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26 NORTHERN DISTRICT OF CALIFORNIA  
27 SAN FRANCISCO DIVISION

28 UNITED STATES OF AMERICA ex rel.  
RONDA OSINEK,

Plaintiff,

v.

KAISER PERMANENTE, et al.,

Defendants.

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

) **UNITED STATES' REPLY IN SUPPORT OF**  
) **MOTION TO STRIKE DEFENDANTS'**  
) **AFFIRMATIVE DEFENSES**

) Hearing: November 9, 2023 at 1:30 p.m.  
) Location: Zoom videoconference

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1 **INTRODUCTION**

2 Defendants' Opposition, Dkt. No. 313 ("Opp'n"), confirms that Defendants' affirmative defenses  
 3 are unavailable as a matter of law and insufficiently pleaded. Defendants' primary argument that the  
 4 United States will not be prejudiced by permitting Defendants to pursue their affirmative defenses fails  
 5 because prejudice is not required for the Court to strike these defenses, and even if it were, is easily  
 6 shown here, where the defenses would cause both parties to waste significant "time and money litigating  
 7 spurious issues." *Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167,  
 8 1170 (N.D. Cal. 2010). Indeed, Defendants' affirmative defenses, if not stricken, will result in discovery  
 9 fishing expeditions, production of irrelevant documents, lengthier witness depositions, unnecessary  
 10 motions practice, and increased time and expense throughout discovery and trial. Nothing in  
 11 Defendants' Opposition cures the fatal defects in their affirmative defenses. Accordingly, the Court  
 12 should grant the United States' Motion.

13 **ARGUMENT**

14 **I. The United States Need Not Show Prejudice to Prevail on Its Motion to Strike And, Even If  
 15 Required, Prejudice Exists Here**

16 Defendants misconstrue the standard for striking affirmative defenses by suggesting that "the  
 17 Court should deny the Motion outright because Plaintiff has not shown any unfair prejudice that would  
 18 arise from allowing the affirmative defenses to remain in the case." Opp'n at 2. "In the Ninth Circuit,  
 19 motions to strike are proper, even if the material is not prejudicial to the moving party, if granting the  
 20 motion would make trial less complicated or otherwise streamline the ultimate resolution of the action."  
 21 *Ganley v. Cnty. of San Mateo*, No. C06-3923 TEH, 2007 WL 902551, at \*2 (N.D. Cal. Mar. 22, 2007);  
 22 *accord, e.g., Hartford Underwriters Ins. Co. v. Kraus USA, Inc.*, 313 F.R.D. 572, 575 (N.D. Cal. 2016)  
 23 ("[A] motion to strike an insufficient affirmative defense does not require a prejudice showing.");  
 24 *Barnes*, 718 F. Supp. 2d at 1173 (same). This Court has routinely struck insufficient affirmative  
 25 defenses without requiring a showing of prejudice. *United States v. Acad. Mortg. Corp.*, No. 16-cv-  
 26 02120-EMC, 2020 WL 7056017, at \*3–5 (N.D. Cal. Dec. 2, 2020) (Chen, J.) (applying *Iqbal/Twombly*  
 27 standards and observing that striking meritless defenses "aids in streamlining case management and  
 28 judicial economy by cutting off vague or even frivolous claims early, thus avoiding the time and

1 expense of unnecessary or far-ranging discovery”) (cleaned up); *Izett v. Crown Asset Mgmt., LLC*, No.  
 2 18-cv-05224-EMC, 2018 WL 6592442, at \*2–3 (N.D. Cal. Dec. 14, 2018); *Righetti v. Cal. Dep’t of*  
 3 *Corr. & Rehab.*, No. C-11-2717 EMC, 2013 WL 1891374, at \*3–4 (N.D. Cal. May 6, 2013).<sup>1</sup>

4 Even if the United States were required to demonstrate prejudice, it has done so. The United  
 5 States moved to strike Defendants’ affirmative defenses to “streamline the issues for litigation, ensure  
 6 fair notice to the United States, and avoid unnecessary discovery” and because the defenses fail as a  
 7 matter of law and are insufficiently pleaded. Mot. to Strike at 1, 3, Dkt. No. 312. The burden of litigating  
 8 insufficient defenses is exactly the type of prejudice that merits granting a motion to strike. *See Acad.*  
 9 *Mortg.*, 2020 WL 7056017, at \*2 (“Each affirmative defense can generate added discovery burdens  
 10 without having to withstand the crucible of specific pleadings, often leading to no real advancement of  
 11 any party’s interest or the litigation. Defenses that might confuse the issues in the case and would not,  
 12 under the facts alleged, constitute a valid defense to the action can and should be deleted.”) (cleaned up);  
 13 *Hartford*, 313 F.R.D. at 575 (“Even if prejudice were required, the burden of conducting discovery  
 14 regarding irrelevant and unsustainable affirmative defenses constitutes such prejudice.”) (cleaned up);  
 15 *Barnes*, 718 F. Supp. 2d at 1173 (same). Defendants argue that there will be no additional burden  
 16 because the issues raised in their affirmative defenses are central to this case. Opp’n at 3. But many of  
 17 their defenses are untethered to the United States’ claims and would expand discovery and motions  
 18 practice. In any event, courts strike improper affirmative defenses even where discovery and evidentiary  
 19 issues will not be expanded. *Hartford*, 313 F.R.D. at 572. This is particularly true where, as discussed  
 20 below, the affirmative defenses are improperly pleaded and do not provide fair notice of defendants’  
 21 allegations. *Id.* (striking affirmative defenses where defendants claimed that the defense gave plaintiff  
 22 “fair notice” but did not comply with *Twombly* and *Iqbal* pleading standards).

