No. 12-56352

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

P. VICTOR GONZALEZ, QUI TAM PLAINTIFF, ON BEHALF OF HIMSELF, THE UNITED STATES OF AMERICA, & THE STATE OF CALIFORNIA,
Plaintiff-Appellant,
v.
PLANNED PARENTHOOD LOS ANGELES, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

BRIEF OF APPELLANT

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INTRODUCTION

The federal False Claims Act (FCA) was enacted precisely in response to overcharges and inflated invoices submitted to the government. Yet the district court in this case held that allegations of illegal overbilling did not state a claim under the FCA. This Court should reverse.

The FCA prohibits frauds against the federal government. As a remedial measure, the FCA authorizes certain private individuals – called "relators" – to bring civil suits, in the name of the United States, to enforce the FCA and to recover the fraudulently obtained funds. Such private enforcement actions are known as "*qui tam*" suits. The relator bringing such a *qui tam* suit, if successful, receives a portion of the fraud recovery as an incentive to bring these suits in the first place.

The relator here, P. Victor Gonzalez, is a former Chief Financial Officer of a Planned Parenthood affiliate in California. "[T]he paradigm *qui tam* case is one in which an insider at a private company brings an action against his own employer." *U.S. ex rel. Fine v. Chevron, U.S.A.,* 72 F.3d 740, 742 (9th Cir. 1995) (en banc). *Accord U.S. ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992); *U.S. ex rel. Stinson, Lyons, Gerlin*

and Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1161 (3d Cir. 1991) ("The paradigmatic original source is a whistleblowing insider"). This is such a case.

The district court previously dismissed this case, ruling that Gonzalez was not a proper *qui tam* plaintiff. This Court reversed, holding that Gonzalez is an "original source" entitled to bring suit as a whistleblower. *Gonzalez v. PPLA*, 392 F. App'x 524 (9th Cir. 2010).

On remand, the district court again dismissed the case, this time on the premise that the complaint's allegation of illegal overbilling did not show a "false" claim. That decision cannot be squared with the purpose of the FCA or this Court's precedents. This Court should reverse that dismissal and remand for further proceedings. This appeal also brings up the district court's earlier, interlocutory dismissal of Gonzalez's state law claims on statute of limitations grounds, as well as the district court's subsequent striking of Gonzalez's reallegation of those claims. This Court should reverse as to those claims as well.

STATEMENT OF JURISDICTION

(a) The district court had jurisdiction over Gonzalez's federal False Claims Act (FCA) counts under 28 U.S.C. §§ 1331, 1345 and 31 U.S.C. § 3732(a). The district court also had jurisdiction, under 28 U.S.C. § 1367 and 31 U.S.C. § 3732(b), over the state law counts under the California false claims statute.

(b) The district court entered a final judgment in this case. Doc. 147 (EOR 3). *See* Rule 58, Fed. R. Civ. P. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

(c) The district court dismissed all state law claims on Apr. 19, 2011, while allowing Gonzalez to replead only as to the federal FCA claims. Doc. 104 (EOR 41). The district court subsequently dismissed the remaining, federal counts and struck the realleged state claims on June 26, 2012, Doc. 138 (EOR 5); *see also* Doc. 137 (EOR 20) (minute order of June 25, 2012), and entered judgment on July 18, 2012. Gonzalez filed a timely notice of appeal on July 23, 2012. Doc. 150 (EOR 1). *See* Rule 4(a)(1)(A), Fed. R. App. P.

(d) This appeal is from a final judgment that disposes of all claims.

STATEMENT OF ISSUES

I. Whether the district court erred in holding that the Third Amended Complaint, which alleges the submission of illegally inflated invoices for federal reimbursement, does not allege "falsity" under the False Claims Act (FCA).

Defendants argued in their motion to dismiss (Doc. 125) that the Third Amended Complaint failed to allege "falsity" under the FCA, 31 U.S.C. § 3729(a)(1). The district court agreed. Doc. 138 (EOR 5). "We review *de novo* the dismissal of a complaint for failure to state a claim." *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010).

II. Whether the district court erred in holding that relator should not be permitted to amend his pleading in response to an alleged want of falsity even though defendants had not pressed that falsity argument in any prior dispositive motion.

Defendants argued in their motion to dismiss (Doc. 125) that Gonzalez should not be permitted to amend his complaint to cure any defect the district court might find. The district court agreed. Doc. 138 (EOR 5). "We review the denial of leave to amend a complaint for abuse of discretion." *Telesaurus*, 623 F.3d at 1003. "Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Jewel v. NSA*, 673 F.3d

902, 907 n.3 (9th Cir. 2011) (internal quotation marks and citation omitted).

III. Whether the district court erred in holding that the California False Claims Act (CFCA) counts had to be dismissed, in their entirety, under the pertinent state statute of limitations.

Defendants argued in a prior motion for judgment on the pleadings (Doc. 89) that the CFCA claims were time-barred under the pertinent statute of limitations. The district court agreed. Doc. 104 (EOR 41). "The correctness of the district court's dismissal on statute of limitations grounds is a question of law reviewed *de novo*." *Mann v. American Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003).

IV. Whether the district court erred by striking the CFCA counts from the Third Amended Complaint.

Defendants argued in their motion to dismiss (Doc. 125) that the district court should strike the state CFCA counts, which had previously been dismissed but were realleged for precautionary purposes, namely to preserve of the claims for appeal. The district court struck the state CFCA counts. Doc. 138 (EOR 5). "We review the district court's decision to strike matter pursuant to Federal Rule of Civil Procedure 12(f) for

abuse of discretion." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). The question whether Rule 12(f) authorizes the district court to strike the particular matter at all is a "purely legal issue [reviewed] *de novo*." *Id.*

STATUTES

The prohibition section of the False Claims Act provided, at the time this suit was filed (*see infra* note 1), as follows:

> (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) (quoted by district court, Doc. 138 at 7 n.6 (EOR 11).

The statute of limitations for *qui tam* actions under the state false claims statute provided prior to 2009 as follows:

> § 12654. Limitations period; Activity prior to effective date; Burden of proof; Guilty verdict as estopping defendant
>
> (a) A civil action under Section 12652 may not be filed more than three years after the date of discovery by the official of the state or political subdivision charged with responsibility to act in the circumstances or, in any event, no more than 10 years after the date on which the violation of Section 12651 is committed.
>
> (b) A civil action under Section 12652 may be brought for activity prior to the effective date of this article if the limitations period set in subdivision (a) has not lapsed.
>
> . . .

Cal. Gov't Code § 12654 (1996).

