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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA *ex rel*. BENJAMIN POEHLING,

Plaintiffs,

v.

UNITEDHEALTH GROUP, INC. *et al.*,

Defendants.

No. CV 16-08697 MWF (SSx)

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO STRIKE AFFIRMATIVE DEFENSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: July 30, 2018
Time: 10:00 a.m.
Court: Hon. Michael W. Fitzgerald

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NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on July 30, 2018, at 10:00 a.m., or as soon thereafter as the parties may be heard, in Courtroom 5A of the United States District Court, Central District of California, located at 350 W. 1st Street, Los Angeles, California 90012, Honorable Michael W. Fitzgerald presiding, the United States of America and *Qui Tam* Plaintiff Benjamin Poehling (collectively, "Plaintiffs") will, and hereby do, move the Court to dismiss Defendants' Affirmative Defenses Nos. 2-3, 6-8, 10-11, and 14.[1]

This Motion is and will be made on the grounds that the defenses at issue are insufficient under Federal Rule of Civil Procedure 12(f), and for the reasons set forth in the Memorandum of Points and Authorities filed concurrently herewith.

This Motion is based upon the Memorandum of Points and Authorities filed concurrently herewith, the pleadings and other papers on file herein, any matters of which the Court may take judicial notice, and such argument and evidence as may be presented in connection with the hearing of this Motion.

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on May 9, 2018. This Motion is timely pursuant to the Court's April 5, 2018 Order Setting Briefing Schedule and Hearing Date on United States' Responses to United Defendants' Answer and Counterclaims (Doc. 226).

[1] After meet-and-confer discussions, Defendants' counsel informed Plaintiffs' counsel that Defendants have "decided that [they] will not pursue affirmative defenses 12, 15, and the second sentence of 16," subject to Defendants' reservation of the "right to present any legal or factual argument relevant to any issue or claim as to which plaintiffs bear the burden of proof." Accordingly, Defendants waived those purported defenses, and Plaintiffs therefore have not moved to strike them.

Dated: May 22, 2018

Respectfully submitted,

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Attestation

I hereby attest that the other signatory listed, on whose behalf the filing is submitted, concurs in the filing's content and has authorized the filing.

Dated: May 22, 2018

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA *ex rel*, BENJAMIN POEHLING, Plaintiffs, v. UNITEDHEALTH GROUP, INC., *et al.*, Defendants.	Case No. CV-08697-MWF (SSx) **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES** Date: July 30, 2018 Time: 10:00 a.m. Court:Hon. Michael W. Fitzgerald

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

MEMORANDUM OF POINTS AND AUTHORITIES

The United States (the "Government") and *Qui Tam* Plaintiff Benjamin Poehling ("Relator") respectfully submit this memorandum in support of their motion to strike Defendants' Affirmative Defenses Nos. 2-3, 6-8, 10-11, and 14.

I. INTRODUCTION

In this False Claims Act ("FCA") action, the Government and Relator ("Plaintiffs") allege that UnitedHealth Group Inc. and its various subsidiaries ("Defendants"), in violation of the "reverse false claims" provisions of the FCA, knowingly concealed, avoided, or decreased their obligation to repay to the Government significant sums of money that Defendants received through the Medicare Advantage ("MA") program as a result of Defendants' submission of invalid diagnosis codes. Plaintiffs alternatively allege causes of action for unjust enrichment and payment by mistake. Defendants assert 22 affirmative defenses.

Defendants premise many of those affirmative defenses upon the theory that they cannot be held responsible for their misconduct – even if Plaintiffs prove every element of their claims – because of some unspecified conduct by the Government. Those defenses seek to turn the focus of this case, and of discovery, away from Defendants' conduct and toward the actions, deliberations, and mental state of a wide range of Government employees and agency officials.

This dramatic expansion of the scope of discovery is unwarranted. Defendants' blame-the-Government affirmative defenses must fail because of the general principle that non-statutory defenses[1] cannot defeat the Government's recovery in cases involving public funds, and for other reasons particular to each defense. Striking these invalid affirmative defenses will help prevent the unwarranted and burdensome expansion of

[1] As used in this brief, the term "non-statutory defense" means any defense Defendants have asserted other than one that a lawfully enacted statute provides may be applicable to the subject matter of this case. For example, no statute provides that estoppel may be a defense in an FCA case or that the Government may be estopped from seeking return of Medicare funds that were improperly paid. Accordingly, estoppel is a non-statutory defense.

discovery in this case and will avoid later disputes before this Court concerning the relevance of facts and evidence that have no bearing on Defendants' liability.

Plaintiffs are mindful that this Court is reluctant to strike defenses unless doing so will promote the efficient administration of justice. Plaintiffs therefore have not moved to strike defenses that, though invalid, do not appear likely to impede the progress of this case.[2] The defenses at issue in this motion, however, are not only invalid but also threaten to become the focus of unwarranted and burdensome discovery and litigation, and the Court should strike them.

