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

REPLY BRIEF OF APPELLANT

JACK M. SCHULER*
SAM D. EKIZIAN
SCHULER, BROWN & EKIZIAN
[redacted]

EDWARD L. WHITE III
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

JAY ALAN SEKULOW
STUART J. ROTH
WALTER M. WEBER
Lead Counsel
TIFFANY N. BARRANS
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

*Not admitted this jurisdiction

Attorneys for Plaintiff-Appellant

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INTRODUCTION

The classic false claim is where a party knowingly and unlawfully bills the government at inflated rates. That is exactly the claim here.

Appellant Gonzalez's opening brief explains why this Court should reverse the judgment of the district court and reinstate this *qui tam* action under the federal False Claims Act (FCA) and its California state statutory counterpart. In essence, this suit asserts that defendants Planned Parenthood Los Angeles *et al.* (collectively, "PP") bilked the federal (and state) government out of tens of millions of dollars by knowingly and unlawfully inflating its charges for birth control drugs and devices (specifically, billing for these items at its "usual and customary" rates instead of "at cost," as legally required).

In its answering brief, PP takes the position that no FCA action can lie against PP for PP's illegal overbilling, no matter how this case is pleaded. PP Br. at 38 ("there is no amendment Gonzalez could make to sufficiently allege falsity"). The heart of PP's argument is that "violation[s] of the laws governing billing" in federally funded programs constitute "mere regulatory violations [which] do not give rise to a viable FCA action." PP

Br. at 47. To the contrary, knowingly submitting unlawful claims for money represents the core target of the False Claims Act. This Court should reject PP's attempts essentially to do away with the FCA in the context of illegal billing. This Court should reverse the district court's judgment dismissing the federal FCA claim in this case.

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. As explained in Gonzalez's opening brief and in this reply, this Court should reverse as to those claims as well.

REPLY TO APPELLEES' STATEMENT

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). The plaintiff Victor Gonzalez (called a "relator" in a *qui tam* case) alleges that the defendants Planned Parenthood of Los Angeles (PPLA) *et al.* ("PP") knowingly submitted unlawfully inflated bills to the state, and through it the federal government, to the tune of tens of millions of dollars.

Gonzalez's opening brief accurately lays out the pertinent facts, and PP has not taken issue with any part of Gonzalez's statement. PP's own statement of the facts and proceedings contains an important concession, but unfortunately is incomplete and in places inaccurate or misleading. The following points merit particular mention.

1. PP concedes the billing mark-ups: PP does not dispute that, in billing the state and federal government for birth control drugs and devices, PP used marked-up prices instead of acquisition cost. PP Br. at 8. *See also* Gonzalez Br. at 13-15 (documenting enormous magnitude of these mark-ups, both relative to the actual costs and as gross amounts).

2. Distinct time periods: PP misleadingly blurs the chronology of this case. In fact, there are three distinct time periods relevant to the state statute of limitations issue (*infra* § III).

First, from May 1997 to Jan. 1998, PP and state officials with the California Department of Health Services (DHS) engaged in an exchange of correspondence. Gonzalez Br. at 15; EOR[1] 123-30, 181-86. In that exchange, DHS representatives repeatedly informed PP that it must bill

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[1] EOR refers to Appellant's Excerpts of Record.

the government "at cost," *not* at a marked-up "usual and customary" rate, for birth control drugs and devices. PP in its letters argued for the marked-up rate, and admitted this had been its practice through the time of the correspondence, but insisted that it sought to "clarify[] the issue," EOR 127, and "would like to resolve this issue as soon as possible," EOR 186. At no point in these letters, however, did PP suggest that it would continue billing at marked-up rates regardless of DHS's guidance; nor did PP intimate that PP would defy the DHS interpretation of the governing billing requirements.

Second, from Jan. 1998 through Jan. 2004, despite the DHS instructions to the contrary, PP continued billing at the unlawful marked-up rate, but made efforts to conceal this practice from the state. Gonzalez Br. at 15-16. There is no allegation (or, at this point, evidence) that PP was somehow "open" or "candid" with the state about its billing practices during this six-year period.