STATEMENT OF THE CASE

Nature of Case

This is a whistleblower *qui tam* suit under the federal False Claims Act, 31 U.S.C. § 3730, and the corresponding California False Claims Act, Cal. Gov't Code § 12652(c). Essentially, the plaintiff (called a "relator" in a *qui tam* case) alleges that the defendants Planned Parenthood of Los Angeles (PPLA) *et al.* illegally overbilled the state, and through it the federal government, to the tune of tens of millions of dollars.

Course of Proceedings

Victor Gonzalez, relator (plaintiff), filed his suit under seal, as required by the False Claims Act, on Dec. 19, 2005. 31 U.S.C. § 3730(b)(2).[1] The suit named as defendants the California affiliates of Planned Parenthood (PP), the statewide PP lobbying entity, several PP officials, and unnamed Doe defendants (hereinafter collectively referred to as "PP"). After extended consideration, *see* § 3730(b)(3), the United States Government on Nov. 1, 2007, declined to intervene, *see* § 3730(b)(4)(B). Doc. 26. The district court subsequently unsealed the case as to all documents beginning with the federal government's notice of declination. Doc. 27. On May 1, 2008, relator filed a First Amended Complaint (FAC). Doc. 31 (EOR 187). The FAC contained twelve separate counts. Counts I-III were brought under the FCA. Counts VIII-XI were brought under the California False Claims Act (CFCA). Gonzalez did not defend the

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[1] The False Claims Act (FCA) was amended by a bill signed into law on May 20, 2009. Pub. L. 111-21, Fraud Enforcement and Recovery Act of 2009. The private *qui tam* section of the FCA, 31 U.S.C. § 3730, was not amended, with the exception of § 3730(h), the retaliation provision, which is not at issue here. The Patient Protection and Affordable Care Act also amended the FCA, but those amendments are not retroactive. *Graham County Soil & Water Conservation Dist. v. United States*, 130 S. Ct. 1396, 1400 n.1 (2010).

remaining counts, which were brought on other theories, and those counts are no longer at issue.

On July 9, 2008, PP filed the first of a series of (thus far) four dispositive motions, in each of which PP would successively introduce some new legal argument(s) not previously pressed as grounds for dismissal. (The basis for the district court's latest dismissal, currently under review, was not argued until the fourth PP dispositive motion.) This first motion was a motion to dismiss. Doc. 33. PP argued a want of jurisdiction (under the public disclosure provisions of the FCA) and, on the merits, a lack of scienter and – because of the supposed ambiguity of the rule against billing above cost – a lack of falsity. *Id*. PP did not argue a lack of particularity, statute of limitations, lack of injury to the federal government, or a lack of alleged falsity beyond the ambiguity argument. *Id*. The district court granted the motion to dismiss on public disclosure grounds, without reaching the merits. Doc. 43.

The Ninth Circuit rejected PP's jurisdictional argument and sent the case back to the district court. *Gonzalez v. Planned Parenthood of Los Angeles*, 392 F. App'x 524 (9th Cir. 2010).

PP filed an answer in October of 2010, Doc. 76, and moved for judgment on the pleadings, Doc. 89. PP again argued a lack of scienter and (on account of supposed ambiguity) falsity, but this time added a lack of particularity in pleading fraud and a statute of limitations objection to the state claims. *Id*. PP still did not argue a lack of injury to the federal government or a lack of falsity beyond the ambiguity argument. *Id*. The district court held the state law claims barred by the statute of limitations. Doc. 104 (EOR 41). Regarding the FCA claims, the district court rejected the substantive defenses (lack of scienter and falsity on account of ambiguity) but, finding some lack of particularity in the First Amended Complaint (FAC), allowed Gonzalez to replead the federal FCA claim only. *Id*.

Gonzalez then filed a Second Amended Complaint (SAC). Doc. 105. This pleading realleged the FCA claims and, strictly for purposes of preserving the claims for appeal, realleged the state false claims counts as well. PP again filed an answer, Doc. 108, and again filed a motion for judgment on the pleadings – PP's third dispositive motion at the pleadings stage – this time seeking to dismiss in part and to strike in part. PP again

argued lack of particularity but this time added a lack of injury to the federal government for certain years. *Id*. PP still did not argue a lack of falsity beyond the (now abandoned) ambiguity argument. *Id*. The parties agreed 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: TAC, Doc. 120 (EOR 178). The district court approved, Doc. 121, and Gonzalez then filed the TAC, Doc. 122 (EOR 63). PP withdrew the motion directed to the SAC. Doc. 124.

PP next filed a fourth dispositive motion, namely, a motion to dismiss and strike (in part) the TAC. Doc. 125. PP again argued lack of particularity and lack of injury to the federal government for certain years, but added yet another new argument, namely, lack of falsity as such. *See also* Order (denying attorney fees), Doc. 157 at 2 (EOR 56) (describing falsity argument as "the new legal theory presented by Defendants in their motion to dismiss").

Notably, the argument that falsity was lacking from the TAC was

added at the very last minute to the motion to dismiss. *See* Supp'l McKaig Decl. p. 54 of 55 (Doc. 131-1) (EOR 60) (defendants' counsel listing intended arguments for purposes of meet-and-confer obligations, but not listing falsity); Mot. to Dismiss TAC at 11 n.7 (Doc. 125) (EOR 62) (noting, in footnote to end of falsity argument, that this argument was communicated to plaintiff on Sept. 12, 2011, the same date the motion was filed, for purposes of meet-and-confer obligations). Appellant Gonzalez flags this detail, not to suggest that the argument was included improperly – for purposes of efficiency, Gonzalez did not object to the belated meet-and-confer communication of the falsity argument – but to highlight that this was a brand new argument in support of dismissal, one that had not been pressed in any prior dispositive motion.

Disposition Below

The district court issued a tentative ruling and, after a hearing on June 25, 2012, *see* Tr. 1-19 (Doc. 155) (EOR 21-39), entered a minute order, Doc. 137 (EOR 20), followed by an order, Doc. 138 (EOR 5), granting dismissal. The district court ruled that the TAC did not sufficiently allege the element of falsity, and that leave to amend should not be granted. Doc.

138 (EOR 5). The district court also struck the state law claims. *Id*. The district court expressly did not reach the question whether the complaint lacked particularity under Rule 9(b), Fed. R. Civ. P. *See* Doc. 138 at 6 (EOR 10).

The district court entered judgment on July 18, 2012. Doc. 147 (EOR 3). Gonzalez filed a timely notice of appeal on July 23, 2012. Doc. 150 (EOR 1).