II. SUMMARY OF PLEADINGS

Relator filed this action in March 2011. Dkt. No. 1. The Government intervened in the action in February 2017, filed a Complaint in Intervention in May 2017, and filed an amended Complaint in Intervention in November 2017. Dkt. Nos. 78, 114, 171.

Defendants own and operate or are Medicare Advantage organizations ("MAOs"), which provide health care coverage for Medicare beneficiaries in exchange for monthly payments from the Medicare Program. Dkt. 171, ¶¶ 1-2. The Program's monthly payment to MAOs is adjusted separately for each beneficiary based upon a number of risk-related factors, including the health status of each beneficiary. *Id.* ¶ 2. By adjusting for health status, the Government generally pays more for beneficiaries who have been diagnosed and documented as having certain health conditions that create a risk of increased health expenses compared to relatively healthier beneficiaries with similar demographic characteristics. To obtain these increased "risk-adjusted" payments, MAOs submit diagnosis codes to the Government for the beneficiaries enrolled in their plans. *Id.*, ¶ 3. The MAOs obtain those diagnosis codes either from the medical providers who provide services to the beneficiaries, or from separate initiatives, including the MAOs' large-scale review of their beneficiaries' medical records to hunt for diagnosis codes they believe are supported by those records even though the providers did not submit those

[2] Plaintiffs, of course, reserve the right to seek judgment or other appropriate relief with respect to each remaining defense at a later date.

codes to the MAOs. *Id.*, ¶¶ 3, 10.

Diagnosis codes used to calculate risk-adjustment payments must be unambiguously supported by the beneficiaries' medical records resulting from qualified provider encounters during the relevant data-collection year. *Id.*, ¶ 4. The Government uses the diagnosis codes submitted by the MAOs to calculate a "risk score" for each beneficiary, which, in turn, is used to calculate monthly payments to the MAO for that beneficiary during the payment year. *Id.*, ¶ 3. Diagnosis codes not supported by the relevant medical records are invalid as the bases for risk-adjustment payments. *Id.*, ¶ 4. MAOs are obligated to delete invalid codes if they previously submitted them to the Government, or to use other means to return risk-adjustment payments based upon them. *Id.*, ¶¶ 103-113.

Plaintiffs allege that, for more than a decade, Defendants have conducted reviews of millions of medical records to mine them for diagnoses not reported to Defendants by providers, and that Defendants submitted those additional codes to the Government to increase their risk-adjustment payments. *Id.*, ¶ 10. In the course of those reviews, and through other initiatives, Defendants learned of significant numbers of previously submitted diagnoses that were invalid because the beneficiaries' medical records did not substantiate those diagnoses. *Id.*, ¶¶ 11-18. Plaintiffs allege that, rather than discharging their obligation to delete those invalid diagnoses, Defendants knowingly retained the enormous risk-adjustment overpayments—for just four of the years at issue, more than a billion dollars—they received as a result of them. *Id.* Plaintiffs accordingly allege that Defendants violated the FCA's "reverse false claims" provision, which prohibits a person from knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money to the Government. *Id*, at 161-62, ¶¶ 341-343. Plaintiffs alternatively allege causes of action for unjust enrichment and payment by mistake. *Id.* at 164-65, ¶¶ 356-361.

Defendants filed their Answer in March 2018. In it, Defendants asserted 22 affirmative defenses. Dkt. 223 at 81:12-83:22. Although Plaintiffs believe that each of those defenses will fail, Plaintiffs now move to strike only eight affirmative defenses that are legally invalid and that, if not resolved early, will unjustifiably and materially increase the burden of this action on the Court and the parties.[3]

III. ARGUMENT

A. The Court Should Strike Invalid Defenses That Threaten to Impose Substantial Discovery and Litigation Burdens

"The court may strike from a pleading an insufficient defense …." Fed. R. Civ. Proc. 12(f). Courts ordinarily are reluctant to strike extraneous matter that will not affect the litigation. However, where, as here, affirmative defenses threaten to impose unnecessary discovery-related and other burdens on both the Court and parties, "motions to strike remove unnecessary clutter from the case, [and] they serve to expedite, not delay." *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989). "Where a defense must fail as a matter of law, its inclusion prejudices the plaintiff because it will increase the duration and expense of trial." *United States v. Manhattan-Westchester Med. Servs., P.C.*, 2008 WL 241079, at *3 (S.D.N.Y. Jan. 28, 2008) (striking affirmative defenses in FCA case) (citation omitted). Accordingly, in cases in which the Government is the plaintiff—including FCA cases—courts routinely grant motions to strike improperly asserted defenses, including many at issue here.[4]

The benefit of striking these invalid defenses is practical, not theoretical. To succeed in this action, Plaintiffs must prove that Defendants had an obligation to delete

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[3] After meet-and-confer discussions, Defendants' counsel informed Plaintiffs' counsel in a May 18, 2018 email that Defendants have "decided that [they] will not pursue affirmative defenses 12, 15, and the second sentence of 16," subject to Defendants' reservation of the "right to present any legal or factual argument relevant to any issue or claim as to which plaintiffs bear the burden of proof." Accordingly, Defendants waived those purported defenses, and Plaintiffs therefore have not moved to strike them.

