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 13 **UNITED STATES DISTRICT COURT**  
 14 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

17 UNITED STATES OF AMERICA ex rel.  
 RONDA OSINEK,

18 Plaintiff,

19 v.

20 KAISER PERMANENTE, et al.,

21 Defendants.

Case No. 3:13-cv-03891-EMC

**DEFENDANTS' OPPOSITION TO THE  
 UNITED STATES' MOTION TO  
 STRIKE DEFENDANTS'  
 AFFIRMATIVE DEFENSES**

Hearing Date: November 9, 2023

Time: 1:30 PM

Judge: Hon. Edward M. Chen

Courtroom: 5, 17th Floor

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 27 (CAPTION CONTINUED)

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UNITED STATES OF AMERICA ex rel.  
GLORYANNE BRYANT and VICTORIA  
HERNANDEZ,

Plaintiff,

v.

KAISER PERMANENTE, et al.,

Defendants.

Case No. 3:18-cv-01347-EMC

**DEFENDANTS' OPPOSITION TO THE  
UNITED STATES' MOTION TO  
STRIKE DEFENDANTS'  
AFFIRMATIVE DEFENSES**

Hearing Date: November 9, 2023  
Time: 1:30 PM  
Judge: Hon. Edward M. Chen  
Courtroom: 5, 17th Floor

UNITED STATES OF AMERICA ex rel.  
JAMES M. TAYLOR,

Plaintiff,

v.

KAISER PERMANENTE, et al.,

Defendants.

Case No. 3:21-cv-03894-EMC

**DEFENDANTS' OPPOSITION TO THE  
UNITED STATES' MOTION TO  
STRIKE DEFENDANTS'  
AFFIRMATIVE DEFENSES**

Hearing Date: November 9, 2023  
Time: 1:30 PM  
Judge: Hon. Edward M. Chen  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Court should deny Plaintiff United States' Motion to Strike Defendants' Affirmative  
4 Defenses ("Motion") in full. Defendants<sup>1</sup> have asserted detailed factual allegations in support of  
5 their affirmative defenses, which more than satisfy the applicable pleading standard. Plaintiff has  
6 not even attempted to show how it will be prejudiced if these defenses remain in the case. The  
7 Court should deny the Motion based on that failing alone. Plaintiff's arguments about the  
8 sufficiency of the defenses fare no better. Those arguments quibble with the facts as Defendants  
9 have alleged them and rely on legal arguments that have been rejected by other courts within the  
10 Ninth Circuit. Plaintiff's Motion is, as a practical matter, a summary judgment challenge to  
11 Defendants' affirmative defenses and is inappropriate at this stage of the litigation. Thus, the  
12 Court should deny the Motion.

13 **II. LEGAL STANDARD**

14 A plaintiff moving to strike affirmative defenses carries a heavy burden. Motions to strike  
15 are disfavored and they must be denied unless the moving party can demonstrate "that it will  
16 suffer prejudice if the motion to strike is not granted." See *FDIC v. Straub*, 2012 WL 1965621, at  
17 \*3 (N.D. Cal. May 31, 2012); *Turano v. Cnty. of Alameda*, 2018 WL 5629341, at \*8 (N.D. Cal.  
18 Oct. 30, 2018) (dismissing motion to strike in part based on the "absence of any allegations by  
19 [D]efendants that they are prejudiced by the presence of these statements in the complaint").

20 Additionally, to strike an affirmative defense, this Court has held that "the moving party  
21 must convince the court that there are no questions of fact, that any questions of law are clear and  
22 not in dispute, and that under no set of circumstances could the defense succeed." *Asetek*  
23 *Danmark A/S v. CoolIT Sys. Inc.*, 2019 WL 7589209, at \*3 (N.D. Cal. Dec. 30, 2019) (Chen, J.).  
24 In assessing a motion to strike affirmative defenses, the Court "must treat as admitted all material  
25 factual allegations underlying the challenged defenses and all reasonable presumptions that can  
26

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27 <sup>1</sup> "Defendants" refers to Kaiser Foundation Health Plan, Kaiser Foundation Health Plan of  
28 Colorado, The Permanente Medical Group, Southern California Permanente Medical Group, and  
Colorado Permanente Medical Group.

1 be drawn therefrom.” *Perez v. Auto Tech. Co.*, 2014 WL 12592254, at \*2 (C.D. Cal. Feb. 4,  
 2 2014).<sup>2</sup> “These narrow standards are designed to provide a party the opportunity to prove his  
 3 allegations if there is the possibility that his defense or defenses may succeed after a full hearing  
 4 on the merits.” *Carter-Wallace, Inc. v. Riverton Lab ’ys, Inc.*, 47 F.R.D. 366, 368 (S.D.N.Y.  
 5 1969).

### 6 **III. ARGUMENT**

#### 7 **A. Plaintiff Has Not Shown, and Cannot Show, Unfair Prejudice**

8 As an initial matter, the Court should deny the Motion outright because Plaintiff has not  
 9 shown any unfair prejudice that would arise from allowing the affirmative defenses to remain in  
 10 the case. “Motions to strike are generally viewed with disfavor, and will usually be denied unless  
 11 the allegations in the pleading have no possible relation to the controversy, and may cause  
 12 prejudice to one of the parties.” *First Nat’l Ins. Co. of Am. v. Peralta Cmty. Coll. Dist.*, 2013 WL  
 13 622944, at \*7 (N.D. Cal. Feb. 15, 2013); *see* C. Wright & A. Miller, 5C Fed. Prac. & Proc. Civ.  
 14 § 1380 n.34 (3d ed.) (collecting cases and noting that “even when technically appropriate and  
 15 well-founded, Rule 12(f) motions often are not granted in the absence of a showing or prejudice  
 16 to the moving party” because “of their somewhat dilatory and often harassing character”). For