Third, in Jan. 2004 the state caught PP's overbilling red-handed through an audit of one of PP's affiliates. Gonzalez Br. at 17-21. PP sought through its political contacts to quash that audit as well as future

audits. *Id*. at 17-18. (PP was partially successful. Although the initial audit was completed, there were no audits of other affiliates, and the state declined to require repayment of the $5.2 million dollars which it found PP had overbilled. *Id*. at 20-21.) PP decided to address the matter "quietly . . . within the administration" and specifically directed affiliates not to take any "public action." EOR 177. PP ultimately pursued a legislative remedy, and in lobbying for that remedy admitted that it had been billing at marked-up rates all along. EOR 137.

In its brief in the present appeal, PP blurs the first and third time periods together, PP Br. at 7, and completely ignores the intervening six years of concealment of its unlawful billing practices. (PP also claims that "[t]he state never responded to PP's Jan. 14, 1998 letter." PP Br. at 8. This detail is not (yet) in the record and may or may not be true.) Thus, contrary to PP, PP Br. at 7, 19, 20 n.4, the complaint does *not* allege, and the record does *not* show, that PP "openly" or "candidly"informed the state of PP's ongoing overbilling in the teeth of contrary DHS instructions.

3. No repudiation of "false certification" theory: Gonzalez never disclaimed the "false certification" theory under the FCA. PP repeatedly asserts that Gonzalez "expressly disavowed" (PP Br. at 2), "rejected" (*id.* at 3), "forswore" (*id.* at 24), "affirmatively abandoned" (*id.* at 24), or "affirmatively disavowed" (*id.* at 1, 40) the false certification theory of falsity. This is flatly incorrect. All along, Gonzalez has argued that this case can proceed as a classic false billing case, and thus there is *no need* for resort to alternative theories like false certification. To say that resort to a false certification theory is "not required" (PPER[2] 181) is not to *repudiate* that theory as an alternative model. And in fact Gonzalez has explained that his FCA claims could – though they need not – proceed under a false certification theory as well. *E.g.*, Plaintiff's Opp. to Defts' Mot. for Att'y Fees at 9-10 (Doc. 146); Gonzalez Br. at 33-35.[3]

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[2] PPER refers to Appellees' Excerpts of Record.

[3] PP also cites an exchange in which PP's attorney Matthew Umhofer and the district court agreed *with each other* that Gonzalez had "disavowed" the legal falsity theory. PP Br. at 25-26. Gonzalez's counsel was not party to that exchange, did not express agreement, and was in fact prevented by the district court from responding further. *See* EOR 38 ("COURT: Okay. Well, I don't have questions. And you have nothing to rebut that Mr. Umhofer just said, Mr. Weber. So . . . [t]his will be my ruling. . . .")

4. No prior PP challenge to falsity as such: As explained in the opening brief, Gonzalez Br. at 9-12, PP has filed a series of (thus far) four dispositive motions in this case, in each of which motion PP would successively introduce some new legal argument(s) not previously pressed as grounds for dismissal. In particular, the basis for the district court's latest dismissal – a supposed want of falsity as such – was not argued until the fourth PP dispositive motion. This is important, as it refutes the incorrect notion that Gonzalez supposedly has already had multiple chances to correct the complaint on this issue, and thus should not be permitted to replead in the event this Court finds the current complaint deficient but correctable.

PP nevertheless intimates that falsity was an issue well before PP filed its fourth dispositive motion. PP Br. at 40. Specifically, PP contends that PP "argued from the beginning of the case in its first motion for judgment on the pleadings as to the FAC that Gonzalez did not and could not establish the required falsity." *Id*. This is deeply misleading.