[4] For cases granting motions to strike numerous defenses in FCA cases, *see, e.g.*, *United States v. Assocs. in Eye Care, P.S.C.*, 2014 WL 12606508, at *3-5 (E.D. Ky. Nov. 14, 2014); *United States ex rel. Baker v. Cmty. Health Sys., Inc.*, 2011 WL 13115254, at *10 (D.N.M. Dec. 7, 2011); *United States ex rel. Monahan v. Robert Wood Johnson Univ. Hosp.*, 2009 WL 4576097, at *8 (D.N.J. Dec. 1, 2009); *United States ex rel. Dye v. ATK Launch Sys., Inc.*, 2008 WL 4642164, at *4 (D. Utah Oct. 16, 2008); *Manhattan-Westchester Med. Servs.*, 2008 WL 241079 at *4; *United States v. Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763, 778 (N.D. Tex. 2002).

diagnosis codes that they knew—as that term is defined in the FCA—were invalid, and that Defendants concealed or avoided that obligation. 31 U.S.C. § 3729(a)(1)(G). That proof necessarily will focus on Defendants' knowledge and conduct. But Defendants have asserted defenses of estoppel, government knowledge, failure to mitigate, ratification, course of performance, assumption of risk, and unjust enrichment (Affirmative Defenses Nos. 2-3, 6-8, 10-11, and 14), each of which focuses on the Government's knowledge and conduct. This expansion of the scope of the case will impose enormous discovery burdens on the parties (and likely on the Court), as Defendants' own statements demonstrate. *See, e.g.*, Joint Rule 26(f) Statement, Dkt. 224, at 15:27-16:24 (identifying extensive list of current or former Government agency employees who United asserts "may be key witnesses"). Striking these legally invalid defenses will promote the efficient resolution of this case and will spare the Court and the parties substantial unnecessary burdens.

B. Defendants' Non-Statutory Defenses (Affirmative Defenses Nos. 2-3, 6-8, 10-11, and 14) Cannot Defeat the Government's Claims to Recover Public Money

Defendants contend that the claims in this case are barred by various non-statutory defenses, including the equitable doctrines of estoppel, failure to mitigate, ratification, and unjust enrichment (Affirmative Defenses Nos. 2, 6, 7, and 11), the common-law defense of assumption of risk (Affirmative Defense No. 10), and the additional non-statutory defenses of government knowledge (Affirmative Defenses Nos. 3 and 14) and course of performance (Affirmative Defense No. 8). Because judicially-created doctrines cannot bar the Government from recovering money paid in the absence of a statutory appropriation, these defenses must fail.

The Appropriations Clause of the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of appropriations made by law." U.S. Const., Art. I, § 9, cl. 7. "[I]n other words, the payment of money from the Treasury must be authorized by statute …. [N]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990).

In light of this "straightforward and explicit command," the Supreme Court has held that the Government cannot be estopped in a case involving the payment of public funds. *Id.* In *Richmond*, a benefit claimant received erroneous advice from a government employee concerning eligibility limits for a disability annuity. *Id.* at 416. In reliance on that advice, the claimant exceeded the eligibility limits and was denied six months of benefits. *Id.* He appealed, claiming that the government employee's erroneous advice estopped the Government from denying his benefits and thus entitled him to benefits in excess of those allowed by law. *Id.*

The Supreme Court disagreed. Because only Congress has the authority to make appropriations, the Court held that "judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized." *Id.* at 426. Operation of the estoppel doctrine in cases involving public funds "could render the Appropriations Clause a nullity," and thus the use of estoppel to justify a payment of money "in violation of a statute" is an "impossibility." *Id.* at 428, 430. In short, in cases involving the payment of funds from the Treasury, "there can be no estoppel, for courts cannot estop the Constitution." *Id.* at 434; *see also Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 391 (9th Cir. 2000) ("We therefore interpret *Richmond* to preclude a court from granting a remedy that draws funds from the Treasury in a manner that is not authorized by Congress"); *United States v. Fowler*, 913 F.2d 1382, 1385 (9th Cir. 1990) (citing *Richmond* in holding that "claims for estoppel [against the government] cannot be entertained where public money is at stake").

While *Richmond* involved the offensive use of estoppel, its reasoning applies with equal force to all equitable or judicially created doctrines, whether employed offensively or as defenses. The legal principle dictating the result in *Richmond* was that "[a]ny exercise of a power granted by the Constitution to one of the other Branches of Government is limited by a valid reservation of congressional control over funds in the

Treasury." *Richmond*, 496 U.S. at 425. Thus, neither the executive branch (through the actions of its agents) nor the judicial branch (through the creation and application of non-statutory doctrines) can permit or excuse payments from the Treasury that have not been authorized—or that are prohibited—by an act of Congress. *See*, *e.g.*, *Baker*, 2011 WL 13115254, at *5, 8-10 (in FCA action, holding that *Richmond* precluded application of estoppel, waiver, failure-to-mitigate, and unclean-hands defenses); *Dye*, 2008 WL 4642164, at *2 (in FCA action, holding that *Richmond* applies to equitable defenses).