## 23 **II. Richmond Bars Defendants’ Equitable Defenses**

24 As explained in the United States’ Motion, the Appropriations Clause bars Defendants’ non-  
 25 statutory equitable defenses of estoppel, ratification, and failure to mitigate. Mot. to Strike at 3–4. The  
 26 Appropriations Clause requires that “[n]o Money shall be drawn from the Treasury, but in Consequence

27 <sup>1</sup> While the Ninth Circuit has not endorsed a pleading standard for affirmative defenses, courts in this  
 28 District apply the plausibility standard set forth in *Iqbal* and *Twombly*. *See Acad. Mortg.*, 2020 WL  
 7056017, at \*2 (discussing the “strong policy reasons for requiring parties to meet the pleading standard  
 set forth in *Twombly* and *Iqbal* for affirmative defenses”); *Izett*, 2018 WL 6592442, at \*1.

1 of Appropriations made by Law.” U.S. Const., art. I, § 9, cl. 7. Because “payments of money from the  
2 Federal Treasury are limited to those authorized by statute,” only Congress can specify the terms when  
3 public funds are at issue. *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 416 (1990). As a result, courts  
4 cannot create non-statutory equitable defenses, such as estoppel, for claims involving public funds. *Id.* at  
5 426; *see also United States ex rel. Poehling v. UnitedHealth Grp., Inc.*, No. CV 16-8697-MWF, 2019  
6 WL 2353125, at \*9–10 (C.D. Cal. Mar. 28, 2019) (holding in FCA action that *Richmond* bars non-  
7 statutory defenses, including estoppel, failure to mitigate, and ratification). The two FCA cases  
8 Defendants cite in support of their equitable defenses wrongly apply a prejudice standard and run  
9 contrary to the majority view. Opp’n at 4–5. In the first case, which reasoned that striking equitable  
10 affirmative defenses was premature until summary judgment, the court applied a prejudice standard and  
11 also incorrectly framed the issue as whether “a party could successfully mount an equitable defense  
12 against the government in *statutory enforcement actions*.” *United States ex rel. Ling v. City of L.A.*, No.  
13 CV 11-974 PSG (JCX), 2020 WL 1229734, at \*4 (C.D. Cal. Jan. 28, 2020) (emphasis added). But the  
14 correct inquiry is whether estoppel can apply where public money is at stake. *Richmond* addressed that  
15 question, holding that “[t]here can be no estoppel” involving payment of public funds. 496 U.S. at 434.  
16 And the better and more efficient approach, rather than waiting until summary judgment, is to strike  
17 invalid defenses at the outset of discovery. *See, e.g., Poehling*, 2019 WL 2353125, at \*9; *Acad. Mortg.*,  
18 2020 WL 7056017, at \*3 (striking defenses of waiver, acquiescence, and abandonment in FCA action);  
19 *United States v. Assocs. in Eye Care, P.S.C.*, No. 13-CV-27, 2014 WL 12606508, at \*4 (E.D. Ky. Nov.  
20 14, 2014) (striking defenses of waiver and ratification as inadequate in FCA action). In the second case,  
21 the court wrongly required a showing of prejudice and declined to strike equitable affirmative defenses  
22 on that basis alone. *United States v. Paksn, Inc.*, No. 2:15-cv-09064-SB-AGR, 2022 WL 2276372, at \*1  
23 (C.D. Cal. Feb. 7, 2022). As discussed above, no showing of prejudice is required for the Court to strike  
24 meritless affirmative defenses, *see, e.g., Hartford*, 313 F.R.D. at 575, and, even if such a showing was  
25 required, the United States meets that burden here.

26 Defendants next argue that *Richmond* and its progeny do not apply because an FCA case could  
27 hypothetically involve no public money. Opp’n at 5. But that argument is wholly divorced from this  
28 case, which centers around false diagnosis codes that Defendants submitted to receive public money

1 from the Medicare Advantage program. Amend. Compl., Dkt. No. 240 ¶¶ 359–73. Indeed, Defendants  
2 elsewhere point out that hundreds of millions of dollars in public funds are at stake in this litigation.  
3 Opp’n at 14 n.5. Defendants have not alleged, and cannot allege, that no public funds were at stake  
4 based on their submission of the diagnosis codes at issue. The Ninth Circuit has held that estoppel  
5 “cannot be entertained where public money is at stake.” *United States v. Fowler*, 913 F.2d 1382, 1385  
6 (9th Cir. 1990). Defendants cannot escape this holding based on a hypothetical untethered to the facts of  
7 this case.

8 Defendants also argue that because the FCA provides for relief beyond return of public funds,  
9 they can bring estoppel defenses as to penalties. But the law is clear that *Richmond* applies broadly  
10 where “public money is at stake.” *Id.*; *Richmond*, 496 U.S. at 434 (foreclosing estoppel in cases  
11 “involving payment from the Treasury”). Nothing suggests that courts should parse *Richmond*’s bar on  
12 equitable defenses based on the type of relief or remedies available for claims involving payment from  
13 the Treasury.