To be sure, PP argued in that first motion a lack of falsity *because of the supposed ambiguity of the rule against billing above cost*. *See* EOR 42

(district court describing PP's first dispositive motion directed at FAC: "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.") The district court did not reach that argument at the time because the court dismissed the case on other grounds (namely, public disclosure). After this Court reversed on appeal and remanded the case, *Gonzalez v. Planned Parenthood of Los Angeles*, 392 F. App'x 524 (9th Cir. 2010), PP renewed this ambiguity argument in its second motion. *See* EOR 44 (district court describing PP's contention that ambiguity and openness with the state authorities precluded falsity and scienter). This time the district court rejected PP's argument, EOR 48, 50, and PP did not renew that ambiguity-precludes-falsity argument thereafter. Hence, this particular argument about falsity was no longer on the table and required no corrective repleading. Indeed, the district court's opinion cited Ninth Circuit precedent to the effect that, where (as here) a defendant is accused of having violated the pertinent rules "in order to overcharge the government," it is "compliance with these regulations, as interpreted by this court, that determines whether its . . . practices resulted in the

submission of a 'false claim' under the [FCA]." In short, Gonzalez had every reason to believe that the *falsity* of an illegal overcharge, as such, was not an issue. Notably, PP itself did not raise the latest, brand-new, falsity argument until its fourth dispositive motion, and even then at only the eleventh hour. Gonzalez Br. at 11-12.

PP's objection under the particularity requirement of Rule 9(b), Fed. R. Civ. P. – introduced in PP's second dispositive motion, Gonzalez Br. at 10 – does not change this fact. In that objection, PP argued, not a lack of falsity, but a failure to identify *particular* false claims and statements. EOR 52-53. The argument went to particularity, not falsity: "'Although it is not mandatory that [plaintiff] provide representative examples, such examples would go a long way in providing the necessary particularity'". *Id.* at 53-54 (district court quoting Ninth Circuit precedent on this issue). The district court accepted PP's particularity argument in part and allowed Gonzalez to replead, EOR 54-55. Gonzalez accordingly repleaded, adding particulars, including "representative examples" of PP's overbilling. *See, e.g.*, EOR 82-86 (TAC ¶¶ 62-65). PP responded to the TAC with its fourth dispositive motion, which the district court granted

on different grounds. EOR 5. The district court expressly did not reach the question of particularity under Rule 9(b). *See* Doc. 138 at 6 (EOR 10). Hence, any defect in particularity was not decided,[4] is not before this Court on appeal, and cannot be the basis of PP's claim that Gonzalez should not be permitted, if necessary, any further chance to amend his pleadings.

5. Not just FPACT: PP describes this case as arising out of the California Family Planning, Access, Care and Treatment Program (FPACT). PP Br. at 6. This is true but incomplete. As the TAC makes clear, this case targets PP's illegally inflated charges to the state and federal governments for birth control drugs and devices. The precise funding channel varied for particular clients at particular times, and thus included not just Medi-Cal through the FPACT program, but also Medi-Cal directly, Gonzalez Br. at 16, as PP subsequently acknowledges, PP Br. at 6-7.

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[4] PP thus errs doubly when it asserts that the Second Amended Complaint (SAC) "once again failed to comport with Rule 9(b) as to six defendants." PP Br. at 11. The district court never ruled upon the SAC at all, *see* Gonzalez Br. at 10-11, and as to the TAC expressly did not reach the Rule 9(b) issue.

ARGUMENT

The TAC alleges that the defendants knowingly and unlawfully overbilled the state, and through it the federal government, for birth control drugs and devices. That illegal overbilling is itself "false." "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.*" *U.S. ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006) (emphasis added). Moreover, 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. Further, 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. The TAC thus sufficiently alleges "falsity". But even if the TAC were deemed not sufficiently explicit about these matters, 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 billing practices at that time put state officials on notice of the fraud, triggering the statute of limitations, despite PP's professed desire to "clarify" the matter and despite no hint that PP intended to defy state guidance on the matter. But whether the circumstances actually put the state on notice is a question of unresolved *fact* that cannot justify 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 to rebut the normal expectation that an entity will, having obtained the state's directions, thereafter obey the law as explicated by state officials. If the pleading at the time (the FAC) 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. Gonzalez Br. § IV. PP concedes that the viability of the state counts is properly before this Court, PP Br. at 47, so the stricken allegations are not themselves necessary to preserve the issue for the present appeal. Nevertheless, if this Court reverses the dismissal of these claims, then Gonzalez will need to have a current pleading in the district court that contains those state claims. Reversal of the order striking those claims is a simple way to reinstate those state claims.