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17  
 18 <sup>2</sup> The Ninth Circuit has not yet endorsed a pleading standard for affirmative defenses. *Kohler v.*  
 19 *Staples the Off. Superstore, LLC*, 291 F.R.D. 464, 468 (S.D. Cal. 2013) (observing the Ninth  
 20 Circuit’s silence on this issue and noting “it is clear that this point of law is unresolved”). District  
 21 courts within the Ninth Circuit disagree about the pleading standard that applies to affirmative  
 22 defenses. Some apply a “fair notice” standard, which is a “low bar” that “does not require great  
 23 detail, but requires ‘some factual basis’ for the affirmative defense.” *United States v. Rite Aid*  
 24 *Corp.*, 2020 WL 230202, at \*2 (E.D. Cal. Jan. 15, 2020). Others require a standard more akin to  
 25 the plausibility standard under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft*  
 26 *v. Iqbal*, 556 U.S. 662 (2009). *See Gencarelli v. Twentieth Century Fox Film Corp.*, 2018 WL  
 27 376664, at \*2 (C.D. Cal. Jan. 11, 2018) (“the Court will apply the *Twombly/Iqbal* standard to  
 28 affirmative defenses”). A leading treatise concludes that the “better view” is that the plausibility  
 standard applies only to affirmative claims for relief, because *Twombly* and *Iqbal* “were  
 interpreting the ‘showing’ language of Rule 8(a)(2)—language that does not appear in Rule 8(b)  
 or Rule 8(c) [which applies to defenses]—and given the different circumstances facing claimants  
 (who have months or years to prepare their claims) compared with those facing respondents to  
 claims (who typically have a few weeks to prepare a response).” C. Wright & A. Miller, 5C Fed.  
 Prac. & Proc. Civ. § 1381 (3d ed.). While Defendants contest that the plausibility standard is the  
 applicable standard for this Motion, the detailed allegations offered in support of their affirmative  
 defenses satisfy that standard in any event.

1 this reason, courts routinely deny motions to strike where the movant cannot show any prejudice.  
2 See *Straub*, 2012 WL 1965621, at \*3; *Turano*, 2018 WL 5629341, at \*8; *Mary Pickford Found. v.*  
3 *Timeline Film, LLC*, 2013 WL 12131550, at \*2 (C.D. Cal. Jan. 11, 2013) (“the Court declines to  
4 strike the paragraphs in the Answer in the absence of a showing of unfair prejudice”).

5 Here, Plaintiff’s Motion does not even attempt to explain how the affirmative defenses  
6 will unfairly prejudice Plaintiff. Nor can Plaintiff show prejudice. The affirmative defenses  
7 respond to Plaintiff’s factual allegations and legal theories, all of which are central to the disputed  
8 issues in this case. For instance, these defenses address how the Centers for Medicare &  
9 Medicaid Services (“CMS”) interpreted the key provision of the ICD Guidelines at issue in this  
10 case (the so-called Contested Provision), how CMS conducted its Risk Adjustment Data  
11 Validation (“RADV”) audits to document the diagnosis codes submitted by Medicare Advantage  
12 Organizations (“MAOs”) for risk-adjusted payments, and what CMS told or did not tell  
13 Defendants and other MAOs about how to interpret and apply the Contested Provision. Nothing  
14 in the affirmative defenses could possibly constitute a surprise, present unduly complicated  
15 issues, risk juror confusion, or otherwise unfairly prejudice Plaintiff. See *Rezek v. City of Tustin*,  
16 2012 WL 5829928, at \*9 (C.D. Cal. Nov. 15, 2012) (denying motion to strike where moving  
17 party did not show that allegations would “mislead the trier of fact or lead to unnecessary  
18 complication”). The failure to identify any prejudice is reason alone to deny the Motion in full—  
19 the Court need not even assess Plaintiff’s arguments about the sufficiency of each defense. See  
20 *United States v. Paksn, Inc.*, 2022 WL 2276372, at \*1 (C.D. Cal. Feb. 7, 2022) (“Accordingly,  
21 because the United States has not demonstrated any specific prejudice, the Court declines to  
22 determine the merits of Defendants’ affirmative defenses at this stage.”).

### 23 **B. Defendants Have Plausibly Alleged Their Affirmative Defenses**

24 In the Motion, Plaintiff raises two primary arguments: first, that the equitable affirmative  
25 defenses—estoppel, ratification, and failure to mitigate—cannot proceed against the United States  
26 as a matter of law; and second, that all but one of the affirmative defenses do not satisfy the  
27  
28

1 applicable pleading standard.<sup>3</sup> Both arguments fail.

2 First, Plaintiff argues that because it seeks the return of funds paid from the U.S. Treasury,  
3 equitable affirmative defenses must be dismissed as a matter of law under *Office of Personnel*  
4 *Management v. Richmond*, 496 U.S. 414 (1990). Mot. at 3–4. But district courts in this Circuit  
5 have considered—and rejected—that exact argument, repeatedly allowing equitable affirmative  
6 defenses to proceed through discovery. *See, e.g., United States ex rel. Mei Ling v. City of Los*  
7 *Angeles*, 2020 WL 1229734, at \*4–5 (C.D. Cal. Jan. 28, 2020) (rejecting argument that equitable  
8 defenses must be stricken in False Claims Act (“FCA”) cases); *Paksn*, 2022 WL 2276372, at \*1  
9 (same). While the Supreme Court in *Richmond* held that estoppel did not apply to the United  
10 States based on the facts of the case before it, the Court expressly refused to “embrace a rule that  
11 no estoppel will lie against the Government in any case.” *Richmond*, 496 U.S. at 423. Instead,  
12 the holding in *Richmond* was limited to situations where there was “a claim for payment of  
13 money from the Public Treasury contrary to a statutory appropriation.” *Id.* Given the express  
14 limits on the *Richmond* holding, “the Supreme Court has not entirely foreclosed the possibility  
15 that a party could successfully mount an equitable defense against the government in statutory  
16 enforcement actions.” *Mei Ling*, 2020 WL 1229734, at \*4.