14 In any event, the Supreme Court has foreclosed the application of equity to defeat statutory  
15 penalties specified by Congress. *Clark v. Barnard*, 108 U.S. 436, 457 (1883) (“[W]here any penalty or  
16 forfeiture is imposed by statute . . . courts of equity will not interfere to mitigate the penalty or  
17 forfeiture, . . . for it would be in contravention of the direct expression of [Congress].”); *United States v.*  
18 *Dieckerhoff*, 202 U.S. 302, 313 (1906) (“[I]t is not within the province of courts of equity to mitigate the  
19 harshness of penalties or forfeitures in such cases, for such relief would run directly counter to the  
20 statutory requirements.”). Congress identified the specific acts giving rise to liability under the FCA.  
21 31 U.S.C. § 3729(a)(1). When the elements of the statutory violation have been met, Congress imposed  
22 mandatory statutory relief—the offending party “is liable to the United States Government for a civil  
23 penalty of not less than \$5,000 and not more than \$10,000, . . . plus 3 times the amount of damages.” *Id.*  
24 There is no judicially-created equitable defense that can defeat this mandatory statute. *Valley Ice & Fuel*  
25 *Co. v. United States*, 30 F.3d 635, 640 (5th Cir. 1994) (agreeing “equity will not bar the imposition of a  
26 statutory penalty”); *United States v. Coastal Ref. & Mktg., Inc.*, 911 F.2d 1036, 1043 (5th Cir. 1990)  
27 (“[T]here is no inherent power for the judiciary to mitigate congressionally-mandated penalties”); *cf.*  
28 *Pan-Am. Petroleum & Transp. Co. v. United States*, 273 U.S. 456, 506 (1927) (holding that the

1 principles of equity “will not be applied to frustrate the purpose of [the United States’] laws or to thwart  
 2 public policy”). The fact that Congress expressly provided for additional relief in the FCA beyond the  
 3 return of public funds does not permit Defendants to alter or defeat the statute’s requirements through  
 4 judicially-created equitable defenses.<sup>2</sup>

5 Finally, as the United States explained in its motion, the applicability of *Richmond* and its  
 6 progeny is not limited to estoppel. *See, e.g., Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 391 (9th  
 7 Cir. 2000) (holding that *Richmond*’s “scope is not limited to the applicability of estoppel”). Courts have  
 8 accordingly recognized that *Richmond* bars non-statutory equitable defenses, including estoppel, failure  
 9 to mitigate, and ratification when public funds are at stake. *See Poehling*, 2019 WL 2353125, at \*9–10;  
 10 *United States ex rel. Baker v. Cmty. Health Sys., Inc.*, No. CIV 05-279 WJ/WDS, 2011 WL 13115254,  
 11 at \*5, \*8–10 (D.N.M. Dec. 7, 2011). Defendants offer no response to this case law other than to assert  
 12 that *Richmond* applies only to estoppel, notwithstanding *Flick*’s clear holding to the contrary. *Flick*, 205  
 13 F.3d at 391. Defendants cannot escape *Richmond* by merely repackaging the same conclusory estoppel  
 14 allegations for each equitable defense. *See* Dkt. Nos. 298, 300–02 ¶¶ 397–401; Dkt. No. 299 ¶¶ 397–  
 15 402. Accordingly, all of Defendants’ nearly identical equitable defenses are barred by *Richmond*.

### 16 **III. The United States Has No Duty to Mitigate Damages in a Fraud Action**

17 Defendants’ failure to mitigate defense fails for the additional reason that the United States has  
 18 no duty to mitigate under the FCA. The cases Defendants cite do not hold otherwise. In *United States ex*  
 19 *rel. Jordan v. Northrop Grumman Corp.*, No. CV 95-2985 ABC (EX), 2002 WL 35454612 (C.D. Cal.  
 20 Aug. 5, 2002), the court made clear that “Defendant’s argument that the Government had a duty to  
 21 mitigate damages to recover under the FCA in this case must fail as a matter of law.” *Id.* at \*16. And in  
 22 *United States v. Rite Aid Corp.*, No. 2:12-CV-1699-KJM-EFB, 2020 WL 230202 (E.D. Cal. Jan. 15,  
 23 2020), the court acknowledged there is “authority for the argument that the United States does not have  
 24 a duty to mitigate damages for a claim under the FCA,” yet denied the motion to strike because the  
 25 plaintiff also brought a claim under the doctrine of payment by mistake. *Id.* at \*6. Defendants’ reliance  
 26 on *Academy Mortgage* is similarly misplaced. There, the plaintiff moved to strike the defendant’s failure  
 27 to mitigate defense only on the grounds that it was insufficiently pleaded. *See* Mot. to Strike at 6, No.

28 <sup>2</sup> Defendants do not challenge *Richmond*’s application to the United States’ common law claims, which  
 only seek the return of wrongful, erroneous, or illegal payments. Opp’n at 5 n.4.

1 16-cv-02120-EMC, Dkt. No. 137 (N.D. Cal. Oct. 19, 2018). Neither party addressed whether the United  
 2 States has a duty to mitigate damages as a matter of law and, as such, the Court’s decision did not  
 3 address the viability of a failure to mitigate defense. *See Acad. Mortg.*, 2020 WL 7056017, at \*5.

4 Further, these principles apply equally to the common law claims to recover funds that were  
 5 “wrongfully, erroneously, or illegally paid,” and the “right to recover funds . . . is not barred unless  
 6 Congress has ‘clearly manifested its intention’ to raise a statutory barrier.” *United States v. Wurts*, 303  
 7 U.S. 414, 415–16 (1938). Under *Wurts*, only Congress through statute can limit the return of public  
 8 funds that were wrongfully paid. Because Defendants cannot rely on a non-statutory mitigation defense  
 9 to keep wrongfully paid funds,<sup>3</sup> the Court should strike Defendants’ failure to mitigate defense.

#### 10 **IV. Defendants Fail to Plausibly Allege Affirmative Defenses Due to Insufficient Pleading**

11 Defendants’ purported affirmative defenses of estoppel, ratification or consent, and failure to  
 12 mitigate damages also fail because they are insufficiently pleaded.