I. THE TAC SUFFICIENTLY ALLEGES FALSITY.

The archetypal false claim occurs when an entity knowingly charges the government for money to which the entity is not entitled. Such a claim can be "false" in many ways – false as to the quantity of goods or services provided, false as to price, false as to quality (e.g., selling items that are broken or not made to specifications). Ultimately, what makes the claim "false" is that the billing entity is *not entitled to the amount billed*, either in whole or in part. *Cafasso v. Gen. Dynamics C4 Sys.*, 637

F.3d 1047, 1056 (9th Cir. 2011) (false claims are those that, "in some way, falsely assert entitlement to obtain or retain government money or property"). As the en banc Fifth Circuit phrased the point, it is "those claims for money or property to which a defendant is not entitled that are 'false' for purposes of the False Claims Act." *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 674-75 (5th Cir. 2003) (en banc). That is, the defendant "falsely" claims, by its submission of an invoice or other billing device, a right to the payment in question.

A. PP's Hypertechnical Focus on Categories of "Falsity" Is Misguided.

In its appeal brief, PP expends much effort trying to force this case into specific analytical categories, and then attempting to find some mismatch between the false claims at issue here and the particular analytical subsets. This effort misses the forest for the trees. As the First Circuit perceptively observed:

> [W]e comment briefly on the conceptual divisions . . . between (1) factually false or fraudulent claims and legally false or fraudulent claims, as well as, (2) claims rendered legally false or fraudulent by an "express certification" and claims rendered legally false or fraudulent by an "implied certification." . . . . We decline to employ the district court's categories here. . . . In the context of the FCA's lengthy history, which dates back to its enactment during the Civil

> War, . . ., these judicially created formal categories are of relatively recent vintage. They have not been adopted by the Supreme Court . . . .
>
> The distinction between factually and legally false or fraudulent claims appears to derive from a 2001 decision of the Second Circuit. . . . The distinction between express and implied certification appears to have emerged in circuit case law in a series of decisions at roughly the same time. . . .
>
> . . . .
>
> Courts have created these categories in an effort to clarify how different behaviors can give rise to a false or fraudulent claim. Judicially-created categories sometimes can help carry out a statute's requirements, but they can also create artificial barriers that obscure and distort those requirements. The text of the FCA does not refer to "factually false" or "legally false" claims, nor does it refer to "express certification" or "implied certification." Indeed, it does not refer to "certification" at all. *See United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1172 (9th Cir. 2006) (refusing to give the term "certification" a "paramount and talismanic significance" in part because it does not appear in the text of the FCA). In light of this, and our view that these categories may do more to obscure than clarify the issues before us, we do not employ them here.

U.S. ex rel. Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 385-86 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 815 (2011).

This Court has previously used the categories in question and need not jettison those analytical tools here. But as the First Circuit's discussion notes, those categories should not be used in a way that obscures or distorts the analysis. PP's arguments – which would preclude FCA

lawsuits for illegal overbilling of the sort that lies at the heart of the FCA – vividly illustrate how the analytical categories can be used to obscure rather than clarify.

On the one hand, according to PP, illegal overcharges are not *factually* false: "If the charge exceeded a limit set by a law or rule (e.g., when a claim seeks $10 per stapler despite a regulation setting a $1-per-stapler billing limit), factual falsity is not alleged because the alleged falsity turns not on a factual misstatement, but on a legal requirement." PP Br. at 18. But this approach would deny *factual* falsity in *all* unlawful billing cases. After all, the billing claim is *false* because it violates some legal norm governing the charge for the pertinent transaction (e.g., knowingly billing for an inflated price, an inflated quantity, defective goods, the wrong parts, etc.). PP's argument would therefore expel the universe of inflated invoices from the scope of "factually false" claims under the False Claims Act.

On the other hand, according to PP, illegally marking up invoices also does not make a claim *legally* false: PP says it was "not . . . obligate[d] to comply with the governing billing rules," PP Br. at 32, because PP

supposedly never "certified compliance with a law, rule, or regulation that forbade billing at usual and customary rates," *id.* at 3, and in particular made "no promise to comply with the 'at cost'" requirement, *id.* at 29. According to PP, it seems, unless the billing entity expressly certifies, in so many words, that it will not illegally overbill, then unlawfully inflated invoices are not "legally false" at all. As PP frankly contends, PP's position is that "the False Claims Act is not the proper means of addressing" illegal overcharges that constitute "violations of law, regulations, or billing manual references . . . ." *Id.* at 32.