STATEMENT OF FACTS

The crux of Gonzalez's False Claims Act (FCA) (and corresponding state false claims act) suit is that numerous Planned Parenthood affiliates in California, including the one for which Gonzalez worked (PPLA), knowingly overbilled the state government, and through it the federal government, to the tune of tens of millions of dollars, for birth control drugs and devices provided to clients. In brief, instead of billing for these items "at cost," as legally required, PP sought reimbursement at exorbitantly marked-up "usual and customary" charges.

The magnitude of the overbilling is illustrated by exhibits attached to the Third Amended Complaint (TAC). Exhibit 6 (EOR 148), the DHS

audit report, shows, for the San Diego and Riverside PP affiliate, the actual cost of the items in question per facility during the audit period (parts of 2002-2004), the amount the state paid, and the amount of the excess payment over cost. For example, the Euclid Avenue Center PP 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. EOR 154. The Mission Valley Center PP 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. *Id.* And Exhibit 4 (EOR 139) includes a spreadsheet prepared by Gonzalez at the direction of his superior, which shows for the Los Angeles affiliate the actual cost of the particular birth control items, the amount the state paid, and the amount of the excess (mark-up) for a one-year period. For example, 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 reimbursement of $214,812.00. EOR 140. 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. *Id*.

Because the timing of the events is important to certain issues on appeal, Gonzalez provides the following chronology.

- **1970 to Present**: PP clinics bill California's Department of Health Services (DHS) their "usual charges" for oral contraceptives (and by implication, for other birth control drugs and devices), rather than at the lower rate of acquisition cost. TAC Ex. 3d, Planned Parenthood Affiliates of California, Inc. (PPAC) handout "AB 2151 (Jackson) Q&A," p. 2 (EOR 135). DHS in turn seeks reimbursement from the federal government, bringing this matter within the ambit of the FCA.
- **May 1997 - Jan. 1998**: In correspondence with Kathy Kneer, Executive Director of PPAC, the California Department of Health Services (DHS) repeatedly instructs PP that it may seek reimbursement for drugs, specifically oral contraceptives, only at acquisition cost, not at "usual and customary" rates. TAC Exs. 2a, 2b, 2c, 2d (EOR 123-30). PP subsequently makes deliberate efforts

to conceal this overbilling from state officials, TAC ¶¶ 69, 70, 122 (EOR 87-88, 105);[2] meanwhile, PP clinics continue billing DHS at their "usual and customary" rates, TAC Ex. 3d, PPAC handout "AB 2151 (Jackson) Q&A," p. 4 (EOR 137). "This has been the practice of all PP affiliates since the FPACT program was inaugurated in 1997," TAC Ex. 7 (EOR 160). *See also* EOR 228-42 (background on FPACT). (The overbilling here proceeded through a fiscal intermediary, TAC ¶ 46 (EOR 77-78), and, in turn, through either Medi-Cal or FPACT in conjunction with Medi-Cal, TAC ¶¶ 28, 32 (EOR 71-72). The details of the funding stream are not pertinent to the present appeal.)

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[2] 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 . . . .'" Doc. 138 at 3 (citing TAC ¶ 42, Ex. 3(a)). To the contrary, the complaint alleges that PP sought to *conceal* its overbilling. TAC ¶¶ 69, 70, 122 (EOR 87-88, 105). The "open acknowledge[ment]" only came *after* PP was caught red-handed. *See* TAC Ex. 3a (EOR 131) (letter dated Aug. 9, 2004, months after the state's first audit visit on Jan. 26, 2004, TAC Ex. 5 (EOR 143). *See also* Tr. 6-9 (EOR 26-29) (informing district court judge of this error). While PP never *denied* its mark-up practice, TAC ¶ 124 (EOR 106), 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 (EOR 106-07) (admissions in 2004 and later).

- **Dec. 9, 2002**: PPLA hires relator P. Victor Gonzalez as Chief Financial Officer (CFO). TAC ¶ 3 (EOR 65).
- **Jan. 26, 2004**: The California DHS visits PP of San Diego and Riverside Counties (PPH), initiates an audit focusing on oral contraceptive purchases and reimbursement rates, and announces a plan to audit all state PP affiliates. PPH's President and CEO Mark Salo emails this information to other PP affiliates, including Martha Swiller of PPLA. Swiller forwards the Salo email to PPLA staff, including CEO Mary-Jane Waglé and CFO Victor Gonzalez, with the message, "This is bad." TAC Ex. 5 (EOR 143).
- **Jan. 27, 2004**: DHS Audits and Investigations representative Stephan J. Edwards, Chief of the Medical Review Section - South III, e-mails Bob Coles, Vice President and CFO of PPH, recounting Coles's admission that PPH bills at its "usual and customary" rates rather than at product acquisition cost. Edwards agrees to "pend" this part of the audit temporarily in light of objections from PP attorney Lilly Spitz, Chief Legal Counsel, California Planned Parenthood Education Fund. TAC Ex. 14 (EOR 169).

- **Feb. 5, 2004**: Spitz e-mails PP affiliate CEOs and CFOs, including Gonzalez, to report that Kim Belshe of DHS "declined to halt the cost audit at this time." Spitz states that PPAC "needs some up-to-date information from you" including a "[c]omplete list of oral contraceptives and contraceptive supplies, the purchase price under nominal pricing, and the amount billed to Medi-Cal." PPAC's Kneer forwards the Spitz e-mail to Gonzalez and other PP staff, adding her own message. Kneer reports that "Kim" (Belshe) "did state that DHS legal office has advised her that the law requires us to bill at acquisition cost." Kneer opines 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." Kneer adds:

> We have asked each affiliate to provide our office with information about our affil[ia]tes['] billing practice for nominal and 340B priced contraceptive methods. I will assure you that this information will not be used publicly except in a state aggregate and to assure we are accurately reflecting the de[]pth of the impact and to insure we are fully covering ourselves with any statute change. . . .
> . . . .
> . . . 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 (EOR 176-77).

- **Feb. 6, 2004**: PPLA CEO Waglé forwards Kneer's Feb. 5 e-mail to "PPLA Senior Staff" and identifies Gonzalez as the individual assigned to provide the requested "cost impact information." TAC Ex. 10 (EOR 176).
- **Feb. 18, 2004**: PPLA CEO Waglé e-mails Gonzalez her revised version of Gonzalez's draft Finance Report, now "[r]eady to go out with attachments," adding "Go for it!" The revised version admits that PP affiliates bill the state at their "usual and customary" rates and have done so at least "since the FPACT program was inaugurated in 1997." TAC Ex. 7 (EOR 158, 160).
- **Feb. 20, 2004**: Gonzalez e-mails PPLA's outside accountant Tom Schulte at RBZ, attaching the spreadsheet. Gonzalez explains the problem of PPLA's "hefty markup over cost" being "proscribed by DHS regulations," with a consequent multi-million dollar impact. Gonzalez proposes 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 (EOR 139).

