BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ISMAIL J. RAMSEY (CABN 189820)
United States Attorney

MICHELLE LO (NYBN 4325163)
Chief, Civil Division

SHIWON CHOE (CABN 320041)
DAVID M. DEVITO (CABN 243695)
Assistant United States Attorneys

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495
Telephone: (415) 436-7200
Facsimile: (415) 436-6748
shiwon.choe@usdoj.gov
david.devito@usdoj.gov

JAMIE ANN YAVELBERG
PATRICIA L. HANOWER
BRADEN CIVINS
ARTHUR S. DI DIO
GARY R. DYAL
MICHAEL FISHMAN
RACHEL C. KARPOFF
LAURIE A. OBEREMBT
JONATHAN T. THROPE
United States Department of Justice
Civil Division
Commercial Litigation Branch

DAVID MOSKOWITZ
Special Attorney to the U.S. Attorney General

Attorneys for the United States of America

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA ex rel. RONDA OSINEK, Plaintiff, v. KAISER PERMANENTE, et al., Defendants.	Case No. 3:13-cv-03891-EMC **UNITED STATES' MOTION TO STRIKE DEFENDANTS' AMENDED AFFIRMATIVE DEFENSES** Hearing: November 9, 2023 at 1:30 p.m. Location: Zoom videoconference

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 9, 2023, at 1:30 p.m., on Zoom videoconference, Plaintiff the United States of America will respectfully move the Court under Federal Rule of Civil Procedure 12(f) for an order striking Defendants' affirmative defenses of estoppel, ratification/consent, failure to mitigate, and excessive fines, and Defendant Kaiser Foundation Health Plan of Colorado's affirmative defense of voluntary disclosure under 31 U.S.C. § 3729(a)(2). Dkt. Nos. 298, 300–02 ¶¶ 397–400; Dkt. No. 299 ¶¶ 397–401. The United States' motion is based on this notice, the following points and authorities, such oral argument as the Court may permit, and all other matters properly before the Court.

STATEMENT OF RELIEF

The United States respectfully moves to strike Defendants' affirmative defenses because they fail as a matter of law and, to the extent they are not facially invalid, are insufficiently pleaded.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Pursuant to Rule 12(f), the United States moves to strike affirmative defenses asserted by Defendants Kaiser Foundation Health Plan, Inc. ("KFHP"), Kaiser Foundation Health Plan of Colorado ("KFHP-CO"), The Permanente Medical Group, Inc. ("TPMG"), Southern California Permanente Medical Group ("SCPMG"), and Colorado Permanente Medical Group, P.C. ("CPMG") (collectively, "Kaiser" or "Defendants") in paragraphs 397–400 of Docket Nos. 298 and 300 to 302 and paragraphs 398–401 of Docket No. 299. Striking these defenses will streamline the issues for litigation, ensure fair notice to the United States, and avoid unnecessary discovery.

The United States' Amended Complaint-in-Intervention ("Complaint") asserts claims against Defendants under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–33, and common law based on Defendants' scheme to unlawfully obtain payments from the Medicare Advantage program. Dkt. No. 240. In their original Answers to the Complaint ("Answers"), each Defendant raised ten identical affirmative defenses. Dkt. Nos. 282–86 ¶¶ 397–406. On August 21, 2023, the United States filed a Motion to Strike Defendants' Affirmative Defenses under Rule 12(f). Dkt. No. 293. In response, the Defendants notified the United States of their intent to amend their affirmative defenses, Dkt. No. 297,

which they did in their Amended Answers to the Complaint ("Amended Answers"), filed on September 12, 2023. Dkt. Nos. 298–302. In their Amended Answers, the Defendants jettisoned four of the affirmative defenses asserted in their original Answers. *Compare* Dkt. Nos. 298, 300–02 ¶¶ 397–401 and Dkt. No. 299 ¶¶ 397–402 *with* Dkt. Nos. 282–86 ¶¶ 397–406.[1]

The Amended Answers to the Complaint now assert five identical affirmative defenses. One Defendant, KFHP-CO, asserts a sixth affirmative defense that the other Defendants do not. The United States moves to strike all but one of these defenses.[2]

STANDARD OF REVIEW

Rule 12(f) permits a court to strike from a pleading an insufficient defense. The purpose of a Rule 12(f) motion is to "avoid spending time and money litigating spurious issues." *Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010).