17 Relying on *Richmond*, Plaintiff asserts that Defendants’ equitable affirmative defenses  
18 seek only to “prevent the United States from recovering funds unlawfully paid out from the  
19 Treasury.” Mot. at 5. But that is obviously incorrect from the face of the Amended Complaint.  
20 The FCA allows for a finding of liability and the associated imposition of civil penalties even  
21 where there is ***no finding of damages***. *United States ex rel. Hagood v. Sonoma Cnty. Water*  
22 *Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (“No damages need be shown in order to recover the  
23 [FCA] penalty.”). The FCA also imposes treble damages. 31 U.S.C. § 3729(a)(1). The  
24 Amended Complaint specifically alleges that Plaintiff is entitled to treble damages and civil  
25 penalties. Am. Compl. ¶ 381. Neither penalties nor treble damages implicate funds drawn from  
26

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27 <sup>3</sup> The Motion does not challenge Defendants’ Affirmative Defense, which is based on the  
28 nondelegation doctrine. Mot. at 2 n.2; *see also* Dkt. 298, ¶ 401 (KFHP); Dkt. 299, ¶ 402 (KFHP-  
CO); Dkt. 300, ¶ 401 (TPMG); Dkt. 301, ¶ 401 (CPMG); Dkt. 302, ¶ 401 (SCPMG).

1 the U.S. Treasury. They are “punitive in nature”—not compensatory. *See Vt. Agency of Nat. Res.*  
2 *v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000); *see also United States v. Mackby*, 261  
3 F.3d 821, 830–31 (9th Cir. 2001). Though Defendants expect to defeat liability in this case, it is  
4 of course plausible that there could be a finding of FCA liability and associated penalties in this  
5 case without implicating *a single dollar* drawn from the U.S. Treasury. That possibility alone  
6 forecloses striking equitable defenses on this basis at this juncture. *See Paksn*, 2022 WL  
7 2276372, at \*1 (declining to strike equitable defenses where the United States failed to adequately  
8 respond to the argument that the FCA provides for punitive damages and therefore does not only  
9 implicate funds drawn from the Treasury).

10 Plaintiff also relies on *United States ex rel. Poehling v. UnitedHealth Grp., Inc.*, where a  
11 district court granted a motion to strike equitable affirmative defenses asserted against the United  
12 States in an FCA action. *See* 2019 WL 2353125, at \*10 (C.D. Cal. Mar. 28, 2019). But the court  
13 in *Poehling* appears to have assumed that the affirmative defenses would result in “the payment  
14 of money in a way that Congress did not authorize,” and the defendant there made no argument to  
15 the contrary. *Id.* So *Poehling*’s persuasive value here is limited. And, in any event, subsequent  
16 courts in this Circuit have declined to follow *Poehling*’s reasoning. *See Mei Ling*, 2020 WL  
17 1229734, at \*4–5; *Paksn*, 2022 WL 2276372, at \*1.

18 Because the parties here do not yet know what, if any, damages a trier of fact may impose,  
19 Plaintiff’s reliance on *Richmond* and *Poehling* is misplaced. The parties do not yet know if  
20 Treasury funds will be implicated at all in this case. And even if they are, because the FCA  
21 imposes treble damages and penalties, *Richmond* does not conclusively answer whether estoppel,  
22 the only equitable doctrine it addressed, would apply. Accordingly, Plaintiff has failed to show  
23 that any equitable defenses should be stricken on this basis.<sup>4</sup>

24 Plaintiff’s second argument—that Defendants have failed to plead the required elements

25 \_\_\_\_\_  
26 <sup>4</sup> Citing *United States v. Wurts*, 303 U.S. 414, 415 (1938), Plaintiff argues that equitable defenses  
27 do not apply to common-law claims for the same reasons that they do not apply to FCA claims:  
28 they implicate funds from the Treasury. Mot. at 4–5. But the Court need not decide whether the  
equitable defenses also apply against the common-law claims because they can proceed against  
the FCA claims.

1 for all but one of the defenses—also fails. Defendants have plausibly alleged every one of their  
2 affirmative defenses.

### 3 1. Estoppel

4 To plead estoppel, Defendants must allege: (1) Plaintiff’s knowledge of the facts; (2) that  
5 Plaintiff intended its conduct be acted on or must act such that Defendants have a right to believe  
6 it would be acted upon; (3) Defendants must be ignorant of the true facts; and (4) Defendants  
7 must rely on Plaintiff’s conduct to their injury. *United States v. Acad. Mortg. Corp.*, 2020 WL  
8 7056017, at \*3 (N.D. Cal. Dec. 2, 2020) (Chen, J.).

9 Here, Defendants allege that (1) CMS was aware of Defendants’ diagnosis coding  
10 practices and their interpretation of the Contested Provision both through communications with  
11 the agency about the Contested Provision and the agency’s Risk Adjustment Data Validation  
12 (“RADV”) audits; (2) CMS knowingly affirmed those practices and that interpretation, including  
13 by stating “that healthcare provider documentation of a diagnosis in the beneficiary’s medical  
14 record is acceptable support for submission of diagnosis codes to CMS under Medicare Part C”  
15 and communicating to Defendants and others in a way that “affirmed Defendant’s interpretation  
16 and application of the Contested Provision during the period at issue in this case”; and (3) CMS  
17 failed to provide contrary guidance to Defendants. Dkt. 298, ¶¶ 398–400 (KFHP); Dkt. 299,  
18 ¶¶ 399–401 (KFHP-CO); Dkt. 300, ¶¶ 398–400 (TPMG); Dkt. 301, ¶¶ 398–400 (CPMG); Dkt.  
19 302, ¶¶ 398–400 (SCPMG). Defendants also allege that they relied on these communications and  
20 actions in conducting their business and interpreting the Contested Provision. *Id.*

21 Despite these clear allegations, Plaintiff argues that Defendants have not alleged estoppel,  
22 but each of Plaintiff’s arguments fails.