Defendants' non-statutory defenses seek to do exactly what *Richmond* prohibits: compel the payment of money that Congress has not appropriated, through the improper application of judicially created doctrines or improper reliance on executive conduct. Each of those defenses is an attempt to permit Defendants to retain money paid to them because of the invalid diagnoses they submitted. But, in designing the MA program, Congress has never appropriated money to make risk-adjustment payments to MA plans for conditions that their beneficiaries <u>do not have</u>, as reflected by the lack of substantiation of those conditions in the beneficiaries' medical records. To the contrary, Defendants' non-statutory defenses would conflict with at least two statutes.

First, where, as here, Defendants have an obligation to return money improperly paid from the Treasury, *see* Complaint, ¶ 104, the FCA provides a statutory prohibition against the concealment or avoidance of the return of that money. 31 U.S.C. § 3729(a)(1)(G). Indeed, the FCA expressly recognizes that such an obligation may arise from "the retention of any overpayment." 31 U.S.C. § 3729(b)(3). Defendants' non-statutory defenses purport to defeat the statutorily authorized recovery of such improperly paid funds, an "impossibility," in the words of the Supreme Court. *Richmond*, 496 U.S. at 430. As one court in this District put it, "there has been no authorization for the payment of money from the Treasury based on fraud." *United States v. Hughes Aircraft Co.*, 1991 WL 11693422, at *2 (C.D. Cal. Jan. 17, 1991).

Second, Congress directs CMS to adjust the amount of the payment the Government makes for each MA beneficiary based on that beneficiary's "health status."

42 U.S.C. § 1395w-23(a)(1)(C). That directive necessarily implies a requirement that the information on which the Government relies to determine health status be accurate and truthful. But, in derogation of this statutory requirement, Defendants' non-statutory affirmative defenses seek to require the Government to adjust the payment in a manner not based on the particular beneficiary's health status or accurate or truthful information about it. Based upon their affirmative defenses, Defendants contend that they were entitled to risk adjustment payments based upon diagnosis codes invalidated by Defendants' own medical record reviews and, thus, codes that do not accurately or truthfully reflect the beneficiaries' health status. These defenses must fail because they conflict with Congress's intent to adjust MA payments based upon accurate and truthful information about health status. *Richmond*, 496 U.S. at 426.

Because Defendants' non-statutory defenses would sanction the payment of Treasury funds in a manner that Congress did not authorize (increased payments for conditions that the beneficiaries do not have, as reflected by the lack of support in their medical records), and would defeat a statutory remedy for recovering such unauthorized payments (the FCA), they infringe upon Congress's exclusive appropriations power. Accordingly, in identical circumstances, courts have applied *Richmond* in striking non-statutory affirmative defenses to Government claims. *See, e.g.*, *Baker*, 2011 WL 13115254 at *5, 7-10 (holding that *Richmond* "precludes an assertion of an equitable estoppel defense against the federal government, as well as other equitable defenses," including waiver and failure to mitigate).[5] For these reasons, the Court should strike

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[5] *See also United States ex rel. Fisher v. Ocwen Loan Servicing, LLC*, 2016 WL 3031713, at *9 (E.D. Tex. May 25, 2016) (applying *Richmond* in holding that estoppel "does not bar Relators' claims" in FCA case because "claims for estoppel cannot be entertained where public money is at stake"); *United States ex rel. Freedman v. Suarez-Hoyos*, 2012 WL 4344199, at *6 (M.D. Fla. Sep. 21, 2012) (citing *Richmond* in holding that "equitable estoppel is not an available affirmative defense in this [FCA] case"); *Monahan*, 2009 WL 4576097, at *7 (citing *Richmond* in striking estoppel defense in FCA case); *Dye*, 2008 WL 4642164, at *2 (same); *Manhattan-Westchester Med. Servs.*, 2008 WL 241079 at *3 (same); *Cushman & Wakefield*, 275 F. Supp. 2d at 768-69 (same); *United States v. Inc. Village of Island Park*, 888 F. Supp. 419, 453 (E.D.N.Y. 1995) (citing *Richmond* in holding that in FCA case involving public funds, "there can be no estoppel"); *Hughes Aircraft*, 1991 WL 11693422, at *1-2 (citing *Richmond* and granting summary judgment on estoppel defense, because "a successful estoppel defense would impermissibly obligate

Defendants' non-statutory defenses of estoppel, government knowledge, failure to mitigate, ratification, course of performance, unjust enrichment, and assumption of risk (Affirmative Defenses Nos. 2-3, 6-8, 10-11, and 14).

C. <u>Defendants' Affirmative Defenses Are Legally Inapplicable or Invalid for Independent Reasons</u>

Defendants' affirmative defenses also are invalid for independent reasons.