##### 13 **A. Estoppel**

14 To plead the traditional elements of an estoppel defense, Defendants must allege (1) the United  
 15 States’ knowledge of the facts, (2) that the United States intended its conduct be acted on or acted such  
 16 that Defendants had a right to believe it so intended, (3) Defendants were ignorant of the true facts, and  
 17 (4) Defendants relied on the United States’ conduct to their injury. *Acad. Mortg.*, 2020 WL 7056017, at  
 18 \*3. Further, when asserting estoppel against the United States, Defendants must also plead that the  
 19 United States engaged in affirmative misconduct (going beyond mere negligence) and that the public’s  
 20 interest will not suffer undue damage. *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995);  
 21 *Mukherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir. 1986). Defendants fail to plead these elements.

22 Turning to the latter requirements first, Defendants fail to plead the threshold requirements for  
 23 estoppel against the United States. First, Defendants cannot plead affirmative misconduct, which is  
 24 defined “to mean a ‘deliberate lie’ or ‘a pattern of false promises.’” *Socop-Gonzalez v. INS*, 272 F.3d  
 25 1176, 1184 (9th Cir. 2001) (en banc), *overruled on other grounds by Smith v. Davis*, 953 F.3d 582 (9th

26 \_\_\_\_\_  
 27 <sup>3</sup> *See, e.g., United States ex rel. Mandel v. Sakr*, No. 17-CV-907S, 2021 WL 1541490, at \*2 (W.D.N.Y.  
 28 Apr. 20, 2021) (holding failure to mitigate defense was “unavailable as to all of Plaintiff’s claims,”  
 including its claims of unjust enrichment and payment by mistake). The case that Defendants cite to  
 refute *Mandel*—*United States v. Adams*, 371 F. Supp. 3d 1195 (N.D. Ga. 2019)—does not hold to the  
 contrary, but simply lays out the pleading standards for payment by mistake. *Id.* at 1217–18.

1 Cir. 2020) (en banc). Instead, Defendants dispute this legal standard by pointing to outdated cases that  
 2 precede the Supreme Court’s decision in *Richmond*. Opp’n at 7 (citing *Lavin v. Marsh*, 644 F.2d 1378  
 3 (9th Cir. 1981); *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989)). *Richmond*, however, not only  
 4 foreclosed estoppel in cases involving public funds, it also addressed the repeated improper application  
 5 of estoppel by lower courts. Emphasizing that it had reversed every case applying estoppel against the  
 6 government, often summarily, *Richmond*, 496 U.S. at 422–23, the Court made clear that if estoppel  
 7 could ever apply against the government, only “extreme circumstances” would suffice. *Id.* at 434.  
 8 Following *Richmond*, the Ninth Circuit, sitting en banc, defined the “affirmative conduct” standard  
 9 required for estoppel to mean “a ‘deliberate lie’ or ‘a pattern of false promises.’” *Socop-Gonzalez*, 272  
 10 F.3d at 1184; accord, e.g., *Elim Church of God v. Harris*, 722 F.3d 1137, 1143–44 (9th Cir. 2013)  
 11 (same). Decisions from the Supreme Court and the en banc Ninth Circuit control over Defendants’  
 12 outdated citations. Because Defendants fail to plead such affirmative misconduct, the estoppel defense  
 13 should be stricken.<sup>4</sup>

14 Defendants also fail to plead that the public interest will not be harmed. As the Ninth Circuit has  
 15 recognized, the public faces substantial harm where applying estoppel would allow a party to retain  
 16 government funds it never should have received in the first place. *United States ex rel. Hagood v.*  
 17 *Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1422 (9th Cir. 1991). Defendants’ only argument to the  
 18 contrary is again that an FCA case could hypothetically not involve payments from the Treasury. Opp’n  
 19 at 5. This hypothetical fails here for the reasons explained above.

20 Defendants also neglect to plead even the traditional elements of estoppel. The United States  
 21 alleges that Defendants submitted diagnosis codes for conditions that did not exist and/or did not affect  
 22 patient care, treatment or management, in contravention of Section IV.K of the ICD-9 Guidelines and

23 \_\_\_\_\_  
 24 <sup>4</sup> Courts have repeatedly rejected estoppel even in clear instances of erroneous misinformation, failure to  
 25 provide guidance, or similar conduct. See, e.g., *Socop-Gonzales*, 272 F.3d at 1181, 1184 (government’s  
 26 erroneous advice to withdraw appeal and submit an application for adjustment, which directly resulted  
 27 in deportation order, was not “affirmative misconduct”); *Jordan*, 2002 WL 35454612, at \*12–13  
 28 (government’s continual review, investigation, and approval of defendant’s quality and manufacturing  
 procedures was not “affirmative misconduct” in defective-parts case); *Baker*, 2011 WL 13115254, at \*5  
 (that government “was fully informed” of the alleged misconduct and yet continued to authorize claims,  
 was not “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 the application of equitable estoppel.”).  
 Defendants’ conclusory allegations come nowhere close to pleading affirmative misconduct.

1 Section IV.J of the ICD-10 Guidelines (the “ICD Guidelines”).<sup>5</sup> Amend. Comp. ¶¶ 2, 85, 103. Thus, to  
2 assert a successful estoppel defense, Defendants must allege, at a minimum, that CMS knew of, and  
3 approved, Defendants submitting diagnosis codes for conditions that *did not* exist and/or *did not* require  
4 or affect patient care, treatment, or management. Defendants’ conclusory allegations that they had some  
5 unspecified “interpretation” of the ICD Guidelines—an interpretation that Defendants conspicuously  
6 never identify in their Amended Answers or Opposition—which they purportedly conveyed through  
7 unspecified “communications” hardly satisfies the standard for estoppel. *See Hernandez v. Cnty. of*  
8 *Monterey*, 306 F.R.D. 279, 284 (N.D. Cal. 2015) (“[T]he burden is on the *defendant* to proffer sufficient  
9 facts and law to support an affirmative defense, and not on the plaintiff to gamble on interpreting an  
10 insufficient defense in the manner defendant intended.”). Defendants’ equally vague claims that CMS  
11 might have gleaned this wholly unspecified interpretation through review of Defendants’ medical  
12 records (but without knowing of Defendants’ practices to alter those records) similarly falls well short of  
13 this threshold pleading requirement.