23 **First**, Plaintiff incorrectly asserts that Defendants “have not pleaded, and cannot plead,  
24 affirmative misconduct by the Government.” Mot. at 6. Defendants allege that CMS knew about  
25 Defendants’ interpretation of the Contested Provision, affirmed through communications that  
26 Defendants’ interpretation was correct, reviewed diagnosis codes submitted by Defendants  
27 consistent with that interpretation as part of the agency’s RADV audits, affirmatively verified that  
28 those diagnosis codes were properly documented in the applicable medical records, and never

1 provided any guidance to Defendants indicating that they were incorrectly interpreting the  
2 Contested Provision. *See* Dkt. 298, ¶¶ 398–400 (KFHP); Dkt. 299, ¶¶ 399–401 (KFHP-CO); Dkt.  
3 300, ¶¶ 398–400 (TPMG); Dkt. 301, ¶¶ 398–400 (CPMG); Dkt. 302, ¶¶ 398–400 (SCPMG). *Id.*

4 Plaintiff also wrongly asserts that Defendants must show a “deliberate lie” or “pattern of  
5 false promises” by the government, relying on *Mukherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir.  
6 1986). To start, the Ninth Circuit did not hold, as Plaintiff suggests, that affirmative misconduct  
7 *requires* a showing of “a deliberate lie . . . or a pattern of false promises.” *See* Mot. at 6. The  
8 court noted that estoppel against the government must rest on conduct “going beyond mere  
9 negligence.” 793 F.2d at 1008. And it concluded that even though the government official in that  
10 case gave the plaintiff incorrect information, there was no evidence showing more than  
11 negligence, which could include “a deliberate lie . . . or a pattern of false promises.” *Id.* at 1009.  
12 In fact, the Ninth Circuit has been explicit that “the question of whether a given set of facts  
13 justifies a finding of ‘affirmative misconduct’ is subject to debate,” and depends on the facts of  
14 each case. *Lavin v. Marsh*, 644 F.2d 1378, 1382 n.6 (9th Cir. 1981); *Watkins v. U.S. Army*, 875  
15 F.2d 699, 707 (9th Cir. 1989) (“There is no single test for detecting the presence of affirmative  
16 misconduct; each case must be decided on its own particular facts and circumstances.”). A  
17 defendant may be able to prove affirmative misconduct by the United States without showing a  
18 deliberate lie or a pattern of false promises at all. In *SEC v. Sands*, for example, the court  
19 declined to strike an estoppel defense where the defendants alleged that the U.S. Securities and  
20 Exchange Commission “tacitly approved all alleged conduct.” 902 F. Supp. 1149, 1166 (C.D.  
21 Cal. 1995) (internal quotes omitted). In addition, unlike here, *Mukherjee* considered an estoppel  
22 argument at *summary judgment*—so the court there could properly assess the evidence on a full  
23 factual record after discovery and conclude that there was an absence of evidence showing  
24 estoppel. *See* 793 F.2d at 1009.

25 Here, drawing all inferences in favor of Defendants, as the Court must at this stage,  
26 Defendants have plausibly alleged affirmative misconduct: CMS knew of Defendants’  
27 interpretation of the Contested Provision, affirmed that interpretation through its RADV audits  
28 and other direct communications with Defendants’ representatives, and never issued any guidance

1 to the alternative—despite purportedly thinking all the while that Defendants were applying the  
2 Contested Provision incorrectly. *See* Dkt. 298, ¶ 400 (KFHP); Dkt. 299, ¶ 401 (KFHP-CO); Dkt.  
3 300, ¶ 400 (TPMG); Dkt. 301, ¶ 400 (CPMG); Dkt. 302, ¶ 400 (SCPMG).

4 **Second**, Plaintiff argues that the estoppel defense fails because the United States’ claims  
5 for relief necessarily implicate funds drawn from the U.S. Treasury, *see* Mot. at 7; but as  
6 explained above, that is not the case, *see supra* at 5.

7 **Third**, Plaintiff argues that the estoppel defense fails because Defendants do not offer  
8 their own interpretation of the Contested Provision. But that argument misses the point.  
9 Defendants have alleged that Plaintiff knew of Defendants’ interpretation of the Contested  
10 Provision—and it is Plaintiff’s knowledge and conduct that is relevant to this defense. *See* Dkt.  
11 298, ¶ 400 (KFHP); Dkt. 299, ¶ 401 (KFHP-CO); Dkt. 300, ¶ 400 (TPMG); Dkt. 301, ¶ 400  
12 (CPMG); Dkt. 302, ¶ 400 (SCPMG). These affirmative defenses do not require allegations of  
13 fraud or pleading with particularity under Rule 9(b). Because knowledge can be alleged  
14 generally, Defendants have no obligation to allege the specifics of Plaintiff’s knowledge at the  
15 pleading stage. Defendants also allege that CMS reviewed the diagnosis codes submitted by  
16 Defendants through the RADV audit process, and thus, the agency clearly knows the  
17 interpretation of the Contested Provision that Defendants employed during the period at issue. *Id.*  
18 Moreover, Defendants contend that CMS even affirmed Defendants’ interpretation of the  
19 Contested Provision through direct communications. *See id.* It also strains credulity for Plaintiff  
20 to argue that it is not on notice of Defendants’ interpretation of the Contested Provision. After all,  
21 the entire premise of this lawsuit is that Defendants knowingly violated the Contested Provision  
22 and Plaintiff investigated Defendants for years prior to bringing suit.