1. <u>Defendants' Estoppel Defenses (Affirmative Defenses Nos. 2 and 8) Are Invalid Because Estoppel Is Not in the Public Interest and the Defendants Have Not Alleged "Affirmative Misconduct"</u>

Defendants assert that the Government's claims are barred by the doctrine of estoppel. Answer (Dkt. 223) at 81:18-19, Affirmative Defense No. 2. In addition, Defendants assert that the Government's claims are barred by Defendants' "course of performance, course of dealing, and usage of trade," a defense that appears to posit that the Government is estopped by its supposed acceptance of Defendants' conduct. *Id.* at 82:5-9 (Affirmative Defense No. 8). Because the doctrine of estoppel cannot be applied in this case, the Court should strike both defenses.

Even if estoppel can ever be asserted against the Government, "the Government may not be estopped on the same terms as any other litigant." *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60 (1984). When a party seeks to assert estoppel against the Government, the Ninth Circuit imposes two requirements that "must be shown as a threshold matter before deciding whether the traditional elements of estoppel are present." *United States v. Nye Cty.*, 951 F. Supp. 1502, 1511 (D. Nev. 1996). The party asserting estoppel must show that: (1) "the public's interest will not suffer undue damage" as a result of the application of the doctrine; and (2) the Government "engaged in 'affirmative conduct going beyond mere negligence ….'" *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995) (quoting *Watkins v. United States Army*, 875 F.2d 699, 707 (9th Cir.

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the Treasury to the payment of funds which were never appropriated").

1989)). Defendants have not met and cannot meet these requirements.

a. The Ability to Retain Improper Payments Cannot Justify Application of Estoppel

Defendants cannot meet their burden of showing that the use of estoppel in this case will not harm the public interest, because, as a matter of law, "[t]he defendant's 'inability to retain money that it never should have received in the first place' is not the kind of detrimental reliance that justifies estoppel against the government." *United States ex rel. Hagood v. Sonoma Cty. Water Agency*, 929 F.2d 1416, 1421-22 (9th Cir. 1991) (quoting *Heckler*, 467 U.S. at 60); *accord Nye Cty.*, 951 F. Supp. at 1512 (quoting *Hagood*). If Plaintiffs succeed in proving their affirmative case—the only circumstance under which this affirmative defense can be at issue[6]—they will have established that Defendants never should have received risk-adjustment payments for invalid codes in the first place. Estoppel therefore is inapplicable as a matter of law. *Id.*

b. Defendants Have Not Pled "Affirmative Misconduct" Justifying Application of Estoppel

Defendants also have not pled – and cannot plead – "affirmative misconduct" by the Government. "Affirmative misconduct" is "a high hurdle for the asserting party to overcome." *Baker*, 2011 WL 13115254, at *5 (striking estoppel defense). "[L]aches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917). Instead, "affirmative misconduct" requires "a 'deliberate lie' or 'pattern of false promises.'" *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1185 (9th Cir. 2001) (*en banc*) (quoting *Mukherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir. 1986)). Mere misstatements, failures to inform the defendant of the law, or continued payments despite Defendants' misconduct do not constitute "affirmative misconduct." *Mukherjee*, 793 F.2d at 1009 (misinformation about legal requirements is not "affirmative

[6] An "affirmative defense" is one that "assuming the complaint to be true, constitutes a defense to it." Black's Law Dictionary at 38 (6th ed. 1991).

misconduct"); *United States ex rel. Jordan v. Northrop Grumman Corp.*, 2002 WL 35454612, at *13 (C.D. Cal. Aug. 5, 2002) ("neither the failure to inform an individual of his or her legal rights nor the negligent provision of misinformation constitute affirmative misconduct"); *Schoonover v. United States*, 1993 WL 151146, at *1 (N.D. Cal. Apr. 30, 1993) ("The provision of misinformation by a government official does not constitute affirmative misconduct").

Defendants have not pled any "affirmative misconduct" by the Government. Accordingly, the Court should strike Affirmative Defenses Nos. 2 and 8. *See, e.g.*, *Assocs. in Eye Care*, 2014 WL 12606508, at *3-4 (striking estoppel defense containing no factual allegations demonstrating elements of defense); *Baker*, 2011 WL 13115254, at *5 (striking estoppel defense for failure to allege affirmative misconduct by Government); *Dye*, 2008 WL 4642164, at *2 (same).

2. <u>Failure to Mitigate (Affirmative Defense No. 6) is Not a Defense to Claims under the FCA</u>

Defendants contend that the Government's claims are barred "to the extent that the United States failed to take adequate measures to mitigate damages." Answer (Dkt. 223) at 82:1-2, Affirmative Defense No. 6.