14 Defendants argue that their allegations regarding CMS’s knowledge suffice because they are not  
15 subject to the particularity requirements of Rule 9(b). Opp’n at 8. This is a non sequitur. Even under  
16 Rule 8, in order to plead estoppel, defendants must plead *what* the plaintiff allegedly knew. *See, e.g.,*  
17 *First Fin. Sec., Inc. v. Freedom Equity Grp., LLC*, No. 15-cv-01893-HRL, 2016 WL 3017552, at \*3  
18 (N.D. Cal. May 26, 2016) (striking estoppel defense as insufficiently pled under Rule 8 where defendant  
19 did not allege what pertinent facts plaintiff allegedly knew). Simply pleading that CMS purportedly  
20 knew of Defendants’ “interpretation”—without pleading what that interpretation was—does not satisfy  
21 Rule 8. *See, e.g., Niantic, Inc. v. Global++*, No. 19-cv-03425-JST, 2020 WL 1548465, at \*10 (N.D. Cal.  
22 Jan. 30, 2020) (striking estoppel defense where defendants claimed that they “relied on [plaintiff]’s acts  
23 or omissions” but defendants did not plead what those acts and omissions were); *Ansari v. Elec.*  
24 *Document Processing, Inc.*, No. 5:12-cv-01245-LHK, 2013 WL 664676, at \*3 (N.D. Cal. Feb. 22, 2013)  
25 (striking estoppel defense where defendants alleged that plaintiffs’ claims were barred “based upon  
26 misrepresentations” but defendants did not plead what those misrepresentations were).

27 \_\_\_\_\_  
28 <sup>5</sup> Defendants label these sections of the ICD Guidelines “the Contested Provision,” *see, e.g.,* Dkt. Nos.  
298, 300–02 ¶¶ 397–401, though they have not explained what aspect of the provision they “contest” in  
their Answer, Opposition, or discovery responses.

1 Defendants deny any obligation to plead their supposed interpretation of the ICD Guidelines  
 2 because discovery is ongoing. Opp’n at 9. This is nonsensical considering Defendants’ allegations  
 3 concern an interpretation *they claim to have conveyed to CMS years ago*. See Dkt. Nos. 298, 300–02  
 4 ¶¶ 400; Dkt. No. 299 ¶ 401 (alleging CMS knew of Defendants interpretation of the ICD Guidelines  
 5 “through communications between representatives of CMS and representatives of Defendant[s]”).  
 6 Defendants do not need discovery to know their *own* interpretation. See, e.g., *Loop AI Labs Inc. v. Gatti*,  
 7 195 F. Supp. 3d 1107, 1117 (N.D. Cal. 2016) (party does not need discovery from its opponent to  
 8 identify its *own* information that it has put at issue); *Hernandez*, 306 F.R.D. at 286–87 (striking  
 9 affirmative defense where defendant pleaded only a list of actions it “may” have taken, because  
 10 “defendants ought to be fully aware and able to allege” their own actions).

11 Likewise, Defendants’ argument that the United States should be “on notice of Defendants’  
 12 interpretation” of the ICD Guidelines as a result of its investigation, Opp’n at 8, and thus that  
 13 Defendants need not plead their interpretation, is similarly misplaced. See, e.g., *K.C. v. Vejmolá*, No.  
 14 17cv683-LAB (NLS), 2018 WL 1083455, at \*4 (S.D. Cal. Feb. 27, 2018) (“[A party] cannot circumvent  
 15 pleading requirements by claiming that the [other party] already knows the underlying facts.”). The  
 16 question is what interpretation Defendants supposedly conveyed to CMS, how it was conveyed, and how  
 17 CMS responded at the time, such that it would now be estopped from challenging Defendants’ conduct.  
 18 Defendants allege none of these basic facts.<sup>6</sup>

19 Defendants try to distract from their failure to plead their interpretation of the ICD Guidelines by  
 20 addressing a separate issue regarding the level of documentation needed to *support* a diagnosis code  
 21 submitted to CMS. See Opp’n at 11; see also Dkt. Nos. 298, 300–02 ¶ 398; Dkt. No. 299 ¶ 399 (alleging  
 22 that “CMS also has stated that healthcare provider documentation of a diagnosis in the beneficiary’s  
 23 medical record is acceptable support for submission of a diagnosis code to CMS under Medicare Part

24 <sup>6</sup> As set forth in the Amended Complaint, the facts uncovered during the United States’ investigation  
 25 highlight Defendants’ current dissembling. Defendants documented their understanding of the ICD  
 26 Guidelines in official policies called Kaiser Permanent Program Advisories. Amend. Compl. ¶¶ 91–99,  
 27 289–92. These policies reflect that Defendants understood that a condition must be considered,  
 28 evaluated, or treated at the patient visit in order to meet the requirements of the ICD Guidelines. *E.g.*,  
 Amend. Compl. ¶¶ 91–99, 289–292; Dkt. No. 217-1 at 14. Defendants now claim to have some other  
 interpretation of the ICD Guidelines that they shared with CMS under which they could submit  
 conditions that did not exist and that did not require or affect patient care, treatment, or management—  
 but refuse to identify that interpretation in their Answers. Affirmative defenses should not be a guessing  
 game as to the core elements underlying the defense.