"An affirmative defense is an assertion raising new facts and arguments that, if true, will defeat plaintiff's claim, even if all allegations in [the] complaint are true." *United States v. Acad. Mortg. Corp.*, No. 16-cv-02120-EMC, 2020 WL 7056017, at *4 (N.D. Cal. Dec. 2, 2020) (Chen, J.) (citation omitted). Federal Rule of Civil Procedure 8 requires a party to "state in short and plain terms its defenses" to give the opposing party "fair notice of the [affirmative] defense." Fed. R. Civ. P. 8(b), (c); *Acad. Mortg.*, 2020 WL 7056017, at *1 (quoting *Schutte & Koerting, Inc. v. Swett & Crawford*, 298 F. App'x 613, 615 (9th Cir. 2008)). "Affirmative defenses are governed by the same pleading standard as complaints." *J & J Sports Prods., Inc. v. Nguyen*, No. C 11-05433 JW, 2012 WL 1030067, at *1 (N.D. Cal. Mar. 22, 2012); *Moonbug Entm't Ltd. v. BabyBus (Fujian) Network Tech. Co.*, No. 21-CV-06536-EMC, 2023 WL 4142969, at *1 (N.D. Cal. June 21, 2023) ("Courts in this district have consistently required affirmative defenses to meet the *Twombly*/*Iqbal* standard."). "A defendant's general reference to a legal doctrine—without providing factual allegations in support of the defense or setting forth the elements of the defense—does not give the plaintiff fair notice of the defense." *J & J Sports*, 2012 WL 1030067, at

[1] The Amended Answers do not raise the following prior affirmative defenses: vagueness, acts of non-parties, unjust enrichment, and the right to assert additional affirmative defenses.

[2] The United States is not electing to challenge in this Motion to Strike Defendants' defense regarding the nondelegation doctrine because, notwithstanding its lack of merit, it does not appear to have any applicability to this case. *See* Dkt. Nos. 298, 300–02 ¶ 401; Dkt. No. 299 ¶ 402.

*1. The standard prevents "an all-too-common practice of proffering a litany of canned affirmative defenses with no supporting factual allegations." *Acad. Mortg.*, 2020 WL 7056017, at *2.

ARGUMENT

Defendants' purported affirmative defenses of—(1) estoppel, (2) ratification or consent, (3) failure to mitigate damages, (4) excessive fines, and (5) the voluntary disclosure provision of section 3729(a) of the FCA—all fail as a matter of law and are insufficiently pleaded. Accordingly, the Court should strike these meritless affirmative defenses raised by the Defendants.

I. Estoppel, Ratification/Consent, And Failure To Mitigate Are Not Defenses To Claims By The United States And Also Suffer From Fatal Pleading Defects

The United States' claims seek the return of public funds obtained by Defendants as a result of false submissions to the United States. Defendants contend that the United States' claims are barred by various non-statutory defenses: estoppel, ratification or consent, and failure to mitigate. These judicially-created doctrines are grounded in equity, however, and, as a matter of law, do not apply to the United States' FCA and common law claims.

Equity cannot grant a remedy that Congress has not authorized with respect to public funds. *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990). The Appropriations Clause of the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. "[I]n other words, the payment of money from the Treasury must be authorized by a statute [and] . . . [n]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424 (citation and quotation omitted). In light of this "straightforward and explicit command," the Supreme Court has held that "[t]here can be no estoppel" in the context of the payment of public funds from the Treasury. *Id.* at 424, 434. In *Richmond*, a benefit claimant sought to estop the United States from denying benefits based on prior erroneous advice from a federal employee. *Id.* at 416. But the Court refused, holding that "judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized." *Id.* at 426. Based on the *Richmond* decision, the Ninth Circuit has likewise held that "claims for estoppel [against the government] cannot be entertained where public money is at stake." *United States v. Fowler*, 913 F.2d 1382, 1385 (9th Cir. 1990) (holding that estoppel against the government

could not apply as a defense to retain public funds); *cf. Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 767 F.3d 912, 928 (9th Cir. 2014) ("[W]e know of *no* Ninth Circuit case estopping the government from recovering an erroneous monetary payment, nor have the parties identified one.").

The Ninth Circuit has also recognized that the principles underlying *Richmond* extend beyond estoppel. *See, e.g.*, *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 391 (9th Cir. 2000) (holding that *Richmond's* "scope is not limited to the applicability of estoppel to the federal government" and "[w]e therefore interpret *Richmond* to preclude a court from granting a remedy that draws funds from the Treasury in a manner that is not authorized by Congress"). Accordingly, courts have recognized that *Richmond* applies equally to bar other non-statutory equitable defenses because, again, equity cannot grant a "remedy that Congress has not authorized" with respect to public funds. *Richmond*, 496 U.S. at 426. Consistent with this precedent, in *United States ex rel. Poehling v. UnitedHealth Grp., Inc.*, No. CV 16-8697-MWF, 2019 WL 2353125, at *9–10 (C.D. Cal. Mar. 28, 2019), a case involving FCA and common law claims against a Medicare Advantage Organization, the court held that *Richmond* barred the defendants' non-statutory defenses, including estoppel, failure to mitigate, and ratification. *See also, e.g.*, *United States ex rel. Baker v. Cmty. Health Sys., Inc.*, No. CIV. 05-279, 2011 WL 13115254, at *5, 8-10 (D.N.M. Dec. 7, 2011) (in FCA action, holding that *Richmond* precluded application of estoppel, waiver, failure-to-mitigate, and unclean-hands defenses).