"The Government has no duty to mitigate damages in fraud actions, including those under the FCA." *Monahan*, 2009 WL 4576097, at *8 (citing *Toepleman v. United States*, 263 F.2d 697, 700 (4th Cir. 1959), and reversing trial court's reduction of damages in FCA case for failure to mitigate); *see also Jordan*, 2002 WL 35454612, at *16 ("Defendant's argument that the Government had a duty to mitigate damages to recover under the FCA in this case must fail as a matter of law. … '[A]s a matter of law under the False Claims Act, the government has no legal duty to mitigate damages'") (citation omitted). A defendant "is not permitted to shield itself from potential liability from the Government's allegations by arguing that the Government should have done more to stop [the defendant] from perpetrating an alleged fraud." *Monahan*, 2009 WL 4576097 at *8; *see also Assocs. in Eye Care*, 2014 WL 12606508 at *5 (striking failure-to-mitigate defense).[7] Because the Government's alleged failure to mitigate its damages is not a valid defense in FCA or other fraud cases, the Court should strike this defense.

3. Defendants Have Not Pled and Cannot Plead a Ratification Defense (Affirmative Defense No. 7) to FCA Claims

Defendants assert that the Government's claims are barred because it "ratified, or otherwise consented to," Defendants' misconduct. Answer (Dkt. 223) at 82:7-8, Affirmative Defense No. 7.

Because Defendants have not described the basis for this defense, it is unclear whether they are asserting that the purported ratification constitutes an estoppel or a waiver of the Government's claims. If it is the former, the defense is invalid for the same reasons that Defendants' estoppel defenses are invalid, as set forth above. If, however, Defendants are asserting that the Government's supposed ratification constitutes a waiver, the Court should strike the defense because Defendants have not pled and cannot plead that the Department of Justice ("DOJ") waived the Government's claims under the FCA.

The doctrine of ratification is similar to that of waiver. *Assocs. in Eye Care*, 2014 WL 12606508, at *4 ("For ratification to apply, the Attorney General would have had to approve of [defendant's conduct] in a similar sense to that of waiver"). "A waiver is an intentional relinquishment or abandonment of a known right or privilege." *Groves v. Prickett*, 420 F.2d 1119, 1125 (9th Cir. 1970). Where a party asserts a defense of Government waiver, waiver "'will not be implied, but instead must be surrendered in unmistakable terms.'" *United States v. Philip Morris Inc.*, 300 F. Supp. 2d 61, 68 (D.D.C. 2004) (quoting *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987)). Thus, a

[7] *See also United States v. City Nursing Servs.*, 2016 WL 320766, at *4 (S.D. Tex. Jan. 27, 2016) ("[t]he Government has no duty to mitigate damages in cases where fraud is alleged …. [G]iven that this is a suit under the FCA, the Government has no duty to mitigate damages") (citations omitted); *United States ex rel. King v. Solvay, S.A.*, 304 F.R.D. 507, 514 (S.D. Tex. 2015) ("the Government is under no duty to mitigate in fraud cases"); *Baker*, 2011 WL 13115254, at *9 ("failure to mitigate is not a proper affirmative defense or theory to assert against the Government [in an FCA case], and the defense shall be stricken"); *Dye*, 2008 WL 4642164, at *4 (striking failure-to-mitigate defense to FCA claims).

party seeking to invoke waiver by ratification against the Government must show an unequivocal, intentional waiver by a Government agent acting within the scope of his or her authority. *See*, *e.g.*, *Fowler*, 913 F.2d at 1386-87 (Government "cannot be considered to have waived its right to reimbursement simply because its agents mailed an unlawful payment to the [defendants]") (citations omitted).

"Congress has vested the Attorney General as the government entity with the authority to bring civil actions under the FCA. … Violations of the FCA, therefore, may only be waived by the Department of Justice, and the unauthorized statements of United States agents may not serve to waive the Government's claims." *United States ex rel. Spay v. CVS Caremark Corp.*, 2013 WL 1755214, at *11 (E.D. Pa. Apr. 24, 2013). Thus, courts frequently strike defenses of waiver and ratification where the defendant has not alleged an unmistakable waiver by the DOJ. *See Assocs. in Eye Care*, 2014 WL 12606508, at *4; *United States v. Honeywell Int'l., Inc.*, 841 F. Supp. 2d 112, 115 (D.D.C. 2012) (striking waiver defense where defendant "fails to identify any clear and intentional relinquishment or abandonment by the Attorney General of the right to sue under the FCA"); *Baker*, 2011 WL 13115254, at *8 (striking waiver defense because "only the DOJ can waive the Government's right to sue" under the FCA, and defense was based upon conduct of other agencies); *Dye*, 2008 WL 4642164, at *3 (striking waiver and ratification defenses because "Defendant has not alleged that the Department of Justice waived" the Government's FCA claims); *Cushman & Wakefield*, 275 F. Supp. 2d at 771 (striking waiver and ratification defenses because defendant "has not pled that the DoJ waived these rights. … At most, [defendant] has alleged that [a different agency] waived and compromised its rights").