1 C”). The question of how much documentation is needed to support a diagnosis code does not plead a  
2 proper affirmative defense, i.e., one that “will defeat plaintiff’s claim, even if all allegations in [the]  
3 complaint are true.” *Acad. Mortg.*, 2020 WL 7056017, at \*4; *accord, e.g., J & J Sports Prods., Inc. v.*  
4 *Angulo*, No. 2:14-cv-02666-KJM-DAD, 2015 WL 5020725, at \*5 (E.D. Cal. Aug. 21, 2015) (“An  
5 affirmative defense presumes all allegations of the complaint are true.”). The United States alleges that  
6 Defendants “pressed [their] physicians to add the diagnoses to medical records retrospectively using an  
7 addendum to make it appear as if the conditions had been addressed in some way during the patient visit  
8 when in fact they had not.” Amend. Compl. ¶ 1. The entire point of this scheme was to generate  
9 documentation of these diagnoses in the medical record. Whether Defendants wrote enough words in the  
10 medical record to be acceptable from a documentation standpoint is not at issue. The issue is whether the  
11 diagnoses complied with the substantive provision.

12 For these reasons, Defendants’ estoppel defense should be stricken.

### 13 **B. Ratification**

14 Defendants acknowledge that they have not pleaded any statements or conduct by the Attorney  
15 General or the Department of Justice (“DOJ”) to support ratification. Nor can Defendants distinguish the  
16 litany of cases holding that actions by government agencies other than the DOJ do not waive the United  
17 States’ claims under the FCA. *See, e.g., United States ex rel. Condie v. Bd. of Regents*, No. C89-3550-  
18 FMS, 1993 WL 740185, at \*2 (N.D. Cal. Sept. 7, 1993) (rejecting argument that NIH waived FCA  
19 claims because “the DOJ is the only agency that can waive prosecution of FCA claims”); *United States*  
20 *v. Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763, 771 (N.D. Tex. 2002) (same regarding United  
21 States Post Office employees); *Baker*, 2011 WL 13115254, at \*8 (same regarding CMS employees).

22 Instead, Defendants argue that they have sufficiently pleaded ratification by offering the  
23 conclusory allegation that CMS “engaged in conduct and had communications that ratified” Defendants’  
24 interpretation of the ICD Guidelines. Opp’n at 10. Defendants rely on reasoning in *Jordan*, 2002 WL  
25 35454612, at \*7–8, which permitted a defendant “to assert the affirmative defense of ratification or  
26 waiver against the Government’s FCA claim” because “the knowledge possessed by officials of the  
27 United States may be highly relevant . . . [and] may show that defendant did not submit its claim in  
28 deliberate ignorance or reckless disregard of the truth.” But this logic is flawed: if the facts negate the

1 defendant’s wrongful intent, “the issue is not waiver, rather, the issue is the defendant[s]’ scienter.”  
 2 *United States v. DynCorp Int’l LLC*, 282 F. Supp. 3d 51, 56 n.1 (D.D.C. 2017) (rejecting identical  
 3 ratification/waiver defense).<sup>7</sup> Thus, if the United States proves that Defendants knowingly submitted  
 4 false claims or made false statements, Defendants cannot defeat those claims through a purported  
 5 ratification defense. *See, e.g., Acad. Mortg.*, 2020 WL 7056017, at \*4 (argument that merely negates an  
 6 element is not an affirmative defense); *J & J Sports*, 2015 WL 5020725, at \*5 (same).

7 Moreover, even if CMS could waive the United States’ FCA claims, Defendants still do not meet  
 8 the pleading standard for ratification as they do not plead that CMS “intentionally relinquished or  
 9 abandoned a known right.” *Acad. Mortg.*, 2020 WL 7056017, at \*3. Defendants argue that it is sufficient  
 10 for them to plead that “CMS was aware of” Defendants’ interpretation of the ICD Guidelines “and  
 11 subsequently ratified it because . . . it reviewed and validated Defendants’ diagnosis coding through the  
 12 agency’s RADV audits.” Opp’n at 11. But stating that CMS knew of and reviewed Defendants’  
 13 diagnosis coding is not the same as pleading facts showing that officials with appropriate authority at  
 14 CMS intentionally relinquished or abandoned any right. Likewise, Defendants’ refusal to plead what  
 15 their supposed interpretation of the ICD Guidelines is, or how CMS ratified it, dooms this defense.

### 16 C. Failure to Mitigate

17 Even if Defendants’ failure to mitigate defense were not barred by *Richmond* and otherwise  
 18 unavailable as a matter of law, Defendants allege insufficient facts to put the United States on adequate  
 19 notice. Defendants argue that alleging “CMS had notice of” their interpretation of the ICD Guidelines  
 20 “and an ample opportunity to advise Defendants that it did not agree with that interpretation” is “more  
 21 than sufficient to identify the reasonable steps that the United States should have taken to mitigate any  
 22 damages.” Opp’n at 13. Defendants, however, provide no support for this claim, and their refusal to  
 23 plead what their supposed interpretation of the ICD Guidelines is provides reason enough to dismiss  
 24 their failure to mitigate defense.

### 25 V. A Claim of Excessive Fines Is Not An Affirmative Defense

26 Courts within the Ninth Circuit have repeatedly held that an excessive fines affirmative defense

27 <sup>7</sup> The reasoning in *Jordan* is further undercut by recent Supreme Court jurisprudence that the United  
 28 States’ knowledge cannot negate Defendants’ scienter because “[t]he FCA’s scienter element refers to  
 [the defendant’s] knowledge and subjective beliefs—not to what an objectively reasonable person may  
 have known or believed.” *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 749 (2023).