PP's contentions, if accepted, would gut the FCA.[5] Fortunately, as

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[5] Using the FCA against inflated charges would seem to be part of the bread and butter of federal government enforcement of that act. *E.g.*, "Pharmaceutical Manufacturers to Pay $421.2 Million to Settle False Claims Act Cases" (DOJ press release dated Dec. 7, 2010) (false and inflated prices), *available at* www.justice.gov/opa/pr/2010/December/10-civ-1398.html; "Hospice of Arizona and Related Entities Pay $12 Million to Resolve False Claims Act Allegations" (DOJ press release dated Mar. 20, 2013) (accusations included "inflated bills"), *available at* www.justice.gov/opa/pr/2013/March/13-civ-326.html; "McKesson Corp. Pays U.S. More Than $190 Million to Resolve False Claims Act Allegations" (DOJ press release dated Apr. 26, 2012) (inflated pricing), *available at* www.justice.gov/opa/pr/2012/April/12-civ-539.html; "Lockheed Martin Corporation Reaches $15.85 Million Settlement with U.S. to Resolve False Claims Act Allegations" (DOJ press release dated Mar. 23, 2012) (overcharging), *available at* www.justice.gov/opa/pr/2012/March/12-civ-367.html.

explained in the Brief of Appellant and this reply brief, PP's arguments are incompatible with the history, purpose, and meaning of the False Claims Act. This Court should reject PP's attempts to eviscerate the FCA.

B. The False Claims in this Case Rest at the Core of the FCA.

Striking at overcharges to the government was the very purpose of the FCA: "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).

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.

PP repeats on appeal its concession that billing for nonexistent or misdescribed goods is a factually false claim, without more. PP Br. at 2, 15. As explained previously, Gonzalez Br. at 27-28, this concession is fatal to PP's entire argument against falsity. If falsity as to *quantity* or *quality* is false under the FCA, as the PP defendants concede, then it makes no sense to say that falsity as to *price* is not likewise false.

Contrary to PP's argument, Gonzalez does not claim that FCA liability is triggered by the mere violation of any rule or regulation. Liability requires both falsity *and* scienter *(knowing* submission of a false claim). Gonzalez Br. at 28-29. By requiring both objective falsity and knowing submission, the FCA protects against "innocent or unintentional violations," *Hendow*, 461 F.3d at 1175.

PP is quite wrong to contend that illegally inflated claims for payment are "[m]ere regulatory violations," PP Br. at 47. Inflated claims, which by definition submit to the government a *false claim of entitlement to payment* (and a false amount), lie at the heart of the FCA's purview. As this Court has held, 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). Thus, if the law forbids a certain claim (or amount of that claim), such a claim is *false*. The TAC alleges that PP, ignoring both the governing law and the direct instructions of 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.[6]

PP, following the district court, tries to recharacterize the falsity at issue here as *concealment* of the billing mark-ups. PP Br. at 19. While

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[6] The district court erroneously held that "the overcharging must be committed *in conjunction with a false statement* that is a lie." Doc. 138 at 8 (EOR 12) (emphasis added). As pointed out previously, Gonzalez Br. at 30-31, the FCA describes three separate kinds of violations, only one of which includes a false "statement" or record as an element. The TAC asserted violations of each of the three prohibitions. 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*). PP badly distorts Gonzalez's argument on this point, saying that Gonzalez argues that "a lack of falsity" would defeat all *but* the "false statements" count. PP Br. at 35 n.9. To the contrary, Gonzalez's point is that the want of a false *statement* (not falsity) goes only to the count that requires a false *statement* (not the other counts that lack such an element).

this concealment is relevant to scienter and to the state statute of limitations question, *infra* § III, PP's concealment is not what makes the claims false. Gonzalez Br. at 31 n.4. The primary allegation of falsity here is rather that PP submitted marked-up charges instead of at-cost charges. Tr. 10-12 (EOR 30-32). Those claims are false because PP was not entitled to receive marked-up amounts. Put another way, PP falsely represented inflated charges as the "cost" for which PP had a right to reimbursement.