- **Mar. 9, 2004**: PPLA fires Gonzalez. TAC ¶ 3 (EOR 65).
- **Aug. 9, 2004**: The California legislature's Senate Health and Human Services Committee releases an analysis of AB 2151, the bill purportedly designed to solve PP's billing illegality. Doc. 34-3, Ex. 5 (EOR 247-53). This legislative analysis notes that "[e]xisting regulations . . . [p]rovide that reimbursement of licensed community clinics and free clinics under the Medi-Cal program for take-home drugs shall not exceed the amounts payable for drug ingredient costs established by DHS" and allow "no dispensing fee or markup," *id.* (EOR 248).
- **Nov. 19, 2004**: The California DHS releases its audit report on Planned Parenthood of San Diego and Riverside Counties (PPH). The audit covers two periods, viz., July 1, 2002 to June 30, 2003 for two billing codes (for oral contraceptives and contraceptive barrier methods), and Feb. 2, 2003 to May 30, 2004 for a third billing code (for Plan B products). 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 (EOR 148-57). An accompanying letter from Stan Rosenstein, Deputy Director, Medical Care Services at DHS, purports to excuse PP's overbilling and states 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 (EOR 244-45). No mention is made of the previously planned audits of all other PP affiliates in California.

- **Nov. 18, 2005**: Gonzalez, through counsel, alerts the United States Attorney General (AG) *et al*. to the fraudulent overbilling. TAC Ex. 10 (EOR 171-73).
- **Nov. 21, 2005**: Gonzalez, through counsel, supplies supplemental information and documents to the AG *et al*. TAC Ex. 10 (EOR 174-75).
- **Dec. 19, 2005**: Gonzalez files his *qui tam* suit under the FCA and the California false claims act in federal district court.

SUMMARY OF ARGUMENT

The district court ruled that the Third Amended Complaint (TAC) does not allege falsity. The TAC, however, alleges that the defendants illegally overbilled the state, and through it the federal government, for birth control drugs and devices. That illegal overbilling is itself "false". And if that were not enough, each submission from the PP defendants that listed a marked-up value in the place where the law required "acquisition cost" to be listed was false in that it misrepresented the "cost" at issue. And if even that were not enough, each such submission either expressly or impliedly certified – falsely – that the amounts for which PP sought reimbursement were the "cost" amounts to which it was entitled. This suffices for reversal of the judgment below. But even if the TAC were taken as not being sufficiently explicit about the falsity at issue, the remedy would be to allow Gonzalez to amend his complaint to address this brand-new defense argument, rather than dismiss the complaint without leave to amend.

As to the state law false claims counts, the district court held that PP's description in 1998 of its then-current overbilling practices sufficiently put

state officials on notice of the fraud, triggering the statute of limitations. Whether the circumstances actually put the state on notice is a question of *fact* that cannot serve as a basis for dismissal at the pleadings stage. As a matter of *law*, merely inquiring about the legality of one's current practices does not and should not be taken as rebutting the normal expectation that an entity will, having obtained the state's directions, conform itself henceforth to the law as explained by state officials. If the pleading did not sufficiently allege facts demonstrating that state officials could expect PP's compliance, the remedy would be to allow amendment of the complaint. (And in fact the TAC now explicitly alleges that PP sought to conceal its overbilling from state officials. TAC ¶¶ 69, 70, 122 (EOR 87-88, 105).) Finally, even if the statute of limitations defense were valid, it would not bar the state-law counts in their entirety, but only as to those claims accruing more than three years prior to the filing of the present lawsuit. Thus, the district court judgment must be reversed as to the state claims as well.

The district court also erred in striking the repleading, for preservation purposes, of these state claims. If the repleading was unnecessary, as PP

contends, then Gonzalez can (and does) appeal the state claims based upon his prior pleading. On the other hand, if repleading was necessary, then the striking of those counts was error. Either way, the state claims are properly before this Court now, and those claims should be reinstated. Moreover, the district court misused federal procedure by "striking" a claim instead of disposing of the claim on the merits.

ARGUMENT

This appeal addresses the sufficiency, at the pleadings stage, of a whistleblower's *qui tam* suit under the federal False Claims Act and its state statutory counterpart. The district court erroneously dismissed both sets of claims. This Court should reverse the judgment below and reinstate these claims. The standard of review for each issue is listed *supra* pp. 4-6.

I. THE THIRD AMENDED COMPLAINT ALLEGES FALSITY.

The district court erred by holding that the TAC does not allege falsity.

A. Illegal Overbilling is an Archetypal False Claim.

In the archetypal *qui tam* FCA case, a private party knowingly overcharges the government, rendering the claim for payment itself false

or fraudulent. In fact, the FCA was adopted precisely to respond to the problem of inflated invoices and other overbilling of the federal government. "The FCA was enacted during the Civil War with the purpose of forfending widespread fraud by government contractors who were *submitting inflated invoices,*" *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265 (9th Cir. 1996) (emphasis added). "The FCA was enacted during the Civil War in response to *overcharges* and other abuses by defense contractors.' . . . The purpose of the FCA was to combat widespread fraud by government contractors who were submitting *inflated invoices* and shipping faulty goods to the government." *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1047 (9th Cir. 2012) (emphasis added; citations and editing marks omitted).

Not surprisingly, then, this Court has repeatedly recognized that illegal overbilling is, as such, a classic example of a false claim, entirely apart from any false "certification" by the defendants. Several Ninth Circuit cases recognize this basic proposition:

a. *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006) (emphasis added): "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*."

b. *U.S. ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 995 (9th Cir. 2010) (emphasis added): "a typical FCA claim [alleges] that [defendant] *overcharged the government* for services provided . . . ."

c. *U.S. ex rel. Hopper v. Anton*, 91 F.3d at 1266 (emphasis added): "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."