As a result, Defendants' non-statutory equitable defenses cannot survive under *Richmond* and its progeny. Each of these affirmative defenses is an attempt by Defendants to retain money paid to them by the Treasury, through Congressional appropriations for the Medicare program, that Defendants unlawfully obtained by submitting, or causing to be submitted, false claims and false statements material to false claims. *See* 31 U.S.C. § 3729(a)(1). That is exactly what *Richmond* prohibits in cases like this where public money is at stake.

Similarly, the United States' common law claims seek, pursuant to *United States v. Wurts*, 303 U.S. 414, 415 (1938), to recover public funds wrongfully, erroneously, or illegally paid. As this Court noted in its ruling on Defendants' first motion to dismiss: "When a payment is erroneously or illegally made, as is alleged here, 'it is in direct violation of . . . the Constitution.' To correct for this violation, the United States may exercise its '[well]-established right to sue for money wrongfully or erroneously

paid from the public treasury . . . .'" First MTD Order, Dkt. No. 223 at 30 (quoting *Agility Pub. Warehousing Co. K.S.C.P. v. United States*, 969 F.3d 1355, 1365 (Fed. Cir. 2020)). These are the same principles that animate the *Richmond* decision. While *Richmond* left open the possibility that there may be "extreme circumstances that might support estoppel in a case not involving payment from the Treasury," the Supreme Court foreclosed estoppel defenses in claims involving public funds, explaining "there can be no estoppel, for courts cannot estop the Constitution." *Richmond*, 496 U.S. at 434; *see also, e.g.*, *Poehling*, 2019 WL 2353125, at *9–10 (rejecting argument that *Richmond* does not apply to common law claims); *United States v. Manhattan-Westchester Med. Servs.*, No. 06 CIV.7905, 2008 WL 241079, at *3 (S.D.N.Y. Jan. 28, 2008) (*Richmond*'s rationale "applies equally to Plaintiff's False Claim Act claims and common law claims").

Simply put, whether brought as a claim under the FCA or common law, there are no equitable defenses available to prevent the United States from recovering funds unlawfully paid out from the Treasury. If the United States proves each element of a claim to recover unlawful payments from the Treasury, no judicially-created, equitable defense can act as an affirmative defense to defeat that claim. This invalidates Kaiser's defenses of estoppel, ratification or consent, and failure to mitigate. All should be stricken under the principles laid out in *Richmond*. Nevertheless, for the sake of completeness, the United States addresses additional arguments as to why each of these defenses fail as a matter of law.

A. Estoppel

In addition to being precluded by *Richmond*, Defendants' attempt to assert estoppel fails because Defendants do not plead the required elements. Because "the Government may not be estopped on the same terms as any other litigant[,]" *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984), the party asserting estoppel against the United States must show as a threshold matter (1) "affirmative conduct going beyond mere negligence"; and (2) that "the public's interest will not suffer undue damage." *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995). These are in addition to the traditional elements of estoppel: "(1) the party to be estopped knows the facts; (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended; (3) the party invoking estoppel must be ignorant of the true facts; and (4) he or she must detrimentally rely on the former's conduct." *Id.* at 892.

In their Amended Answers, Defendants assert that the United States' claims are barred by estoppel because the Centers for Medicare and Medicaid Services ("CMS") was allegedly "aware of [the Defendants'] risk adjustment practices" and knew of Defendants' "interpretation and application of [Section IV.K of the ICD-9 Guidelines and Section IV.J of the ICD-10 Guidelines]." Dkt. Nos. 298, 300–02 ¶¶ 399-400; Dkt. No. 299 ¶¶ 400-01. Defendants further allege that, although CMS supposedly knew how Defendants interpreted the ICD Guidelines, "CMS persistently refused to provide clear guidance to Defendant[s] . . . about the correct way to interpret the [ICD Guidelines]." *Id.* Finally, Defendants allege that they "relied on these acts and/or omissions by CMS in conducting . . . risk-adjustment activities and in interpreting the ICD Guidelines, which the United States now challenges" in its Complaint. *Id.*