In this case, Defendants have not alleged and cannot allege any statements or conduct by the Attorney General or DOJ that could constitute a clear and unmistakable waiver of the Government's FCA claims. To the contrary, DOJ diligently investigated Relator's allegations and intervened in this lawsuit. Accordingly, the Court should strike this defense.

4. Assumption of Risk (Affirmative Defense No. 10) Is Not a Defense to Fraud or FCA Claims

Defendants assert that the Government's claims "are barred, in whole or in part, because of its assumption of risk." Answer (Dkt. 223) at 82:12-13, Affirmative Defense No. 10.

"[D]efenses such as … assumption of risk … do not apply to intentional torts," including fraud. *McGill v. Duckworth*, 944 F.2d 344, 352-53 (7th Cir. 1991) (citing *Prosser & Keeton on Torts* 462 (5th ed. 1984)), overruled on other grounds by *Farmer v. Brennan*, 511 U.S. 825 (1994).[8] Claims asserted under the FCA are fraud claims. *See Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) ("The FCA is an anti-fraud statute"). Accordingly, assumption of risk is not a defense to the FCA claims at issue in this case, and the Court should strike Defendants' Affirmative Defense No. 10.

5. Defendants' Unjust Enrichment Defense (Affirmative Defense No. 11) Is Invalid

Defendants assert that the Government's claims are barred "because any recovery would result in unjust enrichment." Answer (Dkt. 223) at 82:14-15, Affirmative Defense No. 11. The Court should strike this defense.

First, there does not appear to be any law permitting an unjust-enrichment affirmative defense to any of the claims at issue in this case. This Court should not be the first to create such a novel defense.

Second, unjust enrichment applies only if the party against whom it is asserted "recei[ved] a benefit" and unjustly retained the benefit at the expense of another. *See, e.g., In re ConAgra Foods Inc.*, 908 F. Supp. 2d 1090, 1113 (C.D. Cal. 2012) (applying

[8] *See also Citimortgage, Inc. v. Just Mortg., Inc.*, 2013 WL 6538680, at *11 (E.D. Mo. Dec. 13, 2013) ("the doctrines of assumption of the risk and comparative fault do not apply to plaintiff's allegations of fraud"); *Centerpoint Energy Servs., Inc. v. WR Prop. Mgmt. LLC*, 2011 WL 780840, at *1 (N.D. Ill. Feb. 28, 2011) ("assumption of the risk is not a valid affirmative defense to allegations of fraud"); *Bio-Vita, Ltd. v. Rausch*, 759 F. Supp. 33, 39-40 (D. Mass. 1991) ("Assumption of risk is not, however, available as a defense in a fraud or contract action"); *Vargas v. Correa*, 416 F. Supp. 266, 269 (S.D.N.Y. 1976) (assumption of risk "has no place in the case of an intentional tort").

California law). This case, however, involves the Government's payment of money to Defendants on behalf of third-party Medicare beneficiaries, to subsidize the insurance of those beneficiaries. The benefit at issue—insurance—was conferred upon a third-party beneficiary, not upon the Government, and the Government was not enriched at all. *See United States v. Speqtrum, Inc.*, 47 F. Supp. 3d 81, 97 (D.D.C. 2014) ("services rendered to a third party are of no value to the Government at all") (citing *United States v. Sci. Applications Int'l. Corp.*, 626 F.3d 1257, 1279 (D.C. Cir. 2010) ("where the defendant fraudulently sought payments for participating in programs designed to benefit third-parties rather than the government itself, the government can easily establish that it received nothing of value from the defendant …")).

Third, if the Government succeeds in proving its affirmative case that Defendants unlawfully retained risk-adjusted payments derived from invalid diagnosis codes—the only circumstance under which this affirmative defense can be at issue—then the Government's recovery of damages for Defendants' misconduct cannot be deemed "unjust."

Fourth, "[u]njust enrichment is a 'quasi-contract' theory that permits courts to imply the existence of a contract where none exists in order to prevent unjust results." *Prudential Ins. Co. v. Clark Consulting, Inc.*, 548 F. Supp. 2d 619, 622 (N.D. Ill. 2008). As a result, "where there is a specific contract [that] governs the relationship of the parties, the doctrine of unjust enrichment has no application." *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 408-09 (9th Cir. 1992) (applying Arizona law; internal quotes and citations omitted); *accord Wilson v. Stratosphere Corp.*, 371 F. App'x 810, 811-12 (9th Cir. Mar. 23, 2010) (unpublished op.) ("unjust enrichment is not available when there is an express, written contract"; applying Nevada law); *Drake v. Option One Mortg. Corp.*, 2010 WL 11464891, at *5 (C.D. Cal. Apr. 15, 2010) ("[A]s a matter of law, a quasi-contract action for unjust enrichment does not lie where … express binding agreements exist and define the parties' rights"). Defendants concede that they entered into contracts with the Government that defined the parties' rights. Answer (Dkt.

223) at 93:7-94:4, ¶¶ 17-22 (alleging the process by which CMS and Defendants' MA organizations enter into contracts). Thus, Defendants have pled the existence of contracts that preclude their unjust-enrichment defense.