23 *United States v. Academy Mortgage Corp.*, which Plaintiff cites, actually supports  
24 Defendant’s point here. *See* 2020 WL 7056017, at \*3. There, this Court did not hold, as Plaintiff  
25 asserts, that the defendant must describe specifically what facts CMS knew about the defendant’s  
26 conduct. Mot. at 8. The Court instead held that “the party to be estopped must ‘know the facts’  
27 of the alleged false claims.” 2020 WL 7056017, at \*3. Defendants have more than cleared that  
28 hurdle—they allege that CMS knew the relevant facts given that CMS reviewed Defendants’

1 diagnosis codes when conducting RADV audits and the agency affirmed Defendants’  
2 interpretation of the Contested Provision through communications. Dkt. 298, ¶ 400 (KFHP); Dkt.  
3 299, ¶ 401 (KFHP-CO); Dkt. 300, ¶ 400 (TPMG); Dkt. 301, ¶ 400 (CPMG); Dkt. 302, ¶ 400  
4 (SCPMG). The discovery process—which is not yet complete—has already disclosed some of  
5 this evidence, and will presumably uncover the remaining material facts. General allegations of  
6 knowledge are sufficient at the pleading stage—Defendants are not required to say more now.

7 **Fourth**, Plaintiff argues that Defendants fail to allege that CMS knew that Defendants  
8 would rely on their conduct. Mot. at 8. But Defendants have alleged that CMS affirmatively  
9 endorsed Defendants’ interpretation of the Contested Provision, including through RADV audits.  
10 See Dkt. 298, ¶ 400 (KFHP); Dkt. 299, ¶ 401 (KFHP-CO); Dkt. 300, ¶ 400 (TPMG); Dkt. 301,  
11 ¶ 400 (CPMG); Dkt. 302, ¶ 400 (SCPMG). The name of those audits—Risk Adjustment **Data**  
12 **Validation** audits—makes clear that CMS intended Defendants to interpret the results of the  
13 audits as commentary on whether the underlying data were valid or not and thereby whether  
14 Defendants correctly applied relevant diagnosis coding standards. See *id.* The reasonable  
15 inference is that CMS knew that Defendants would rely on these audit results.

## 16 2. Ratification

17 In pleading ratification, Defendants allege that CMS knew about and affirmatively  
18 endorsed Defendants’ interpretation of the Contested Provision, and interpretation that Plaintiff  
19 now argues was wrongful. See Dkt. 298, ¶ 398 (KFHP); Dkt. 299, ¶ 399 (KFHP-CO); Dkt. 300, ¶  
20 398 (TPMG); Dkt. 301, ¶ 398 (CPMG); Dkt. 302, ¶ 398 (SCPMG). Specifically, CMS “reviewed  
21 and verified the types of diagnosis codes that the United States now alleges are false” and  
22 affirmatively provided diagnosis coding guidance about proper documentation in medical records  
23 that Defendants then followed. See *id.* Defendants further allege that “the United States ratified,  
24 or otherwise consented to, transactions and occurrences that are the subject of this action.” *Id.*

25 Plaintiff argues that Defendants’ ratification defense fails because they have not alleged  
26 that the U.S. Department of Justice (“DOJ”) itself ratified Defendants’ conduct. See Mot. at 10.  
27 While Plaintiff relies on a string of nonbinding, out-of-circuit district court cases for that  
28 proposition, *id.*, courts within the Ninth Circuit have held that allegations of ratification need only

1 be tied to the conduct of a government agency or official. In *United States ex rel. Jordan v.*  
2 *Northrop Grumman Corp.*, the district court held that it was “appropriate for Defendant to assert  
3 the affirmative defense of ratification or waiver against the Government’s FCA claim at this  
4 stage” because “the knowledge possessed by *officials of the United States* may be highly relevant  
5 . . . [and] may show that defendant did not submit its claim in deliberate ignorance or reckless  
6 disregard of the truth.” 2002 WL 35454612, at \*7–8 (C.D. Cal. Aug. 5, 2002) (emphasis added);  
7 *see also Rite Aid*, 2020 WL 230202, at \*6 (adopting the reasoning of the *Jordan* court when  
8 declining to strike affirmative defenses). Here, too, Defendants have alleged the United States—  
9 through CMS, *the regulator charged with administering the Medicare Advantage risk-*  
10 *adjustment program*—engaged in conduct and had communications that ratified the very  
11 interpretation of the Contested Provision that Plaintiff now challenges. *See* Dkt. 298, ¶ 398  
12 (KFHP); Dkt. 299, ¶ 399 (KFHP-CO); Dkt. 300, ¶ 398 (TPMG); Dkt. 301, ¶ 398 (CPMG); Dkt.  
13 302, ¶ 398 (SCPMG).

14 Additionally, many of the cases cited by Plaintiff are distinguishable. For example, in  
15 *United States ex rel. Spay v. CVS Caremark Corp.*, the defendant relied on the conduct of the  
16 relator but failed to identify any relevant conduct by government officials. 2013 WL 1755214, at  
17 \*12 (E.D. Pa. Apr. 24, 2013). Other cases cited by Plaintiff pointed to the failure of certain  
18 government officials to act—which is distinguishable from the affirmative endorsement of  
19 conduct that Defendants allege in this affirmative defense. *See United States v. Assocs. in Eye*  
20 *Care, P.S.C.*, 2014 WL 12606508, at \*4 (E.D. Ky. Nov. 14, 2014) (striking waiver defense where  
21 defendant alleged only that state officials failed to take action during a meeting); *United States v.*  
22 *Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763, 771 (N.D. Tex. 2002) (striking waiver defense  
23 where defendant alleged only that postal service employees failed to inspect mail); *United States*  
24 *ex rel. Dye v. ATK Launch Sys., Inc.*, 2008 WL 4642164, at \*3 (D. Utah Oct. 16, 2008) (striking a  
25 ratification defense that did not identify government agency that ratified the conduct or how it did  
26 so). Given the authority in this Circuit holding that the conduct of government officials is  
27 sufficient to form the basis of a ratification defense at the pleading stage, Defendants have  
28 sufficiently pleaded ratification.