As an initial matter, Defendants have not shown, and cannot show, that they meet the threshold requirements necessary to assert estoppel against the United States. First, Defendants have not pleaded, and cannot plead, affirmative misconduct by the Government. Pleading affirmative misconduct is a high hurdle and requires "a deliberate lie . . . or a pattern of false promises." *Mukherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir. 1986). Even negligence, misinformation, or failure to inform by government employees would not constitute affirmative misconduct. *See id.* ("[N]egligence . . . does not reach the level of misconduct required for estoppel under Supreme Court and Ninth Circuit law."); *United States ex rel. Jordan v. Northrop Grumman Corp.*, No. CV 95-2985 ABC (EX), 2002 WL 35454612, at *13 (C.D. Cal. Aug. 5, 2002) ("[N]either the failure to inform an individual of his or her legal rights nor the negligent provision of misinformation constitute affirmative misconduct."); *Schoonover v. United States*, No. C92-2628-FMS, 1993 WL 151146, at *1 (N.D. Cal. Apr. 30, 1993) ("The provision of misinformation by a government official does not constitute affirmative misconduct to justify application of equitable estoppel."). Defendants fail to allege affirmative misconduct, much less provide any facts supporting such an assertion. *See, e.g.*, *Baker*, 2011 WL 13115254, at *5 (striking estoppel defense for the additional reason that the defendant failed to allege affirmative misconduct by the United States). The conclusory assertion that CMS allegedly failed "to provide clear guidance," Dkt. Nos. 298, 300–02 ¶¶ 399-400; Dkt. No. 299 ¶¶ 400-01, does not come close to the type of affirmative misconduct that would satisfy the "extreme circumstances" the Supreme Court has demanded for any potential

estoppel claim. *Richmond*, 496 U.S. at 434.

Second, the United States' claims are in the public interest and seek to recover funds paid from the Treasury for Defendants' fraudulent conduct (as well as FCA treble damages and penalties to deter fraud). "The defendant's 'inability to retain money that it never should have received in the first place' is not the kind of detrimental reliance that justifies estoppel against the government." *United States ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1422 (9th Cir. 1991) (quoting *Heckler*, 467 U.S. at 61).

Because Defendants cannot satisfy the threshold requirements, the Court need not address the traditional elements of estoppel. But here, too, the Defendants fail to allege those elements.

The linchpin of Defendants' estoppel defense is their supposed interpretation of particular ICD Guidelines—what Defendants call the "Contested Provision." But Defendants never actually say what their supposed interpretation of the "Contested Provision" is, let alone how CMS was supposed to have known about, blessed, and engaged in affirmative misconduct with respect to it.

Section IV.K of the ICD-9 Guidelines and Section IV.J of the ICD-10 Guidelines state that, to code a condition for a patient visit, the condition must (1) "coexist at the time of the encounter/visit" and (2) "require or affect patient care treatment or management." Amend Compl., Dkt. No. 240 ¶ 85; *see* First MTD Order, Dkt. No. 223 at 4. The United States alleges that Defendants submitted false claims for payment because Defendants altered patient medical records to add diagnoses that either (1) did not exist or (2) were unrelated to the patient's visit. Amend. Compl., Dkt. No. 240 ¶ 1; *see* First MTD Order, Dkt. No. 223 at 10 (contract and regulation required compliance with ICD Guidelines).

Almost two years into litigation and having exercised an opportunity to amend their Answers, Defendants fail to allege what their interpretation of these provisions is, much less allege any interpretation that would allow them to add diagnoses to patient medical records for conditions that did not exist or that were unrelated to the patient's visit.[3] With no allegation of what, exactly, Defendants'

[3] Defendants' references to what documentation is required to support a diagnosis code is a red herring. Section IV.K of the ICD-9 Guidelines and Section IV.J of the ICD-10 Guidelines address which conditions are *eligible* to be coded, not how much documentation is necessary to *support* the coding. The United States' Complaint is replete with examples of Defendants' efforts to manufacture documentation of conditions that were not eligible for coding because they did not require or affect patient care, treatment or management, with the most glaring examples being conditions that did not even exist.

interpretation of these provisions of the ICD Guidelines was, Defendants' pleadings fail to satisfy either the threshold or traditional requirements of estoppel because they have not alleged what "facts" CMS supposedly knew. *See, e.g.*, *Acad. Mortg.*, 2020 WL 7056017, at *3 (striking estoppel defense where defendant did not allege, *inter alia*, when United States knew or should have known of supposed facts claimed by defendant); *see also Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1046 (9th Cir. 2011) (rejecting claim of equitable estoppel where claimants "have failed to specify what true facts are at issue").

In addition, the Defendants make no allegations that CMS intended that its conduct would be acted on or acted such that Defendants had a right to believe it was so intended. *Hemmen*, 51 F.3d at 892; *see, e.g.*, *United States v. Global Mortg. Funding, Inc.*, No. SACV 07-1275 DOC (PJWx), 2008 WL 5264986, at *4 (C.D. Cal. May 15, 2008) (striking estoppel affirmative defense where answer failed to disclose what actions claimant "took in reliance on the government's decision"). Defendants' conclusory allegations—that CMS supposedly was aware of some undefined interpretation of the ICD Guidelines that Defendants never actually articulate anywhere in their pleadings—fail to support any reasonable inference that CMS intended to cause reliance.