1 fails as a matter of law. *See, e.g., Acad. Mortg.*, 2020 WL 7056017, at \*4–5; *Castellano v. Access*  
2 *Premier Realty7, Inc.*, No. 1:15-cv-00407-MCE-MJS, 2015 WL 7423821, at \*3 (E.D. Cal. Nov. 23,  
3 2015) (striking excessive fines defenses because “challenges to damages do not constitute proper  
4 affirmative defenses”). None of the cases Defendants cite in their brief change that. *Passantino v.*  
5 *Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493 (9th Cir. 2000), and *EEOC v. Wal-Mart*  
6 *Stores, Inc.*, 503 F. Supp. 3d 801 (W.D. Wis. 2020), involve analyses of punitive damages claims  
7 following the Supreme Court’s decision in *Kolstad v. American Dental Association*, 527 U.S. 526  
8 (1999), a case that addressed the standard for imposing punitive damages in a Title VII action.  
9 *Passantino*, 212 F.3d at 516; *Wal-Mart*, 503 F. Supp. 3d at 817. For example, in *Passantino*, while the  
10 court found that, following *Kolstad*, “Defendants may now establish an affirmative defense to punitive  
11 damages liability when they have a bona fide policy against discrimination,” 212 F.3d at 516, the court  
12 did not hold, as Defendants claim, that “where a defense would result in the reduction of punitive  
13 damages, the defense was an affirmative defense.” Opp’n at 13. Similarly, in *Wal-Mart*, the court found  
14 no error in treating the *Kolstad* good faith defense as an affirmative defense but did not address other  
15 purported affirmative defenses. 503 F. Supp. 3d at 817.<sup>8</sup> These cases are irrelevant to the excessive fines  
16 defense sought to be asserted here.

17 *Smith v. Wal-Mart Stores*, No. C 06-2069 SBA, 2006 WL 2711468, at \*6 (N.D. Cal. Sept. 20,  
18 2006), is also unpersuasive as it misunderstands *Passantino* and goes against the weight of authority in  
19 the Ninth Circuit, which holds that a defense that ““does not act to preclude a defendant’s liability even  
20 if a plaintiff proves all of the required elements of the cause of action,’ . . . is not a proper affirmative  
21 defense.” *Barrilleaux v. Mendocino Cnty.*, No. 14-cv-01373-TEH, 2016 WL 1298860, at \*3 (N.D. Cal.  
22 Apr. 4, 2016) (citations omitted); *Acad. Mortg.*, 2020 WL 7056017, at \*5 (“[A]n Eighth Amendment  
23 claim for excessive damages is not an affirmative defense, as it does not operate to defeat [plaintiff]’s  
24 FCA claim”). Accordingly, the Court should reject Defendants’ claim.

25 In any event, Defendants fail to plausibly allege a constitutional violation. Defendants’ argument  
26 that they need not identify “‘how’ the fine likely to be imposed is excessive” under the Eighth  
27 Amendment is unavailing. Opp’n at 14. At a minimum, Defendants must “identify facts” in support

28 <sup>8</sup> *Shepherd v. Popular Publications*, 10 F.R.D. 389, 391 (S.D.N.Y. 1950), is inapposite as it has to do  
with “admittedly partial defenses” and is unrelated to the defenses raised by Defendants.

1 “such as would put Plaintiff on fair notice of their claims.” *J & J Sports Prods., Inc. v. Catano*, No.  
2 1:12-cv-00739-LJO-JLT, 2012 WL 5424677, at \*5 (E.D. Cal. Nov. 6, 2012). Defendants’ recitation of  
3 the possible penalties under the FCA, without an explanation as to how those penalties may be excessive  
4 in this case, is insufficient. The Court should strike this defense.

5 **VI. The FCA’s Voluntary Disclosure Provision Does Not Apply to Defendant KFHP-CO**

6 The FCA mandates the imposition of treble damages on violators. 31 U.S.C. § 3729(a). The  
7 statute affords discretion to reduce that figure (to between double and treble damages) only if a violator  
8 satisfies four statutory requirements set out in § 3729(a)(2). The burden is on the violator to plead each  
9 element, not on the United States to disprove them. *United States ex rel. Maxwell v. Kerr-McGee Oil &*  
10 *Gas Corp.*, No. 04-cv-01224-MSK-CBS, 2010 WL 3730894, at \*1 (D. Colo. Sept. 16, 2010). KFHP-CO  
11 fails to plead that it satisfied any of these four requirements and tries to sidestep this failure by claiming  
12 that the United States’ challenges are factual disputes. Opp’n at 17. Not so. They are pleading defects—  
13 KFHP-CO has not pleaded facts that support this defense.

14 First, KFHP-CO does not plead that it “furnished officials of the United States responsible for  
15 investigating false claims violations with all information known to such person about the violation  
16 within 30 days after the date on which the defendant first obtained the information.” 31 U.S.C.  
17 § 3729(a)(2)(A). KFHP-CO pleads only that “Defendant discovered that some diagnoses associated with  
18 diagnosis codes submitted to CMS may not have been documented for the relevant Medicare Advantage  
19 beneficiaries” and that “Defendant voluntarily disclosed *this* information to CMS.” Dkt. No. 299, ¶ 397  
20 (emphasis added). KFHP-CO does not plead that this was *all* the information KFHP-CO knew about its  
21 violations (as it plainly was not) or that it was provided timely within 30 days. Defendants claim that  
22 “KFHP-CO alleges that it uncovered information about the alleged violation and then disclosed all of  
23 that information to CMS,” Opp’n at 15, but that is not what its Amended Answer actually pleads, and it  
24 is axiomatic that “parties may not amend their pleadings by brief.” *Jones v. Micron Tech. Inc.*, 400 F.  
25 Supp. 3d 897, 927 (N.D. Cal. 2019). At a minimum, KFHP-CO must plead that it furnished *all*  
26 information about these violations that it knew.

