,

Plaintiff must proceed on a theory of implied false certification.

To state a claim for implied false certification, a complaint "must plead with particularity allegations that provide a reasonable basis to infer that (1) the defendant *explicitly* undertook to comply with a law, rule or regulation that is implicated in submitting a claim for payment and that (2) claims were submitted (3) even though the defendant was not in compliance with that law, rule or regulation." *Id*. at 998 (emphasis added).

The FPACT Provider Agreement, attached as Exhibit 1(b) to the TAC, does not explicitly state that Defendants are required to bill at acquisition costs. The Agreement does state, however, "Provider. . . agrees to comply with all federal laws and regulations governing and regulating Providers." (TAC, Exh. 1(b) ¶ 2.) Although the Ninth Circuit has not addressed the issue, the Tenth Circuit has held that such "general sweeping language" does not constitute a certification of compliance for the purposes of the FCA. *Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1219 (10th Cir. 2008) "[B]y arguing that the certification's language is adequate to create an express false certification claim, [plaintiff] fundamentally contends that *any* failure by [defendant] to comply with *any* underlying Medicare statute or regulation during the provision of *any* Medicare-reimbursable service renders this certification false, and the resulting payments fraudulent." *Id*. This Court follows the lead of the Tenth Circuit in finding that such general language cannot constitute a certification of compliance.

Paragraph 20 of the FPACT Provider Agreement also states: "Provider agrees that it shall comply with all of the billing and claims requirements set forth in the Welfare and Institutions Code." Several sentences later, that paragraph goes on to state, "Refer to the Family Pact *Policy, Procedures, and Billing Instruction* manual for diagnosis code and method indicators that are distinctive to the Family PACT program." Plaintiff cites to no provision in the Welfare and Institutions Code that requires Defendants to bill "at cost."[7] (TAC, Exh. 1(b), at 2.) Instead, the only provision Plaintiff cites that uses the words "at cost" is located not in the Provider Agreement but in the entirely separate FPACT manual, which states, "Family PACT requires that drugs and supplies dispensed by the Family PACT provider must be billed 'at cost.'" (TAC, Exh. 1(a), at 1.) But Plaintiff does not even allege that Defendants signed the FPACT manual. What Defendants *did* allegedly sign was the Provider Agreement, which did not require or amount to a promise to comply with every provision in the manual.

It is apparent from the facts alleged and from the correspondence attached as exhibits to the TAC that from 1997 to 2004 Defendants were engaged in a lengthy and open dispute with the government about whether they were entitled to reimbursement at

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[7]In the TAC, Plaintiff does mention 22 C.C.R. 51509.1(c)(3), which states, "Reimbursement for take-home drugs dispensed by clinics that have obtained permits pursuant to Business and Professions Code Section 4063 et seq. shall not exceed the amounts payable for drug ingredient cost under Section 51513. No dispensing fee or markup shall be paid." That regulation, however, is not part of the Welfare and Institutions Code and in any event simply restricts the amount that can be reimbursed, not the amount that can be billed.

acquisition costs or at their usual and customary rates. Plaintiff has successfully alleged facts to show that Defendants may not have complied with the FPACT instruction manual requirement that billing must be "at cost" — but such a showing falls short of the FCA requirement of "a showing of knowing fraud." *Hagood*, 81 F.3d at 1478. As the district court stated in *Hopper*:

> It appears to the court that the plaintiff is operating under a fundamental misconception as to the reach and scope of the FCA. It is not the case that any breach of contract, or violation of regulations or law, or receipt of money from the government where one is not entitled to receive the money, automatically gives rise to a claim under the FCA. Plaintiff assumes that if Los Angeles Unified School District (LAUSD) has violated regulations or law governing the Individuals with Disabilities Education Act (IDEA), it is automatically subject to suit under FCA. The FCA is far narrower. It requires a false claim. Thus, some request for payment containing falsities made with scienter (i.e., with knowledge of the falsity and with intent to deceive) must exist. This does not mean that other types of violations of regulations, or contracts, or conditions set for the receipt of moneys, or of other federal laws and regulations are not remediable; it merely means that such are not remediable under the FCA or the citizen's suit provisions contained therein.

Hopper, 91 F.3d at 1265 (quoting the district court with approval).