See also United States v. Halper, 490 U.S. 435, 437 (1989) (overcharging Medicare program intermediary).[3] This "archetypal" falsity is

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[3] *See also United States v. Erickson*, 75 F.3d 470, 474 (9th Cir. 1996) (inflated billing scheme under Medicare); *U.S. ex rel. Schweizer v. Océ N.V.*, 677 F.3d 1228 (D.C. Cir. 2012) (charges inflated by failure to give government best price offered to other customers); *United States v. Warden*, 635 F.3d 866 (7th Cir. 2011) (Medicare and Medicaid charges inflated by billing for services not performed and "upcoding" services performed); *U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871 (D.C. Cir. 2011) (inflated invoices on government contracts); *cf. U.S. ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575 (4th Cir. 2012) (inflating loan portfolios eligible for government payments); *United States v. Gen. Dynamics Corp.*, 19 F.3d 770, 772, 775 (2d Cir. 1994) (inflated cost estimates in subcontract submitted for approval by the government).

conceptually distinct from theories of express or implied false certification. *E.g.*, *Ebeid*, 616 F.3d at 995. Hence, none of the additional requirements for stating a false *certification* claim apply.

The case at bar presents such an archetypal false claims suit: Gonzalez alleges that PP engaged in illegal billing mark-ups, namely for birth control drugs and devices. While it is true that the False Claims Act "is not *limited* to such facially false or fraudulent claims for payment," *Hendow*, 461 U.S. at 1170 (emphasis added), a relator is not *required* to have resort to alternative theories such as "false certification" or "promissory fraud," *see id.* at 1171. The PP defendants were obligated to comply with the law governing billing whether or not they certified that they would comply.

In an important concession, PP did not dispute that the provision of a bill for nonexistent or misdescribed goods is a factually false claim, without more. Mot. to Dismiss TAC at 9 (Doc. 125); Reply at 2 (Doc. 131). This concession dooms PP's entire argument against falsity, as illustrated by the following hypothetical.

Suppose a government contracts to reimburse a private entity, at cost,

for providing staplers to needy grade school children. The entity buys staplers at one dollar apiece, then distributes 10 staplers (total cost = $10) to needy children, but bills the government for $100 (the cost of 100 staplers). Defendants acknowledge that billing for 100 staplers (false quantity) is factually false: only 10 staplers were provided; the remaining 90 were nonexistent. Billing for the staplers at a cost of $10 each, instead of $1 each (false price), equivalently bilks the government out of $90. In one scheme, the falsity goes to the *quantity* of goods; in the other, the falsity goes to the *cost* of the goods. This detail makes no legal difference as to the existence of falsity.

Here, of course, the "goods" are birth control drugs and devices, not staplers, the recipients are patrons of defendants' clinics, not (one hopes) grade school children, and the dollar amounts and quantities are much, much larger. *See, e.g.*, TAC Ex. 4 (EOR 139-42). But the analysis is the same. If falsity as to quantity is false under the FCA, as the PP defendants concede, then falsity as to price is likewise false.

To be sure, Gonzalez does not claim that FCA liability is triggered by the mere violation of any rule or regulation. *Liability* requires much

more. For liability to attach, the claim must be false under relevant regulations and law, *and* the claim must be tied to a request for payment, *and* the claim must be submitted with the requisite intent. *See, e.g., U.S. ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 388 (1st Cir. 2011) (rejecting argument for judicially imposing new restriction on FCA liability "because other means exist to cabin the breadth of the phrase 'false or fraudulent' as used in the FCA," namely scienter and materiality). The question here is not ultimate liability, however, but falsity. Whether a claim is *false* is governed by whether the claim complies with the relevant law or regulation.

This Court has held that the test for falsity is completely objective – i.e., the "question of 'falsity' itself is determined by whether [defendants'] representations were accurate in light of applicable law." *U.S. ex rel. Oliver v. The Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999). Moreover, this Court has held that a defendant collecting federal funds has an "obligation to be familiar with the legal requirements for obtaining reimbursement . . . and to ensure" the claim is "in accordance with all laws." *United States v. Mackby*, 261 F.3d 821, 828 (9th Cir. 2001). The

TAC alleges that PP, ignoring both the governing law and the direct instructions by the California government officials, knowingly submitted false claims because, in light of applicable law, PP was required to bill only for acquisition costs. TAC ¶¶ 51-52, 54 (EOR 78-80). That is sufficient to satisfy the falsity element.

The district court nonetheless held that illegal overbilling is not itself false: "the overcharging must be committed *in conjunction with a false statement* that is a lie." Doc. 138 at 8 (EOR 12) (emphasis added). That formulation, however, ignores not just the precedents discussed above, but the very text of the FCA statute itself. That statue describes three separate violations: (1) presentation of false claims, (2) use of false records or statements to get a claim paid, and (3) conspiracy to get a false claim paid. 31 U.S.C. § 3729(a) (text quoted by district court, Doc. 138 at 7 n.6 (EOR 11)). Only the second violation requires a false "statement" or record. The TAC asserted violations of each of these three prohibitions. *See* TAC Count I (presentation of false claims), II (use of false records/statements), III (conspiracy to get false claims paid) (EOR 109-11). So even if the district court were correct – which it was not – in its

assertion that there was no false statement alleged, that would only go to Count II of the TAC. And even that count still stands if the TAC sufficiently alleges use of false records, wholly apart from false statements.

The district court placed emphasis on its (mistaken) conclusion that PP demonstrated "consistent candor and truthfulness" about its billing mark-ups. Doc. 138 at 9 (EOR 13). The Court seems to have been of the view that (a) PP in effect told the government that, each time it submitted a dollar figure purportedly for "cost," it was actually submitting a dollar figure for "cost plus mark-up," and that (b) this consistent communication of the fact of overbilling somehow negates the falsity of the inflated claims as a matter of law. As a factual matter, the district court was mistaken: PP sought to *conceal,* not flaunt, its overbilling, *see supra* note 2.[4] *See also infra* § III (unreasonable to conclude, on facts alleged, that the state should have assumed or suspected PP would defy the law). As a

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[4] The district court also erred when it stated that "[a]t the hearing, Plaintiff's counsel clarified that Plaintiff's primary allegation of falsity is that Defendants 'hid' their billing practices . . ." Doc 138 at 8 (EOR 12). The transcript supports no such assertion. The primary allegation of falsity is rather that PP submitted marked-up charges instead of at-cost charges. Tr. 10-12 (EOR 30-32).

procedural matter, it was improper for the district court to construe the TAC against the plaintiff on the factual question whether the overbilling was concealed or notorious. "For the purposes of a motion to dismiss, we construe the pleading in the light most favorable to the party opposing the motion, and resolve all doubts in the pleader's favor." *Hebbe v. Pliler*, 627 F.3d 338, 340 (9th Cir. 2010). But in any event, whether PP told state officials that it was engaging in mark-ups or not, those mark-ups remain illegal overcharges. Telling state officials about the overbilling could not negate falsity as a matter of law unless government knowledge of the billing inflation were a defense to the falsity element. But government knowledge is not a defense[5] to the falsity element of a false claims charge, as the district court previously recognized, Doc. 104 at 9 (EOR 49), and as this Court's precedents make clear. *See*, *e.g.*, *U.S. ex rel. Butler v. Hughes Helicopters*, 71 F.3d 321, 326-27 (9th Cir. 1995) ("government knowledge is no longer on automatic bar to suit," though it may go to the scienter