Thus, even if *Richmond* did not directly preclude application of estoppel involving payments from the Treasury, Defendants' estoppel defense still fails to plead the required elements and should be stricken.

B. Ratification or Consent

Like their estoppel assertions, Defendants' attempt to assert ratification or consent fails fundamentally because Defendants do not actually plead what the United States ratified or consented to that defeats the United States' claims.

Ratification and consent are doctrines similar to waiver; all three are premised on the intentional relinquishment or abandonment of a known right. *United States v. Assocs. in Eye Care, P.S.C.*, No. 13-cv-27-GFVT, 2014 WL 12606508, at *4 (E.D. Ky. Nov. 14, 2014) ("For ratification to apply, the Attorney General would have had to approve of [defendant]'s billing practices in a similar sense to that of waiver."); *Acad. Mortg.*, 2020 WL 7056017, at *3 ("Waiver requires a defendant to show that a plaintiff has intentionally relinquished or abandoned a known right." (internal quotation marks

omitted)). Defendants have not asserted that the United States knew of Defendants' allegedly fraudulent practices, much less that the United States approved of them or intentionally relinquished or abandoned a known right in light of Defendants' practices.

In support of their assertions of ratification and consent, Defendants make no allegations regarding actions taken by the Department of Justice to ratify or consent to Defendants' conduct. Instead, Defendants claim that "through Risk Adjustment Data Validation audits, CMS reviewed and verified the types of diagnosis codes that the United States now alleges are false in its [Complaint]" and that "CMS also has stated that healthcare provider documentation of a diagnosis in the beneficiary's medical record is acceptable support for submission of diagnosis codes to CMS under Medicare Part C, even though the United States' [Complaint] challenges submission of diagnosis codes to CMS where a healthcare provider has documented in the medical record the diagnosis at issue." Dkt. Nos. 298, 300–02 ¶ 398; Dkt. No. 299 ¶ 399. These allegations fail, however, because Defendants do not allege that the United States ratified or consented to any of Defendants' practices or waived any of its claims. "Congress has vested the Attorney General as the governmental entity with the authority to bring civil actions under the FCA. . . . 'Violations of the FCA, therefore, may only be waived by the Department of Justice, and the unauthorized statements of United States agents may not serve to waive the Government's claims.'" *United States ex rel. Spay v. CVS Caremark Corp.*, No. 09-4672, 2013 WL 1755214, at *11 (E.D. Pa. Apr. 24, 2013) (citations and quotations omitted); *accord, e.g.*, *United States v. DynCorp Int'l LLC*, 282 F. Supp. 3d 51, 56–57 (D.D.C. 2017) (striking estoppel and waiver affirmative defenses in FCA case because defendant "cannot successfully allege that the government waived its FCA and fraud claims without showing that DOJ had the unmistakable intent to waive").

Courts therefore strike defenses of waiver, consent, and ratification where defendants have not alleged an unmistakable waiver by the Department of Justice. *See, e.g.*, *Assocs. in Eye Care*, 2014 WL 12606508, at *4; *DynCorp*, 282 F. Supp. 3d at 56–57; *United States ex rel. Dye v. ATK Launch Sys., Inc.*, No. 1:06-cv-39, 2008 WL 4642164, at *3 (D. Utah Oct. 16, 2008) (striking waiver and ratification defenses because "Defendant has not alleged that the Department of Justice waived" the Government's FCA claims). Here, Defendants have not and cannot allege any statements or conduct by the Attorney General or the Department of Justice that could constitute an unmistakable relinquishment of the United

States' FCA or common law claims. To the contrary, the facts pleaded in support of this defense concern only the alleged conduct of CMS, which could not establish waiver, ratification, or consent on behalf of the United States. Because only the Attorney General holds the power to waive the Government's FCA and common law claims, the Court should strike Defendants' ratification defense. *United States v. Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763, 771 (N.D. Tex. 2002) (striking waiver and ratification defense to FCA and common law claims because defendant did not plead Department of Justice had waived these rights).

Additionally, Defendants again conflate the issue of documentary *support* for diagnosis coding with the separate issue of which conditions are *eligible* to be coded. Defendants do not plead that CMS knew of (much less ratified or consented to) Defendants' practices as alleged in the Amended Complaint, i.e., that Defendants repeatedly *added conditions to patient medical records that did not exist at the time or did not actually require or affect patient care, treatment, or management*, and thus have not pleaded a cognizable ratification or consent affirmative defense. *Cf. Acad. Mortg.*, 2020 WL 7056017, at *4 (an affirmative defense is a defense that "'will defeat plaintiff's claim, even if all allegations in complaint are true.'").