1 Finally, Plaintiff’s argument that Defendants “conflate the issue of documentary *support*  
2 for diagnosis coding with the separate issue of which conditions are *eligible* to be coded” makes  
3 little sense and again ignores the applicable pleading standard. *See* Mot. at 10 (emphasis in  
4 original). Plaintiff has chosen to rest its case on the alleged violation of a single diagnosis-coding  
5 guideline—the Contested Provision—which provides professional coders guidance on how to  
6 interpret medical-record documentation and then report diagnoses based on that documentation.  
7 Dkt. No. 197 at 16 (“The Complaint alleges a single scheme through which Kaiser knowingly and  
8 systematically submitted inaccurate diagnosis codes in contravention of the ICD Guidelines’  
9 critical requirement that, in order to be coded, a condition must both ‘[1] coexist at the time of the  
10 encounter/visit and [2] require or affect patient care, treatment or management.’”). Thus,  
11 Plaintiff’s theory of falsity necessarily turns on whether the medical record documentation  
12 complies with the Contested Provision. As Plaintiff states in this Motion, this case is about  
13 whether medical conditions that were coded “*did not exist*” or “*did not actually require or affect*  
14 *patient care, treatment, or management.*” *Id.* (emphasis in original). Although Plaintiff now  
15 appears to backtrack and assert that the documentation in medical records is irrelevant to its  
16 theory of liability, medical record documentation is central evidence when evaluating whether a  
17 coded diagnosis complies with the Contested Provision, as will evidence that the healthcare  
18 provider believed that the condition existed at the time of the encounter and actually affected  
19 patient care. In any event, whether the underlying issue with the diagnosis codes submitted to  
20 CMS is framed as eligibility or documentation, Defendants allege that CMS was aware of their  
21 interpretation of the Contested Provision and subsequently ratified it because, *inter alia*, it  
22 reviewed and validated Defendants’ diagnosis coding through the agency’s RADV audits.  
23 Defendants need not allege any more specifics about the content of CMS’s knowledge at the  
24 pleading stage. *See United States ex rel. Silingo v. WellPoint, Inc.*, 904 F.3d 667, 679 (9th Cir.  
25 2018) (“knowledge may be pleaded generally”).

### 26 3. Failure to Mitigate

27 Nor should the Court strike Defendants’ failure-to-mitigate defense. Plaintiff argues that,  
28 as a matter of law, it had no duty to mitigate damages for either its FCA or common-law claims.

1 Mot. at 10–11. But at least one court has disagreed with that assertion and held that “the  
2 government does have a duty to mitigate damages with respect to a claim for payment by  
3 mistake,” which Plaintiff alleges here. *Rite Aid*, 2020 WL 230202, at \*6; *see also Jordan*, 2002  
4 WL 35454612, at \*18 (denying motion to strike a failure-to-mitigate defense alleged against the  
5 United States based on “the general principle that a party injured by a tort is required to make  
6 efforts to mitigate damages and the Government’s failure to persuade this Court that a contrary  
7 rule exists in cases of common law fraud”).

8 This Court, too, has previously allowed a failure-to-mitigate defense to proceed in an FCA  
9 case where the defendant alleged that the “*United States has failed to mitigate damages* by  
10 failing to take reasonable steps to recoup the fair market value for the properties associated with  
11 the claims in the Amended Complaint.” *Acad. Mortg.*, 2020 WL 7056017, at \*5 (emphasis  
12 added). The court found that allegation “sufficient” and acknowledged that “[t]he factual  
13 allegations required for a defendant to plead failure to mitigate may be lower than what is  
14 required to plead other defenses under the *Twombly* and *Iqbal* standard.” *Id.* (noting that at “this  
15 stage, it would be difficult to plead additional facts relating to precisely what the United States  
16 should have done to mitigate damages,” given that discovery was not then complete).

17 Plaintiff cites only a single, out-of-circuit case striking a failure-to-mitigate defense where  
18 common-law claims were at issue. Mot. at 11 (*citing United States ex rel. Mandel v. Sakr*, 2021  
19 WL 1541490, at \*2 (W.D.N.Y. Apr. 20, 2021)). The court there based its decision entirely on the  
20 fact that “[t]he Government has no duty to mitigate damages in *fraud* actions.” *Id.* (emphasis  
21 added). But to succeed on its common-law claim for payment by mistake, Plaintiff “need not  
22 plead [or prove] that the [D]efendants knew that the payments were mistaken.” *United States v.*  
23 *Adams*, 371 F. Supp. 3d 1195, 1218 (N.D. Ga. 2019). Thus, a claim for payment by mistake may  
24 prevail absent a showing of fraud. Accordingly, the cases in this Circuit are more persuasive.

25 Plaintiff also asserts that *Wurts* stands for the proposition that “the United States had no  
26 duty to mitigate with respect to its common law claims,” Mot. at 10–11, but the Supreme Court  
27 announced no such holding. *Wurts* does not mention any duty to mitigate and has no facts to  
28 suggest that mitigation would have been relevant given that the case was about an erroneous tax

1 refund. *See* 303 U.S. at 415. Plaintiff noticeably fails to cite a single case holding that *Wurts*  
 2 means that the United States never has a duty to mitigate where the United States asserts  
 3 common-law claims. Mot. at 10–11. Given that the weight of the case law suggests that the  
 4 United States in fact has a duty to mitigate when asserting payment-by-mistake claims, Plaintiff  
 5 has failed to show that “questions of law are clear and not in dispute” to support striking the  
 6 defense at this time. *See Asetek Danmark A/S*, 2019 WL 7589209, at \*3.

7 Finally, Plaintiff argues “that it is not clear to the United States what ‘reasonable steps’  
 8 Defendants allege the United States needed to take to respond to Defendants’ un-alleged  
 9 interpretation” of the Contested Provision. Mot. at 11. But that argument ignores Defendants’  
 10 allegations, which plainly state that “the United States did not take reasonable steps to notify  
 11 Defendant[s] that the United States disagreed with Defendant[s]’ interpretation” of the Contested  
 12 Provision despite knowing of that interpretation through direct interactions with Defendants and  
 13 others in the Medicare Advantage industry. Dkt. 298, ¶ 399 (KFHP); Dkt. 299, ¶ 400 (KFHP-  
 14 CO); Dkt. 300, ¶ 400 (TPMG); Dkt. 301, ¶ 399 (CPMG); Dkt. 302, ¶ 399 (SCPMG). Through its  
 15 communications with healthcare industry participants, *see id.*, and through its role administering  
 16 the Medicare Advantage program, CMS had notice of Defendants’ interpretation of the Contested  
 17 Provision and an ample opportunity to advise Defendants that it did not agree with that  
 18 interpretation. These allegations are more than sufficient to identify the reasonable steps that the  
 19 United States should have taken to mitigate any damages. *See Acad. Mortg.*, 2020 WL 7056017,  
 20 at \*5 (declining to strike failure-to-mitigate affirmative defense that simply alleged that the  
 21 United States failed to take “reasonable steps” to recoup fair market value of properties).