PP's false claims obviously had mechanical components, namely, writing or typing amounts into boxes or spaces on forms for submission to the billing intermediary, which in turn submitted the figures to the state (and through the state, ultimately the federal government). EOR 77-79 (TAC ¶¶ 46-51) (describing billing mechanics). These mechanical details are not "a new argument," much less an argument Gonzalez "waived," PP Br. at 23 n.6. Rather, these details simply illustrate further why PP is badly mistaken when it asserts there was no falsity here. The government did not pay PP on a whim; instead, it paid only in response to PP's submission of records containing specific monetary figures. Those figures were legally required to be PP's "cost" – a proposition that the

district court did not dispute – and as a consequence, every submission of an inflated figure falsely claimed entitlement to reimbursements that were orders of magnitude beyond the legally permissible amount. Gonzalez Br. at 14-15.

The district court seemed to be of the view that the complaint had to allege specifically that PP *falsely labeled* the inflated figures it submitted as "acquisition cost": "Plaintiff does not allege . . . that defendants misrepresented their 'usual and customary' rates as 'actual acquisition costs'." EOR 12. As a legal matter, this is incorrect. PP's claims for reimbursements to which it was not entitled – marked-up values instead of acquisition cost – would be false even if PP had written on its figures, "USUAL AND CUSTOMARY RATE." Government knowledge of the overbilling, while it may be relevant to the separate factual question of *scienter*, is not a defense to *falsity*. Gonzalez Br. at 32-33 & n.6. The claim was false because PP was not entitled to receive the requested reimbursement. Moreover, as a factual matter, the district court was also mistaken. There is no reason to think that PP actually telegraphed the overbilling. The TAC alleges the opposite. Gonzalez Br. at 15-16 (citing

TAC ¶¶ 69, 70, 122 (EOR 87-88, 105)). The complaint, fairly read, alleges that PP submitted marked-up figures where it was supposed to be submitting at-cost figures. *E.g.*, TAC ¶¶ 41, 46-52, 60-68 (EOR 76-79, 81-87). "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). It was therefore improper for the district court to construe the TAC against the plaintiff on the factual question whether the overbilling was concealed or notorious, independent of the legal irrelevancy of that factual matter to the question of falsity. And even if the complaint were deemed not to have alleged this fact with sufficient clarity, and this fact were deemed somehow essential, then the remedy would be to allow amendment of Gonzalez's pleading. *Infra* § II.

C. The Complaint Also Alleges "Legal Falsity."

The TAC's allegation of unlawful overbilling – false claims of entitlement to reimbursement – is enough to warrant reversal of the judgment below. But this lawsuit could (though it need not) proceed on a false certification theory as well. Gonzalez Br. at 33-35.

1. There was no waiver of the legal falsity argument.

PP contends that Gonzalez has "waived and abandoned" this argument. PP Br. at 24-26. But as explained *supra* p. 6, Gonzalez never disavowed this claim. Moreover, PP's waiver argument fails to observe the distinction between *claims* and *arguments:* "While matters not presented to the trial court generally may not be raised for the first time on appeal, . . . 'the Supreme Court has made clear [that] it is *claims* that are deemed waived or forfeited, not *arguments*.'" *United States v. Guzman-Padilla,* 573 F.3d 865, 877 n.1 (9th Cir. 2009) (emphasis added) (quoting *United States v. Pallares-Galan,* 359 F.3d 1088, 1095 (9th Cir. 2004) (citing *Lebron v. Nat'l Railroad Passenger Corp*., 513 U.S. 374, 378-79 (1995)). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Hence, Gonzalez is free to press the legal falsity argument in support of his claim.