Like the plaintiff in *Hopper*, here Plaintiff appears to operate under the assumption that he has stated an

FCA claim merely by alleging that Defendants were not complying with FPACT and Medi-Cal billing policies. That is not correct. As shown above, to state an FCA claim, Plaintiff must specify a statement or claim made by Defendants that was *false*. While the TAC alleges in great detail that Defendants submitted bills at their usual and customary rates, it also alleges throughout that Defendants were open about their billing practices.[8] Thus, the Court finds that Plaintiff has failed to plead falsity under the FCA and dismisses Counts I-III.

The question remains as to whether to grant Plaintiff leave to amend. In this Court's previous order dismissing Plaintiff's First Amended Complaint, the Court noted:

> The FAC does not contain sufficient detail regarding the alleged false statements, which he claims took place from "at least 1997" through the filing of his complaint in 2008. *E.g.* FAC ¶ 70. To be sure, Plaintiff need not state each and every claim in exacting detail, but there must be something more than the mere blanket assertion that defendants submitted false claims. He must at least plead the "who, what, when, where, and how" of the alleged false claims with sufficient

[8]Plaintiff's counsel argued at the hearing that the Court's finding in this Order contradicts the Court's April 19 Order, in which it found that government knowledge did not preclude a finding of falsity or scienter. (Dkt. 104.) As the Court explained at the hearing, the Court's decisions are not in conflict. The Court concludes today that Plaintiff's FCA claims fail because Plaintiff has not adequately pled falsity, not because Plaintiff has alleged that the government knew about Defendants' billing practices.

particularity.

(Dk. 104, "April 19 Order," at 13.)

Despite this Court's direction, Plaintiff has failed in the TAC to make any further allegations of false statements made by Defendants. Instead, Plaintiff simply added details about the number of claims Defendants made for reimbursement at a marked-up rate. That Defendants submitted *many* claims does not mean those claims were false. Because Plaintiff has failed to add sufficient detail indicating which of Defendants' claims or statements were *false* (as opposed to non-compliant or illegal), the Court concludes that the federal FCA claims cannot be saved by further amendment and dismisses them with prejudice.

B. Plaintiff's State-Based FCA Claims Are Stricken

The Court previously dismissed Plaintiff's state-based FCA claims with prejudice for being time-barred. Nonetheless, Plaintiff has re-alleged these claims solely for the purpose of preserving them for appeal. Because those claims are "immaterial" to the remaining federal FCA claims, the Court strikes Counts IV - VII pursuant to Fed. R. Civ. P. 12(f).

V. CONCLUSION

For the above reasons, the Court GRANTS Defendants' motion to dismiss and motion to strike. This action is dismissed with prejudice. Defendants shall file a proposed judgment, which will be entered accordingly.

APPENDIX D

31 U.S.C. § 3729 (1994)

§ 3729. False claims

(a) Liability for certain acts.

Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or wilfully to conceal such property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

APPENDIX E

No. 12-56352

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

P. VICTOR GONZALEZ, Qui Tam Plaintiff, on behalf of the United States and State of California, Plaintiff-Appellant, v. PLANNED PARENTHOOD OF LOS ANGELES; PLANNED PARENTHOOD SHASTA-DIABLO, AKA Seal B; PLANNED PARENTHOOD GOLDEN GATE; PLANNED PARENTHOOD MAR MONTE, AKA Seal D; PLANNED PARENTHOOD RIVERSIDE AND SAN DIEGO COUNTIES, INC., AKA Seal E; PLANNED PARENTHOOD ORANGE AND SAN BERNARDINO COUNTIES, INC., AKA Seal F; PLANNED PARENTHOOD PASADENA AND SAN GABRIEL VALLEY, INC., AKA Seal G; PLANNED PARENTHOOD SANTA BARBARA, VENTURA AND SAN LUIS OBISPO COUNTIES, INC., AKA Seal H; PLANNED PARENTHOOD SIX RIVERS, AKA Seal I; PLANNED PARENTHOOD AFFILIATES OF CALIFORNIA, AKA Seal J; MARY JANE WAGLE, AKA Seal K; MARTHA SWILLER, AKA Seal L; KATHY KNEER, AKA Seal M, Defendants-Appellees.

D.C. No. 2:05-cv-08818-AHM-FMO
Central District of California, Los Angeles

Filed Nov. 5, 2014

ORDER

Before: Gould and N.R. Smith, Circuit Judges, and England, Chief District Judge.*

Appellant's Petition for Rehearing is **DENIED**.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. 35. Appellant's Petition for Rehearing En Banc is also **DENIED**.

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*The Honorable Morrison C. England, Jr., Chief District Judge for the U.S. District Court for the Eastern District of California, sitting by designation.