#### 22 4. Excessive Fines

23 Plaintiff offers two arguments in favor of striking Defendants’ affirmative defense based  
 24 on the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution. Both lack  
 25 merit. Plaintiff first argues that this defense is not an affirmative defense because it does not  
 26 operate to defeat a claim for relief. Mot. at 11–12. But the Ninth Circuit has found that where a  
 27 defense would result in the reduction of punitive damages, the defense was an affirmative  
 28 defense—and as explained above, the FCA is punitive in nature. *Passantino v. Johnson &*

1 *Johnson Consumer Prods., Inc.*, 212 F.3d 493, 516 (9th Cir. 2000) (“Defendants may now  
 2 establish an affirmative defense to punitive damages liability when they have a bona fide policy  
 3 against discrimination.”); *see also EEOC v. Wal-Mart Stores, Inc.*, 503 F. Supp. 3d 801, 817  
 4 (W.D. Wis. 2020), *aff’d*, 38 F.4th 651 (7th Cir. 2022) (holding that a defendant waived that same  
 5 defense by failing to allege it as an affirmative defense in the answer). In other words, there is  
 6 “no such limitation on affirmative defenses in the Ninth Circuit.” *Smith v. Wal-Mart Stores*, 2006  
 7 WL 2711468, at \*6 (N.D. Cal. Sept. 20, 2006) (rejecting argument that legal defenses against  
 8 relief are not affirmative defenses); *see also Shepherd v. Popular Publ’ns*, 10 F.R.D. 389, 391  
 9 (S.D.N.Y. 1950) (“Rule 12(f) allows the Court to strike only insufficient defenses. Partial  
 10 defenses are not insufficient. These defenses are substantive rights limiting the plaintiff’s cause  
 11 of action.”).

12 Next, Plaintiff incorrectly argues that the defense fails because Defendants have not  
 13 identified “how” the fine likely to be imposed is excessive. Mot. at 12. But Defendants could not  
 14 make such a showing at this juncture of the litigation because they cannot know what the fines  
 15 imposed in this case will be, if any. Plaintiff has yet to even identify all of the diagnosis codes it  
 16 asserts are false—rendering a calculation of even the maximum amount of damages and civil  
 17 penalties impossible.<sup>5</sup> As such, “[w]hether this amount is grossly disproportionate to the gravity  
 18 of Defendant’s offense remains a question that must be resolved at a later date.” *Jordan*, 2002  
 19 WL 35454612, at \*6 (declining to strike affirmative defense based on Excessive Fines Clause of  
 20 Eighth Amendment).

## 21 5. Voluntary Disclosure

22 The Court also should reject Plaintiff’s arguments to strike KFHP-CO’s affirmative  
 23 defense based on voluntary disclosure. The FCA provides for a reduction in damages if the  
 24 defendant voluntarily discloses certain information. Section 3729(a)(2) grants the Court the

25 <sup>5</sup> Plaintiff alleges that Defendants “improperly obtained and retained hundreds of millions of  
 26 dollars in risk-adjustment payments from CMS, in violation of both the FCA and the common  
 27 law.” Am. Compl. ¶ 13; *see also id.* ¶ 362 (“These false claims inflated CMS’s reimbursements  
 28 to the Kaiser Health Plans by hundreds of millions of dollars, representing a substantial monetary  
 impact.”). Given these allegations, it is plausible that treble damages and civil penalties could  
 total billions of dollars.

1 discretion to reduce FCA damages if it finds that a defendant (1) provided officials “responsible  
2 for investigating false claims violations with all information known . . . about the violation”  
3 within 30 days after “the defendant first obtained the information”; (2) fully cooperated with the  
4 government’s investigation; (3) provided the relevant information when there was no pending  
5 civil, criminal, or administrative action with respect to the violation; and (4) “did not have actual  
6 knowledge of the existence of an investigation into such violation.” KFHP-CO asserts an  
7 affirmative defense based on § 3729(a)(2). Plaintiff argues that KFHP-CO fails to allege each of  
8 these elements of the defense, but none of these arguments persuade, as they rely heavily on  
9 factual disputes regarding the veracity of KFHP-CO’s allegations, which is inappropriate at the  
10 pleadings stage. *See Transamerica Life Ins. Co. v. Rabadi*, 2016 WL 7444912, at \*1 (C.D. Cal.  
11 Mar. 31, 2016) (“The grounds for a motion to strike must appear on the face of the pleading under  
12 attack.”).