2. The TAC sufficiently alleges legal falsity.

It merits emphasis that recourse to the legal falsity/false certification theory is not necessary here. That alternative theory is designed, "not [for] a typical FCA claim that [defendants] overcharged the government," *U.S. ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 995 (9th Cir. 2010), but instead to address the situation where the defendant has supplied the relevant goods or services, at the proper price, but has violated some collateral regulation, such as limits on corporate structure, *id.* In such cases, the parameters of the legal theory are designed to distinguish between what is truly a "mere regulatory violation" versus a violation of some core, material precondition to payment. "[T]he false certification of compliance . . . 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." *Id.* at 998 (emphasis added; internal quotation and editing marks and citation omitted). Obviously, presentation of accurate numbers as to quantity and price are material preconditions to government

payment, so unlawfully inflated billing that qualifies as false under the factual falsity theory *ipso facto* satisfies the legal falsity theory as well.

Here, the TAC sufficiently alleges falsity under either an express or an implied false certification theory. The PP defendants signed a provider agreement, TAC ¶¶ 35-36 (EOR 73), obligating them to comply with the governing billing rules. The relevant billing rules required PP to bill at cost, not at marked-up values. TAC ¶¶ 19-34, 37-38 (EOR 69-74). 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 both entitlement to that amount and 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. PP was violating *legal limits on the billing amounts themselves*, limits which by definition are material prerequisites to government payment of those amounts.

PP objects that Gonzalez must identify "the law or regulation" that was violated. PP Br. at 28. The TAC does so, as referenced above. Moreover, PP did not argue compliance with the relevant law as a defense in its motion below, and the district court did not find fault with the complaint in this regard. PP's remarkable suggestion that billing at the proper rate might *not* be a precondition to payment, PP Br. at 31, merits rejection out of hand, and is of a piece with PP's contention that the FCA does not support claims predicated upon unlawfully inflated invoices, *see supra* pp. 1-2, 17.

Finally, PP takes the position that falsity is precluded by one state official's declaration that, as a matter of enforcement discretion, California would not require PP to return its ill-gotten gains. PP Br. at 1, 7-9, 32. But the fact that one or more state officials "deemed repayment unwarranted" (or more precisely, not mandatory in this case) cannot "confirm[] that [PP's] claims were not false," PP Br. at 32. To the contrary, the state audit in question found that PP had illegally overbilled millions of dollars, EOR 148-57. A discretionary state government "decision," based on "other considerations," EOR 245, not to recoup ill-

gotten money cannot "reverse preempt" a federal FCA claim, much less convert admittedly false but unrecouped claims into claims that are not false.

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

The TAC is sufficient as is. Should this Court disagree, however, and hold that certain factual predicates must be alleged more explicitly to state a claim, reversal is still proper because the district court erroneously prevented Gonzalez from amending his complaint to respond to PP's new falsity argument. "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). *See also U.S. ex rel. Lee v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (reversing district court's refusal to allow amendment because "we can conceive of additional facts that could, if formally alleged, support the claim").

PP contends that the district court properly denied leave on the grounds that Gonzalez had had multiple prior opportunities to amend. PP Br. at 35-36. But this argument rests on the incorrect premise that there

was nothing new about PP's falsity argument. To the contrary, this argument was unveiled only in PP's fourth dispositive motion, and even then only at the last minute. *Supra* pp. 7-10. In short, the objection in question – a supposed lack of falsity as such – had *never been pressed before*. Gonzalez cannot be faulted for failing to cure a defect that PP had not argued in any previous motion.

PP argues in the alternative that any amendment would be futile. PP Br. at 38. This, however, is simply a restatement of PP's extraordinary – and meritless – contention, *supra* pp. 1-2, 17, that unlawful overbilling is not actionable under the FCA (except, according to PP, possibly where the defendant expressly certifies that it will not overbill).

PP finally argues that Gonzalez did not make "a specific request to amend." PP Br. at 39. PP extracts this rule from a Fifth Circuit case; the Ninth Circuit holds to the contrary: "In dismissing for failure to state a claim, a district court should grant leave to amend *even if no request to amend the pleading was made*, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Doe v. United States (In re Doe)*, 58 F.3d 494, 497 (9th Cir. 1995) (emphasis added;

internal quotation marks and citation omitted). In any event, here Gonzalez explicitly requested, in the alternative, leave to amend, explaining that he could spell out more details if they were necessary to support the falsity element. Opp. at 18 (Doc. 27); Tr. 12, ll. 7-8 (EOR 32).