C. Failure to Mitigate

Defendants' Amended Answers allege that the Defendants' "are not liable to the extent the United States failed to take adequate measures to mitigate its damages." Dkt. Nos. 298, 300–02 ¶ 399; Dkt. No. 299 ¶ 400. This argument fails both as a matter of law and because it is premised on the same insufficient allegations that underlie the Defendants' estoppel defense. It is well established "as a matter of law under the False Claims Act, [that] the government has no legal duty to mitigate damages." *Northrop Grumman*, 2002 WL 35454612, at *16 (citation omitted); *United States v. HCR Manor Care, Inc.*, No. 1:09-CV-00013, 2015 WL 11117429, at *1 (E.D. Va. Dec. 9, 2015) ("Failure to Mitigate Damages fails as a matter of law because it is well settled that the United States has no duty to mitigate damages in a fraud action, including an FCA claim."); *United States ex rel. Monahan v. Robert Wood Johnson Univ. Hosp.*, No. 02–5702 (JAG), 2009 WL 4576097, at *8 (D.N.J. Dec. 1, 2009) ("The Government has no duty to mitigate damages in fraud actions, including those under the FCA.").

Likewise, pursuant to *Wurts*, the United States had no duty to mitigate with respect to its

common law claims, which unlike traditional common law claims, seek only to recover money unlawfully paid from the Treasury, not consequential or other damages. *See, e.g.*, *United States ex rel. Mandel v. Sakr*, No. 17-CV-907S, 2021 WL 1541490, at *2 (W.D.N.Y. Apr. 20, 2021) (striking failure to mitigate defenses for identical common law claims). As this Court has explained, "[w]hen a payment is erroneously or illegally made, as is alleged here, 'it is in direct violation of . . . the Constitution.' To correct for this violation, the United States may exercise its '[well]-established right to sue for money wrongfully or erroneously paid from the public treasury . . . .'" First MTD Order, Dkt. No. 223 at 30 (quoting *Agility Pub. Warehousing*, 969 F.3d at 1365). Defendants cannot assert as a defense that they should nevertheless be allowed to keep the money because the United States could have stopped the unlawful payment. Again, for reasons explained in *Richmond*, the Constitution prohibits such unlawful payments, which prevents any judicially crafted, equitable defense to recovery of such funds.

Moreover, even if a duty to mitigate could apply to any of the United States' claims, Defendants' allegations regarding mitigation are insufficient to put the United States on notice of Defendants' defense. Defendants allege that "[t]he United States did not take reasonable steps to notify Defendant that the United States disagreed with Defendant[s'] interpretation of Section IV.K of the ICD-9 Guidelines and Section IV.J of the ICD-10 Guidelines," and that "the United States believed that Defendant was improperly presenting diagnosis codes to CMS based on that disputed interpretation." As explained *supra* at I.A, Defendants never actually say what "Defendant[s'] interpretation of Section IV.K of the ICD-9 Guidelines and Section IV.J of the ICD-10 Guidelines" was nor how the United States was made aware of that interpretation. Dkt. Nos. 298, 300–02 ¶ 399; Dkt. No. 299 ¶ 400. Without this explanation, it is not clear to the United States what "reasonable steps" Defendants allege the United States needed to take to respond to Defendants' un-alleged interpretation.

II. A Claim Of Excessive Fines Is Not A Defense

Courts routinely strike non-defenses improperly labeled as affirmative defenses. *See, e.g.*, *Acad. Mortg.*, 2020 WL 7056017, at *4–5; *Izett v. Crown Asset Mgmt., LLC*, No. 18-cv-05224-EMC, 2018 WL 6592442, at *2 (N.D. Cal. Dec. 14. 2018). Defendants contend that the United States' claims are barred by the prohibition on excessive fines under the Eighth Amendment. Dkt. Nos. 298, 300–02 ¶ 397; Dkt. No. 299 ¶ 398. An Eighth Amendment claim for excessive fines, however, is not an affirmative

defense because it does not operate to defeat an FCA claim. *Acad. Mortg.*, 2020 WL 7056017, at *5. Rather, it would operate, if at all, only to limit penalties. *Id.*

Defendants' excessive fines defense should also be stricken because it is insufficiently pleaded. Decisions "about the appropriate punishment for an offense belong in the first instance to the legislature." *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). Recognizing that any judicial determination regarding the "gravity" of an offense "will be inherently imprecise," the Supreme Court has rejected "strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense." *Id.* A penalty is unconstitutional only if it is "grossly disproportional to the gravity of the defendant's offense." *Id.* at 336-337. This framework is highly deferential: A penalty need only "bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 334.