13 **First**, Plaintiff argues that KFHP-CO fails to allege that it disclosed **all** information  
14 known about the violations, arguing that KFHP-CO did not disclose information about diagnosis  
15 queries to healthcare providers. Mot. at 13. But KFHP-CO makes no allegations about queries in  
16 connection with this affirmative defense—let alone that it should have but did not disclose them.  
17 KFHP-CO alleges that it uncovered information about the alleged violation and then disclosed all  
18 of that information to CMS. Dkt. 299, ¶ 397 (KFHP-CO). The reasonable inference from these  
19 allegations is that KFHP-CO disclosed all information required to be disclosed at that time, which  
20 is all that is required under Section 3729(a)(2). Plaintiff argues that there was more information  
21 that KFHP-CO did know but did not disclose. Mot. at 13–14. That is nothing more than an  
22 attempt to create a factual dispute with KFHP-CO’s allegations, which is insufficient to show that  
23 the defense itself is not properly alleged at this stage.<sup>6</sup> *Harrison v. Lee*, 2019 WL 6528590, at \*1

24 \_\_\_\_\_  
25 <sup>6</sup> In an attempt to show that KFHP-CO knew more than it disclosed, Plaintiff relies on a statement  
26 in KFHP-CO’s Answer to the Amended Complaint admitting that the Amended Complaint  
27 quoted a document accurately. Mot. at 14. This admission says nothing about what KFHP-CO  
28 should have disclosed to meet the first prong of Section 3729(a)(2). First, there is nothing  
connecting the allegation and admission in question to the disclosures that KFHP-CO describes in  
the affirmative defense. Second, an admission that a document is quoted accurately says nothing

1 (D. Or. Dec. 4, 2019) (“[C]ourts may not resolve disputed and substantial factual or legal issues  
2 in deciding a motion to strike.”).

3 Citing a single, out-of-circuit case, Plaintiff argues that the disclosure was similarly  
4 insufficient because it was not made to DOJ and instead was made to CMS—a division of the  
5 U.S. Department of Health and Human Services (“HHS”). Mot. at 14. But the statute itself states  
6 only that the disclosure must be to “officials of the United States responsible for investigating  
7 false claims violations.” 31 U.S.C. § 3729(a)(2)(A). It does not limit disclosure to DOJ or any  
8 specific division or agency of the federal government. Plaintiff also has cited nothing to show  
9 that CMS has no responsibility for policing fraud on the Medicare Advantage program. So  
10 without more facts, there is no basis to conclude from the allegations that KFHP-CO’s disclosure  
11 to CMS was legally insufficient, and Plaintiff has thereby failed to meet its burden to show that  
12 “questions of law are clear and not in dispute” to support striking the defense at this time. *See*  
13 *Asetek Danmark A/S*, 2019 WL 7589209, at \*3.

14 **Second**, Plaintiff argues that “KFHP-CO does not allege that it fully cooperated with the  
15 Government’s investigation,” Mot. at 14, but KFHP-CO alleges that “Defendant was not aware of  
16 an investigation by the United States into these specific diagnosis codes,” Dkt. 299, ¶ 397  
17 (KFHP-CO). The reasonable inference from that allegation is that there was no investigation into  
18 those specific diagnosis codes at the time of the disclosure and therefore no investigation with  
19 which to cooperate.

20 **Third**, Plaintiff argues that because this disclosure post-dated the filing of the *Osinek* and  
21 *Taylor* complaints, the disclosure was too late. Mot. at 14. But the statute clearly states that “at  
22 the time such person furnished the United States with the information about the violation, no  
23 criminal prosecution, civil action, or administrative action had commenced under this title **with**  
24 **respect to such violation.**” *See* 31 U.S.C. § 3729(a)(2)(C) (emphasis added). Plaintiff does not  
25 contend that the *Osinek* and *Taylor qui tam* actions pertain to the diagnosis codes put at issue by  
26 KFHP-CO in its affirmative defense.

27 \_\_\_\_\_  
28 about the veracity of the underlying document. Third, the underlying document is extrinsic  
evidence that is irrelevant to the sufficiency of KFHP-CO’s allegations.

1           **Fourth**, Plaintiff argues that KFHP-CO’s allegation about the timing of its representation  
2 is untrue, ignoring that the Court must accept all facts alleged as true. Mot. at 14–15. Relying  
3 once again on facts and evidence outside the pleadings, Plaintiff argues that its own investigation  
4 was broad enough to cover the alleged violations in question because that investigation was about  
5 “diagnosis coding practices generally.” *Id.* Even setting aside that all of these arguments  
6 disputing the factual content of KFHP-CO’s allegations are inappropriate at this stage, *Rabadi*,  
7 2016 WL 7444912, at \*1, there is nothing that would suggest that Plaintiff’s investigation was an  
8 “investigation into” the specific diagnosis codes put at issue by KFHP-CO’s affirmative defense.  
9 *See* 31 U.S.C. § 3729(a)(2)(C).

10           The crux of Plaintiff’s challenges to this affirmative defense are factual disputes,  
11 tantamount to an argument that KFHP-CO must cite evidence sufficient to prove that Section  
12 3729(a)(2) applies. But that is not the governing pleading standard. To survive a motion to  
13 strike, at most, KFHP-CO need only plausibly allege that the defense applies. *See Acad. Mortg.*,  
14 2020 WL 7056017, at \*6 (declining to strike an affirmative defense that “gives fair notice as to its  
15 underlying theory”). KFHP-CO has done that here. With the benefit of fact discovery—and after  
16 Plaintiff has actually specified what diagnosis codes are at issue in this case, which it has not yet  
17 done—the parties may argue at a later date about the factual nuances of each prong and whether  
18 they apply to the specific disclosures. At that point, Plaintiff is free to marshal evidence in  
19 support of the factual points it now advances, but it cannot do so on a motion to strike.

20           **Finally**, Plaintiff argues that as with excessive fines, reliance on the voluntary-disclosure  
21 provision is not an affirmative defense because it does not operate to defeat liability. Mot. at 15.  
22 But as explained above, there is no rule in the Ninth Circuit that a defense is not an affirmative  
23 defense simply because it operates to reduce punitive damages. *See supra* 13–14.

#### 24 **IV. CONCLUSION**

25           For the foregoing reasons, the Court should deny the Motion in its entirety. If the Court  
26 determines that any affirmative defenses are insufficiently alleged, Defendants request that the  
27 Court grant leave to amend. *Wyshak v. City Nat’l Bank*, 607 F.2d 824, 826 (9th Cir. 1979)  
28 (holding that it was appropriate for the district court to grant leave to amend affirmative defense

1 and observing that “[i]n the absence of prejudice to the opposing party, leave to amend should be  
2 freely given”).

3  
4 Dated: October 13, 2023

Respectfully submitted,

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