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. As explained in the opening brief, Gonzalez Br. § III, 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 limitations period.

PP's responsive arguments, on the question whether the statute of limitations was triggered, are already addressed in Gonzalez's opening brief. And as discussed *supra* pp. 3-5, PP confounds the relevant time periods, in particular glossing over the six year-long period in which PP concealed its overbilling from the state. PP's studied efforts to keep the

state in the dark were the antithesis of candidly putting state officials on notice.

If this Court were to deem PP's concealment essential to overcome the limitations defense, but not adequately alleged in the FAC, then the remedy would be for Gonzalez to amend his complaint. In fact, Gonzalez already did so with the TAC. EOR 87-88, 105. PP argues that Gonzalez should not be permitted to amend as to the state claims because he did not request leave to amend and he has already had opportunities to amend. These responses lack merit for the reasons discussed *supra* § II. Moreover, the district court, when dismissing the state counts under the statute of limitations, expressly allowed repleading only as to the federal counts. EOR 54-55. Gonzalez consequently has had no opportunity to amend his state counts, as such, in response to the district court's ruling.

As Gonzalez has noted, even if the statute of limitations were triggered here, that statute would only bar claims falling outside the limitations period, not the entirety of the state counts. Gonzalez Br. at 44-45. PP points out that the California cases setting forth the rule – that only claims outside the limitations period are barred – did not specifically

involve the California FCA. This is true but quite irrelevant; PP has made no argument why different statute of limitations rules should apply to this particular state statute.

PP asserts that Gonzalez waived, by not raising it below, the argument that only claims outside the limitations period should have been dismissed. This waiver contention falls for the reasons set forth *supra* § I(C)(1). Moreover, the error in question did not arise until the district court dismissed the state claims in their entirety, rather than just barring those outside the limitations period. Once that happened, Gonzalez had no opportunity to argue the point further, either in the district court (since local rules generally bar motions to reconsider, L.R. 7-18 (C.D. Cal.), and the district court did not allow amendment of the state counts) or on appeal (because the dismissal was interlocutory). This appeal presents the first occasion for Gonzalez to flag this particular error.

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

The district court erred by striking the state counts from the TAC. Gonzalez Br. § IV.

The district court's order striking the state claims was an improper use

of Rule 12(f), Fed. R. Civ. P., as this Court explained in *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970 (9th Cir. 2010). Gonzalez Br. at 48-50. PP makes no counter-argument on this point. PP claims that the error, if any, is moot because the district court supposedly did not abuse its discretion on the question. PP Br. at 47. But if it was improper to use Rule 12(f) in this context at all, no exercise of discretion could save it. This Court should therefore reverse on this grounds.

Striking the repleaded state claims was also error because the claims were simply included as a precautionary issue preservation tool. PP's contention that the repleading was "not required," PP Br. at 45, is beside the point. Something is not improper just because it is not absolutely necessary.

In *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012) (en banc) this Court definitively resolved the question of the need to replead, holding that "claims dismissed with prejudice and without leave to amend" need "not . . . be repled in a subsequent amended complaint to preserve them for appeal." *Id*. at 928. But *Lacey* was not decided until Aug. 29, 2012 – after the notice of appeal in this case. Obviously,

Gonzalez cannot be required to rely upon cases not yet decided. Furthermore, *Lacey* acknowledged "the confusion this issue appears to be working in this circuit." *Id*. at 925 n.17. Gonzalez, in the face of that uncertainty, took the prudent course by repleading the state counts to ensure their preservation. Striking those counts was therefore unwarranted as well as improper.

CONCLUSION

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

Respectfully submitted this 10th day of April, 2013,

JACK M. SCHULER*
SAM D. EKIZIAN
SCHULER, BROWN & EKIZIAN
[redacted]

EDWARD L. WHITE III
AMERICAN CENTER FOR
LAW & JUSTICE
[redacted]

*Not admitted this jurisdiction

s/ Walter M. Weber
JAY ALAN SEKULOW
STUART J. ROTH
WALTER M. WEBER
Lead Counsel
TIFFANY N. BARRANS
AMERICAN CENTER FOR
LAW & JUSTICE
[redacted]

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Date

s/ Walter M. Weber
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