Defendants fail to explain how any civil penalty in this matter would meet this framework. Instead, Defendants simply identify the range of civil penalties under the FCA and then allege that the United States "contends that each diagnosis code at issue is a claim for payment, such that each allegedly false diagnosis code could result in mandatory civil penalties ranging from $5,000 to $10,000."[4] Dkt. Nos. 298, 300–02 ¶ 397; Dkt. No. 299 ¶ 398. As set forth in the Complaint, under the CMS-HCC model, each additional diagnosis code associated with an HCC may result in thousands of dollars in additional payments. Dkt. No. 240, Complaint ¶ 69. As one Kaiser employee summed up the value: "Each of these diagnoses adds about $2500 to our bottom line." Dkt. No. 240, Complaint ¶ 255; Dkt. 301, Amended Answer ¶ 255 (admitting this was accurately quoted). Given how the Medicare Advantage risk adjustment payments work, Defendants fail to explain how Congress' scheme does not bear some relationship to the gravity of the offense, let alone plausibly allege facts showing a constitutional violation.

III. The Voluntary Disclosure Provision Of The FCA Does Not Apply

Defendant KFHP-CO claims that its damages should be reduced under 31 U.S.C. § 3729(a)(2) based on a purported voluntary disclosure to CMS in 2015. Dkt. No. 299 ¶ 397. But KFHP-CO does not actually plead that it satisfied the voluntary disclosure requirements set forth in § 3729(a)(2).

[4] The United States asserts that, at a minimum, each false diagnosis code submitted for payment is a false statement material to a false claim, and therefore an independent violation of the FCA.

Section 3729(a)(2) gives the court the discretion to reduce FCA damages if a defendant satisfies certain express statutory obligations. Specifically, the defendant:

1. must provide officials of the United States responsible for investigating FCA violations with "with all information known . . . about the violation within 30 days after the date on which the defendant first obtained the information";

2. must fully cooperate with the government's investigation;

3. must provide the information before any "criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation"; and

4. must provide the information voluntarily, before having "actual knowledge of the existence of an investigation into such violation."

Accordingly, to apply, Defendant KFHP-CO would have had to plead that it (1) provided the Department of Justice with *all* information about its violations (i.e., its efforts to add, unlawfully, patient diagnoses to addenda to obtain additional Medicare payments) within 30 days of first learning this information (i.e., within 30 days of implementing these unlawful practices), (2) fully cooperated with the Government's investigation, (3) provided this information before the first *qui tam* complaint was filed in 2013, and (4) provided this information before it had actual knowledge of the Government's investigation into its violations. Defendant KFHP-CO pleads no such facts.

First, KFHP-CO does not allege that it provided the United States with *all* information about its FCA violations. Instead, KFHP-CO pleads only that it disclosed "*this* information" to CMS—i.e., that "some diagnoses associated with diagnosis codes submitted to CMS may not have been documented for the relevant Medicare Advantage beneficiaries" and that it redacted those diagnosis codes. Dkt. No. 299 ¶ 397. KFHP-CO was aware of the actual reasons and information that led to the redactions, but rather than disclosing those reasons, KFHP-CO disclosed only that some diagnoses "may not have been documented." For example, elsewhere in its own answer, KFHP-CO admits that the Complaint accurately quotes the audit findings which stated "[t]he audit process surfaced questions about the use of queries." Dkt. No. 240, Complaint ¶ 354; Dkt. 299, Amended Answer ¶ 354 (admitting this document was accurately quoted). Yet, KFHP-CO does not, and cannot, allege that it disclosed any information about the use of queries or addenda. Simply put, KFHP-CO has not, and cannot, plead that it met the full disclosure requirement, requiring disclosure of "all information known" in order to apply, 31 U.S.C.

§ 3729(a)(2).

Not only did KFHP-CO not disclose "all information known," it did not even make its limited disclosure to the Department of Justice, or even to the Office of Inspector General at the Department of Health and Human Services ("HHS-OIG"). This failure further bars application of § 3729(a)(2) because the statute requires "the Defendant [to] show that it furnished all the information it knew about the claim to the Attorney General or Department of Justice," the "officials of the United States responsible for investigating false claims violations." *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, No. 04-CV-01224-MSK-CBS, 2010 WL 3730894, at *2–3 (D. Colo. Sept. 16, 2010) (finding § 3729(a)(2)(A) did not apply where defendant alleged it "promptly disclosed all of the relevant information about its royalty calculations" to the Minerals Management Service but "never communicated information about its claims to the Department of Justice"). This failure is all the more glaring because, as detailed further below, KFHP-CO was aware of a Department of Justice and HHS-OIG investigation into its conduct at that time.

Second, KFHP-CO does not allege that it fully cooperated with the Government's investigation. *Cf.* Dkt. No. 299 ¶ 397.

Third, KFHP-CO does not allege that it provided all information about its violations *before* any civil action with respect to such violation. Dkt. No. 299 ¶ 397. To the contrary, KFHP-CO alleges it made its disclosure in 2015, after the *Osinek* and *Taylor qui tam* suits had commenced.