27 Nor does KFHP-CO plead that it furnished information to “officials of the United States  
28 responsible for investigating false claims violations,” as required by § 3729(a)(2). Congress chose not to

1 have § 3729(a)(2) cover disclosure generally to the government, or even to the agency to which the  
2 claim was made. Rather, the disclosure must specifically go to “officials of the United States responsible  
3 for investigating false claims violations,” and the FCA specifies that the Attorney General and the DOJ  
4 are responsible for investigating false claims. *Maxwell*, 2010 WL 3730894, at \*2 (citing 31 U.S.C.  
5 §§ 3729(a)(2), 3730(a)). The facts of this case demonstrate the absurdity of Defendants’ interpretation.  
6 Defendants were under investigation by the DOJ for submitting false claims, yet they did not disclose  
7 *any* information to the officials assigned to investigate these violations.<sup>9</sup>

8         Second, KFHP-CO does not plead that it “fully cooperated with any Government investigation of  
9 such violation[s].” 31 U.S.C. § 3729(a)(2)(B). Instead, Defendants attempt a hairsplitting exercise,  
10 claiming that because KFHP-CO was not aware of the “specific diagnosis codes” under investigation,  
11 KFHP-CO is entitled to a damages reduction. Opp’n at 16. Under Defendants’ theory, even where (as  
12 here) a violator is aware that the Government has been investigating its FCA violations, and the violator  
13 does nothing to cooperate with that investigation, the violator would be entitled to a reduction in  
14 damages as long as it later claims that the investigation did not specify each and every claim at issue.  
15 Defendants cite no authority to support such an interpretation of § 3729(a)(2), “which was initially  
16 enacted as part of a bill ‘to *enhance* the Government’s ability to recover losses sustained as a result of  
17 fraud.’” *Maxwell*, 2010 WL 3730894, at \*2 (quoting S. Rep. No. 99-345 (1986)).

18         Courts have rejected similar hairsplitting in interpreting the reverse false claims provision of the  
19 FCA, § 3729(a)(1)(G)—which, like § 3729(a)(2), was enacted as part of the 1986 FCA amendments to  
20 enhance the Government’s ability to pursue violations. In assessing when the obligation to return  
21 payments starts, courts reject the theory that a defendant must have knowledge of *specific* unsupported  
22 diagnosis codes and payments before its obligation to return such payments begins. *See, e.g., United*  
23 *States ex rel. Ormsby v. Sutter Health*, 444 F. Supp. 3d 1010, 1078–80 (N.D. Cal. 2020) (citing cases).  
24 To the contrary, courts hold that a defendant’s obligation to return payments begins as soon as it is on  
25 notice of *potential* unsupported diagnosis codes or overpayments. *Id.* Defendants’ analogous theory—  
26 that KFHP-CO must have knowledge of a Government investigation into *specific* unsupported diagnosis  
27 codes before it need cooperate with the investigation—is equally unsupported. In order to claim reduced

28 <sup>9</sup> Further, even if § 3729(a)(2) extended beyond the DOJ, KFHP-CO has not pleaded that the officials to  
whom it made its purported disclosure were responsible for investigating false claims violations.

1 damages under § 3729(a)(2), KFHP-CO must plead that it fully cooperated with the Government’s  
 2 investigation into potential unsupported diagnosis codes. This it has failed to do.

3 Third and fourth, KFHP-CO does not plead that, at the time it disclosed the information, no civil  
 4 action had commenced with respect to such violations and KFHP-CO lacked actual knowledge of an  
 5 investigation into such violations. 31 U.S.C. § 3729(a)(2)(C).<sup>10</sup> It is undisputed that at the time KFHP-  
 6 CO allegedly made its disclosure (2015), the *Osinek* and *Taylor qui tams* had commenced and KFHP-  
 7 CO was aware of the Government’s investigation. KFHP-CO’s only response is to recycle its theory that  
 8 civil actions and investigations must specifically delineate each false diagnosis code submission.  
 9 Nothing so limits the requirements in § 3729(a)(2). Rather, as the Supreme Court has held, § 3729(a)(2)  
 10 “applies only in some of those (presumably few) cases involving defendants who provide information  
 11 concerning the violation before they have knowledge that an investigation is underway.” *Vt. Agency of*  
 12 *Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 785 n.16 (2000).

13 Because KFHP-CO has failed to plead the elements of § 3729(a)(2), this defense should be  
 14 stricken. Finally, this defense also fails as a matter of law because it is not an affirmative defense, as it  
 15 only affects the amount of damages. *Acad. Mortg.*, 2020 WL 7056017, at \*4–5.

### 16 CONCLUSION

17 For the foregoing reasons, the United States respectfully requests this Court grant its motion to  
 18 strike Defendants’ affirmative defenses.

19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27 <sup>10</sup> The Senate Committee that proposed this provision specifically emphasized that, “[g]iven the  
 28 deceitful nature of fraud, courts should construe narrowly the requirements defendants must satisfy in  
 order to be eligible for liability limitations. Particularly, courts should guard against defendants  
 attempting to take advantage of this provision once they realize Government or public discovery of  
 violations are impending.” 132 Cong. Rec. 20,537 (Aug. 11, 1986).

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Respectfully submitted,

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