[5] The district court protested that government knowledge was not a basis for its decision. Tr. 17, ll. 18-19 (EOR 37); Doc 138 at 13 n.8 (EOR 17). However, only the falsity element was at issue, so the district's court's reference to PP being open about its billing practices make no sense if the government's knowledge of those practices does not go to the falsity element.

element); *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1051 (9th Cir. 2012) (same); *U.S. ex rel. Hagood v. Sonoma County Water Agency [Hagood I]*, 929 F.2d 1416, 1421 (9th Cir. 1991) ("That the relevant government officials know of the falsity is not in itself a defense"); *U.S. ex rel. Oliver v. Parsons*, 195 F.3d at 463 ("the question of 'falsity' . . . is determined by whether [a defendant's] representations were accurate in light of applicable law"); *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").[6]

B. The Complaint Also Alleges "Legal Falsity".

The TAC's allegation of illegal overbilling is enough to warrant reversal of the judgment below. But there is more. Even aside from the archetypal overbilling false claim, this lawsuit could (though it need not) proceed on

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[6] If government knowledge were a defense, it would not help PP here: even under PP's version of the facts, only *state* officials were aware of the overbilling. Nowhere does the TAC even hint that federal officials were notified. *State* knowledge cannot be a defense to a fraud against the *federal* government. If it were, the federal government would have no remedy whenever collusive or negligent state officials kept the federal government in the dark.

a false certification theory.

As this Court has recognized, a false claims suit can also properly assert that a claim is false because the defendants certified, either expressly or implicitly, compliance with some condition that defendants subsequently violated. "Under both theories, it is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit. Likewise, materiality is satisfied under both theories only where compliance is a *sine qua non* of receipt of state funding." *Ebeid*, 616 F.3d at 998 (internal quotation and editing marks, and citation, omitted).

Here, the TAC sufficiently alleges falsity under either an express or an implied certification theory. The PP defendants signed a provider agreement, TAC ¶¶ 35-36 (EOR 73), obligating them (unsurprisingly) to comply with the governing billing rules. And each and every time the PP defendants submitted a charge to the billing intermediary that, rather than providing the "cost" of the item (as legally required), instead provided an inflated figure, TAC ¶¶ 51-52 (EOR 78-79), PP falsely represented that the number submitted reflected the "cost" rather than a

marked-up value. Whether such misrepresentations and violations of the provider agreements be deemed "express" or "implied" false certification, the certification is false, which suffices to satisfy the falsity element of an FCA claim.

It should be noted that this is not a case where a relator is trying to leverage violation of some collateral regulatory condition, such as the failure to submit a form identifying the number of veterans employed, *e.g.*, *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S. Ct. 1885 (2011), into the designation of every claim submitted as "legally false." Here, PP was violating *legal limits on the billing amounts themselves*, limits which by definition are material prerequisites to government payment of those amounts.

II. IN THE ALTERNATIVE, THE DISTRICT COURT SHOULD HAVE ALLOWED AMENDMENT OF THE COMPLAINT.

The district court also erred by not affording Gonzalez the opportunity to amend his complaint – if necessary – to respond to this new defense argument. "[A] district court should grant leave to amend . . . unless it determines that the pleading could not be cured by the allegation of other facts." *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995). "Dismissal

without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Jewel v. NSA*, 673 F.3d 902, 907 n.3 (9th Cir. 2011) (internal quotation marks and citation omitted).

The denial of leave here was "particularly egregious in light of the fact that [the plaintiff] had indicated, in good faith, that [he] was willing and able to establish with greater specificity" the supposedly missing element, *Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1106 (9th Cir. 2004) (citing *Doe*). Here, Gonzalez explicitly requested, in the alternative, leave to amend, explaining that he could spell out more details if the district court felt they were necessary to support the falsity element. Opp. at 18 (Doc. 27); Tr. 12, ll. 7-8 (EOR 32).

The district court denied leave on the grounds that Gonzalez had had a prior opportunity to amend. Doc. 138 at 13 (EOR 17). It is true that leave to amend may be denied where the plaintiff has "repeatedly failed to cure deficiencies." *Telesaurus*, 623 F.3d at 1003. But here, the objection in question – a supposed lack of falsity as such – had *never been pressed before*. Even as to the TAC, the PP defendants did not press a lack

of falsity as such as a defense except as a last-minute addition to their motion to dismiss. *Supra* pp. 11-12. Gonzalez cannot be faulted for failing to cure a defect that had not been argued in any previous motion to dismiss. Gonzalez's history of pleading amendments to address *other* asserted defects does not show an incapacity to cure a falsity argument that had not yet been made.[7]

III. THE DISMISSAL OF THE CALIFORNIA FCA COUNTS SHOULD BE REVERSED.

The district court held that Gonzalez's claims under the CFCA should be dismissed as time-barred. The district court erred for three reasons: first, it incorrectly held that, as a matter of law at the pleadings stage, this fact question about notice had to be resolved against Gonzalez; second, the district court allowed no chance for curative amendments to the complaint; and third, the district court erroneously dismissed all of the state claims, rather than just those falling outside the statutory

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[7] To hold otherwise would create perverse incentives, rewarding a defendant who holds arguments in reserve, brings them out one at a time, and then objects that the plaintiff has had too many chances already. That is what PP has done here, with its ongoing conveyor-belt succession of new arguments, *supra* pp. 9-11, keeping this case at the pleading stage seven years after its filing.

limitations period.

The district court correctly identified the applicable statute of limitations. The pre-2009 version of the CFCA, which applies to Gonzalez's claims, provides that a civil action must be filed not "more than 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). California courts have defined "discovery" 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, 336 (2001) (emphasis omitted).

Whether state officials were sufficiently on notice so as to trigger the statute of limitations is a question of historical fact. As a fact question, it should not be resolved against Gonzalez at the pleadings stage unless the complaint cannot plausibly be construed (or amended) to avoid this affirmative defense.