Fourth, KFHP-CO does not allege that it provided all information about its violations *before* it had actual knowledge of the existence of an investigation into its FCA violations. To the contrary, KFHP-CO made its alleged disclosure in 2015 only after learning much earlier that the Department of Justice and HHS-OIG were investigating it for FCA violations. *See* Defs. RJN Ex. A, Dkt. No. 142-1 at 7–26.[5] KFHP-CO's claim that when it disclosed and redacted certain diagnosis codes in 2015, it "was not aware of an investigation by the United States into *these specific* diagnosis codes or a lawsuit by any relator involving *these specific* diagnosis codes," Dkt. No. 299 ¶ 397 (emphasis added), is contradicted

[5] The Government subpoenaed KFHP in 2013, and the Subpoena covered all of KFHP's subsidiaries, including KFHP-CO. Defs. RJN Ex. A, Dkt. No. 142-1 at 11; *accord* Defs. First-to-File-Bar MTD, Dkt. No. 141 at 28 (characterizing 2013 subpoena as covering KFHP-CO); Defs. First-to-File-Bar MTD Reply, Dkt. No. 165 at 20 (same). KFHP-CO does not (and cannot) plausibly allege that it was not aware of the Government's investigation in 2015.

by its previous representation to the Court that the United States was investigating its diagnosis coding practices generally. *See, e.g.*, Defs.' First-to-File-Bar MTD Reply, Dkt. No. 165 at 23 (representing that "the United States' subpoenas targeted virtually any document or communication about 'the determination, documentation, assignment, review, analysis, reporting, data mining, addending, updating, or refreshing of diagnoses or diagnosis codes or HCCs for Medicare Advantage [members]'"); *cf. Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 785 n.16 (2000) (§ 3729(a)(2) "applies only in some of those (presumably few) cases involving defendants who provide information concerning the violation before they have knowledge that an investigation is underway").

Defendant KFHP-CO's § 3729(a)(2) defense fails for each of these reasons and should be stricken. Finally, in any event, because § 3729(a)(2) merely reduces damages, it is not a proper affirmative defense. *Acad. Mortg.*, 2020 WL 7056017, at *5.

CONCLUSION

For the foregoing reasons, the United States respectfully requests this Court strike Defendants' affirmative defenses of estoppel, ratification/consent, failure to mitigate, and excessive fines, and Defendant KFHP-CO's affirmative defense of voluntary disclosure under 31 U.S.C. § 3729(a)(2).

DATED: September 29, 2023

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ISMAIL J. RAMSEY
United States Attorney

s/David M. DeVito
SHIWON CHOE
DAVID M. DEVITO
Assistant United States Attorneys

JAMIE ANN YAVELBERG
PATRICIA L. HANOWER
BRADEN CIVINS
ARTHUR S. DI DIO
GARY R. DYAL
MICHAEL FISHMAN
RACHEL C. KARPOFF
LAURIE A. OBEREMBT
JONATHAN T. THROPE

United States Department of Justice
Civil Division
Commercial Litigation Branch

DAVID MOSKOWITZ
Special Attorney to the U.S. Attorney General

Attorneys for the United States of America

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ISMAIL J. RAMSEY (CABN 189820)
United States Attorney

MICHELLE LO (NYBN 4325163)
Chief, Civil Division

SHIWON CHOE (CABN 320041)
DAVID M. DEVITO (CABN 243695)
Assistant United States Attorneys

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495
Telephone: (415) 436-7200
Facsimile: (415) 436-6748
shiwon.choe@usdoj.gov
david.devito@usdoj.gov

JAMIE ANN YAVELBERG
PATRICIA L. HANOWER
BRADEN CIVINS
ARTHUR S. DI DIO
GARY R. DYAL
MICHAEL R. FISHMAN
RACHEL C. KARPOFF
LAURIE A. OBEREMBT
JONATHAN T. THROPE
United States Department of Justice
Civil Division
Commercial Litigation Branch

DAVID MOSKOWITZ
Special Attorney to the U.S. Attorney General

Attorneys for the United States of America

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA ex rel. RONDA OSINEK, Plaintiff, v. KAISER PERMANENTE, et al., Defendants.	Case No. 3:13-cv-03891-EMC **[PROPOSED] ORDER GRANTING UNITED STATES' MOTION TO STRIKE DEFENDANTS' AMENDED AFFIRMATIVE DEFENSES**

The Court, having considered the United States' Motion to Strike Defendants' Amended Affirmative Defenses and finding good cause, hereby strikes Defendants' Affirmative Defenses, Dkt. Nos. 298, 300-02, ¶¶ 397–400 and Dkt. No. 299 ¶¶ 397-401, because they fail as a matter of law and are insufficiently pleaded.

IT IS SO ORDERED.

DATED: _____, 2023

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HON. EDWARD M. CHEN
United States District Judge