The ultimate factual question is whether officials at DHS, the state entity responsible for acting with regard to false claims for overbilling of

contraceptives, were "on notice to inquire about a possible false claim," *id.* at 954-55, 112 Cal. Rptr. 2d at 340, as a result of a series of letters between PP's Kathy Kneer and DHS officials starting in 1997. These letters, however, provide nothing more than information about practices of the Planned Parenthood clinics up to that point, requests for clarification about the proper application of state laws, and responses to those requests by DHS. TAC Exs. 2a-2d (EOR 123-30); PP Answer to FAC, Ex. A, Doc. 76 (EOR 181-86). For example, the DHS letter to Kneer dated October 3, 1997, states, "You have indicated that you *were* billing oral contraceptives at 'usual and customary'. . . ." TAC Ex. 2b (EOR 124) (emphasis added). More importantly, Kneer expressly indicated that the purpose of these communications was to "clarify[] this issue" for resolution. TAC Ex. 2c (EOR 127) (emphasis added).

The district court acknowledged that, "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." Doc. 104 at 11 (EOR 51). The district court, however, found one letter to be an exception: a

letter from Kneer that describes how "our clinics *are* billing," *id.* at 12 (EOR 52) (quoting Kneer letter of January 14, 1998), which in context referred to the overbilling at issue here. (The letter is Ex. A to PP's Answer to the FAC. EOR 181-86.) While this letter might help resolve the factual matter of "notice" at the *summary judgment* stage or *at trial*, after proper discovery, it does not so definitively resolve the question as to warrant a ruling at the *pleadings* stage.

First, the letter concludes, "We would like to resolve this issue as soon as possible." EOR 186). This statement evidences a desire by PP to *comply* with, not *defy*, the law.

Second, this letter is apparently not the end of the story. This letter does not purport to reveal what PP would do *going forward*. Defendants claim there was some sort of "verbal but not written" approval by DHS, TAC Ex. 7 (EOR 160), but the contents of that exchange are yet to be discovered. Did defendants quell any suspicion of future overbilling? The same document indicates that, in PP's words, "DHS did not elect to change the language in the regulations and allowed [PP] affiliates to continue their billing practice." *Id*. What does this mean? Did the state officials

cave in to PP's billing desires, or did the officials instead stand firm – "not elect to change the language" – expecting PP to obey the law? If evidentiary development identifies a point at which DHS in fact did have notice as to *future* billing practices, then that could be the trigger point for the statute of limitations as to the state claims. But if on the contrary defendants took steps to conceal any overbilling, as the TAC alleges, TAC ¶¶ 69-70, 122 (EOR 87-88, 105), it is not reasonable to say the state officials were on notice as to the claims made during the period post-dating the final Kneer letter. The evidence at the current pleadings stage is too incomplete to absolve PP definitively, on statute of limitations grounds, from liability on the state claims. This is, in short, an unresolved question of fact that must await resolution at a later stage of the proceedings.

Third, the argument that these communications should have put DHS on notice that defendants would continue to engage in improper billing practices – after requesting and receiving express clarification from DHS as to proper application of the law – also strains logic. The natural inference to be drawn from these letters is that once the PP defendants

received clarification from DHS on this issue – and no assurance whatsoever that marked-up billing was permissible – their conduct would thenceforth comply with the requirements of the applicable laws and regulations. As the Kneer letter of Jan. 14, 1998 states, the point of the exchange of letters was to "resolve this issue," EOR 186, implying that PP intended to comply with the law, not defy it. To conclude that the information provided in these letters was notice of defendants' intention to engage henceforth in illegal overbilling would require not only an inherent distrust of the citizenry but also clairvoyance on the part of government officials.

Once DHS officials provided Kneer with clarification as to the manner in which defendants were legally required to bill the government, they were entitled to presume, based on Kneer's representations, that defendants would act in accordance with the instructions provided. The state therefore cannot be deemed, at this stage, as a matter of law, to have had knowledge of any "facts that would lead a reasonably prudent person to suspect" defendants of submitting false claims for reimbursement after receiving explicit billing instructions from state officials. *Debro*, 92 Cal.

App. 4th at 950, 112 Cal. Rptr. 2d at 336 (emphasis omitted).[8] The contrary rule would have the destructive consequence of equating any citizen's inquiries with police or prosecutors, regarding the law governing their conduct and their possible need to alter their conduct, with creation of suspicion that the citizen would then proceed to violate the law despite the clarification. This Court should reject such a jurisprudence of distrust.

The state audit in 2004, by contrast, put the state on notice that defendants were violating the law. However, plaintiff filed the present lawsuit in 2005, well within three years of that audit. The statute of limitations therefore does not bar the CFCA claims.

In the alternative, if the pleading at the time the FAC did not sufficiently allege facts demonstrating that state officials could expect PP's compliance with the law, the remedy would be to allow amendment of the complaint to add any factual details deemed necessary. For example, the subsequently filed TAC explicitly alleges that PP sought to conceal its overbilling from state officials. *Supra* note 2. This allegation

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[8] For the same reason, defendants cannot be said to have disclosed the false claim to the state for purposes of Cal. Gov't Code § 12651(a)(8) (the section invoked by Count VI of the TAC).

is consistent with the factual contention that state officials were kept in the dark – and thus not put on notice – of PP's intent to disregard express directions from state officials. This Court should not hold that, as a matter of law and regardless of what the facts will ultimately show, state officials were irrefutably put on notice that PP would proceed – contrary to what one normally expects of persons inquiring with state officials in search of legal guidance – to disregard state instructions and defy state law on billing limits.

Finally, even if the earlier letters did suffice to trigger the statute of limitations, that statute would only bar claims for illegal billing submitted more than three years prior to the date of the civil action.

> When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period. The continuing accrual rule has been applied in a variety of actions involving the obligation to make periodic payments under California statutes or regulations. In instances of long-standing statutory violations, the continuing accrual rule effectively limits the amount of retroactive relief a plaintiff or petitioner can obtain to the benefits or obligations which came due within the limitations period.

Hogar Dulce Hogar v. Community Development Comm'n, 110 Cal. App. 4th 1288, 1295-96, 2 Cal. Rptr. 3d 497, 502 (2003) (citations omitted). "[E]ach

deficient payment created a separate and distinct violation, triggering the running of a new limitations period." *Jones v. Tracy School Dist.*, 27 Cal. 3d 99, 105, 611 P.2d 441, 444, 165 Cal. Rptr. 100, 103 (1980). "It is settled that in such cases each deficient payment constitutes a separate violation triggering the running of a new period of limitations, and hence . . . [a plaintiff] can recover . . . those payments which accrued within the period of the applicable statute of limitations preceding the filing of his complaint." *Green v. Obledo*, 29 Cal. 3d 126, 141, 624 P.2d 256, 265, 172 Cal. Rptr. 206, 215 (1981). The present suit was filed on Dec. 19, 2005; hence, those false claims which PP made on or after Dec. 19, 2002, would not be barred by the statute of limitations. At a minimum, the decision below has to be reversed as to those claims.

IV. THE ORDER STRIKING THE CALIFORNIA FCA COUNTS FROM THE TAC SHOULD BE REVERSED.

The district court also erred by striking the state claims from the TAC.

PP argues that counts dismissed without leave to amend in a prior pleading *need not* be realleged in order to appeal that dismissal at a later point, and some of this Court's cases indicate as much. *Parrino v. FHP, Inc.*, 146 F.3d 699, 704 (9th Cir. 1998) (where certain claims are dismissed

without leave to amend, plaintiff need not include those claims in an amended complaint to avoid waiving those claims). *Accord Mayshack v. Gonzales*, No. 09-55771, 437 F. App'x 615, 2011 U.S. App. LEXIS 11907, at *5-*6 (9th Cir. June 9, 2011). Assuming PP correctly reads the case law, Gonzalez properly brings the present appeal of the state law claims based upon the prior pleading (the FAC), and the question whether such claims *may* be realleged in the TAC as a precautionary matter is thus moot. On the other hand, if PP's assessment of the law is incorrect, and repleading is necessary for purposes of preservation, then Gonzalez properly preserved his state law claims by repleading them in the TAC, in which case the district court erred by striking the realleged counts. Either way, the state claims are properly before this Court and should be reinstated for the reasons set forth *supra* § III.

This Court therefore need not resolve any tension between the language in *Parrino* and *Mayshack*, suggesting there is no need to replead here, and the language in cases like *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), and *New York City Employees' Retirement System v. Jobs*, 593 F.3d 1018, 1025 (9th Cir. 2010), suggesting that a

failure to replead might waive the claims. *See also Lacey v. Arpaio*, 649 F.3d 1118, 1137 (9th Cir. 2011) ("By filing an amended complaint, plaintiff waives any error in the ruling to the original complaint") (internal quotation marks omitted); *Sechrest v. Ignacio*, 549 F.3d 789, 804 (9th Cir. 2008) ("Generally, amendment of a complaint or petition constitutes waiver of any omitted arguments or claims from previous versions of the complaint or petition") (citing *Forsyth*).

In any event, in light of this ambiguity in the governing precedent (and absent definitive word from the U.S. Supreme Court, which of course is not obligated to follow Ninth Circuit case law), Gonzalez's express retention of dismissed claims for purposes of appeal preservation was an exercise in reasonable prudence and precaution. "Counsel were not required to risk forfeiting their client's right to appeal in order to avoid sanctions." *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 812 (9th Cir. 1994). To say that retention in an amended pleading might not be *necessary* is not to say that it is *forbidden* in the exercise of sound judgment. Especially where, as here, the precedents are in tension, "counsel's decision to err on the side of

caution cannot be faulted," *id*.

The TAC clearly labels the state law claims as "Retained by Relator for purposes of appeal." The TAC makes clear that Gonzalez reserved the right to pursue the matter on appeal, as he has now done. Defendants suffered no prejudice from this precautionary course of action. The district court erred by striking these allegations regardless of which version of Ninth Circuit precedent was correct.

The district court's order striking the state claims from the TAC also should be reversed for an independent reason, namely because it was in improper use of Rule 12(f), Fed. R. Civ. P. In *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970 (9th Cir. 2010), the Ninth Circuit recently explained the limited role of a motion to strike under Rule 12(f):

> Rule 12(f) of the Federal Rules of Civil Procedure states that a district court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

618 F.3d at 973.

The district court held that the state claims listed in the TAC for purposes of preservation were "immaterial," under Rule 12(f), Doc. 138 at 14 (EOR 18), because they were "immaterial to the remaining federal FCA

claims," *id*. But independent claims are always "immaterial" to other claims, so this rationale makes no sense. In effect, the district court held that the state claims were immaterial *because they had been dismissed*. But this treats Rule 12(f) as an authority to dismiss (again) claims found meritless, which is not the role of Rule 12(f).

In *Whittlestone*, the Ninth Circuit warned of the danger of misusing Rule 12(f) in this way:

> . . . Handi-Craft's 12(f) motion was really an attempt to have certain portions of Whittlestone's complaint dismissed or to obtain summary judgment against Whittlestone as to those portions of the suit – actions better suited for a Rule 12(b)(6) motion or a Rule 56 motion, not a Rule 12(f) motion. *Compare Yamamoto v. Omiya*, 564 F.2d 1319, 1327 (9th Cir. 1977) ("Rule 12(f) is 'neither an authorized nor a proper way to procure the dismissal of all or a part of a complaint.'") (citing 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1380, at 782 (1969)), *with Rutman Wine Co. v. E.&J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("The purpose of [Rule] 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints . . . .").
>
> Were we to read Rule 12(f) in a manner that allowed litigants to use it as a means to dismiss some or all of a pleading (as Handi-Craft would have us do here), we would be creating redundancies within the Federal Rules of Civil Procedure, because a Rule 12(b)(6) motion (or a motion for summary judgment at a later stage in the proceedings) already serves such a purpose.
>
> Moreover, Rule 12(f) motions are reviewed for "abuse of discretion," whereas 12(b)(6) motions are reviewed *de novo*. Thus,

> if a party may seek dismissal of a pleading under Rule 12(f), the district court's action would be subject to a different standard of review than if the district court had adjudicated the same substantive action under Rule 12(b)(6). Applying different standards of review, when the district court's underlying action is the same, does not make sense.
>
> We therefore hold that Rule 12(f) does not authorize district courts to strike claims for damages on the ground that such claims are precluded as a matter of law.

618 F.3d at 974-75 (footnote and citations omitted).

Here, PP could easily have moved to dismiss the state claims under Rule 12(b)(6), citing the district court's previous dismissal of the state claims as authority. Instead, PP invoked Rule 12(f) for the same purpose, and the district court endorsed the misuse of that rule. This Court should reverse the district court on this grounds as well.

CONCLUSION

This Court should reverse the judgment of the district court as to the federal FCA claims and the state CFCA claims, and remand for further proceedings.

Respectfully submitted,

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December 27, 2012

STATEMENT OF RELATED CASES

Relator Gonzalez, appellant here, is not aware of any related cases pending in the Ninth Circuit.

Form 8. Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 12-56352

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief*

I certify that: **(check appropriate option(s))**

X 1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

X Proportionately spaced, has a typeface of 14 points or more and contains 10,395 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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__ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

__ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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__ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

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Dec. 27, 2012
Date

s/ Walter M. Weber
Signature of Attorney or
Unrepresented Litigant

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U.S. Court of Appeals Docket Number: 12-56352

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on Dec. 27, 2012.

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