For these reasons, the Court should strike Affirmative Defense No. 11.

6. Government Knowledge (Affirmative Defenses Nos. 3, 14) Is Not a Defense to Any Claim in this Case

Defendants assert that the Government's claims are barred because "[t]he United States knew and approved of the particulars of UnitedHealth's claims for payment before such claims were presented but after UnitedHealth had alerted the United States to UnitedHealth's understanding of applicable Medicare Program requirements," and that "[t]he United States at all times relevant to the Amended Complaint knew of the conduct allegedly engaged in by UnitedHealth." Answer (Dkt. 223) at 81:20-23, Affirmative Defense No. 3, and 82:19-21, Affirmative Defense No. 14. These defenses improperly seek to revive and expand a defense that Congress eliminated more than thirty years ago.

Prior to 1986, the FCA deprived courts of jurisdiction over FCA suits prosecuted by whistleblowers (but not those prosecuted by the Government) that were "based upon evidence or information in the possession of the United States, or any agency officer or employee thereof, at the time such suit was brought." 31 U.S.C. §§ 232-235 (1976). In 1986, Congress amended the FCA to eliminate this "government knowledge" defense. *See, e.g.*, *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1051 (9th Cir. 2012) ("After the 1986 amendments to the FCA, government knowledge is no longer an automatic bar to suit …."); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1194 n.3 (9th Cir. 2001) ("The 1986 amendments eliminate the government knowledge defense").

Thus, since 1986, Government knowledge of fraud, without more, has been insufficient to negate FCA liability. *See Hagood*, 929 F.2d at 1421 ("That the relevant government officials know of the falsity is not in itself a defense"); *see also Spay*, 875 F.3d at 755–60 ("knowledge alone on the part of the government is insufficient to establish an FCA defense"; reversing District Court's grant of summary judgment despite clear evidence that government knew of the alleged fraud); *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 952 (10th Cir. 2008) (government knowledge "is not a statutory defense to liability"); *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1156 (2d Cir. 1993) ("we agree with *Hagood* that the statutory basis for an FCA claim is the defendant's knowledge of the falsity of its claim … which is not automatically exonerated by any overlapping knowledge by government officials"); *San Francisco Bay Area Rapid Trans. Dist. v. Spencer*, 2007 WL 1450350, at *8 (N.D. Cal. May 14, 2007) (citing federal law in holding that "[g]overnment knowledge is not a stand-alone defense to a [California False Claims Act] claim" and rejecting jury instruction describing government knowledge as a defense).

The fact that the Government's knowledge may still be relevant to an element of an FCA plaintiff's claims does not elevate it to a complete defense that automatically negates an otherwise sufficient showing of an FCA violation. For example, in limited circumstances, a defendant may be able to use evidence of its disclosures to the government to argue that the defendant lacked the requisite scienter. *See, e.g.*, *Spay*, 875 F.3d at 756 (defendant might disprove knowledge if "the government knows and approves of the facts underlying an allegedly false claim … and the defendant knows that the government is aware of the false information in the claim") (internal quotation omitted). Even in those circumstances, however, "[t]he proper focus of the scienter inquiry … must always rest on the defendant's 'knowledge' of whether the claim is false, a knowledge which may certainly exist even when a government agency misinterprets its own regulations …." *Burlbaw*, 548 F.3d at 952. The Government's knowledge is one type of evidence among many that a fact-finder may consider in evaluating proof of the defendant's knowledge, but it does not automatically preclude a finding of the latter's knowledge. *See United States v. Chen*, 402 F. App'x 185, 188 (9th Cir. Oct. 28, 2010) (unpublished op.) ("whether government knowledge or advice proves the defendant's lack of knowledge is highly fact dependent").

Correctly treating the government's knowledge as merely one category of information relevant to the knowledge element of Plaintiffs' FCA claims, rather than as a free-standing and complete defense to liability, will allow the Magistrate Judge to enforce important limits on discovery. For example, information that Defendants did not know was in the Government's possession will be irrelevant to Defendants' scienter. *Spay*, 875 F.3d at 756. By contrast, if Defendants are permitted to continue arguing that Government knowledge, divorced from the knowledge element to which that concept might properly be relevant, is a defense to liability, then Defendants will resist any attempt to limit the scope of their discovery relating to the Government's knowledge, no matter how far afield the inquiry strays from the issue of Defendants' scienter.

Because the Government's knowledge is not an affirmative defense to an FCA claim, the Court should strike Defendants' Affirmative Defenses Nos. 3 and 14. *See Assocs. in Eye Care*, 2014 WL 12606508, at *4 (striking affirmative defense that "merely alleges 'government knowledge'").

IV. CONCLUSION

For the foregoing reasons, the Court should strike Defendants' Affirmative Defenses Nos. 2-3, 6-8, 10-11, and 14.

Dated: May 22, 2018

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I hereby attest that the other signatory listed, on whose behalf the filing is submitted, concurs in the filing's content and has authorized the filing.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA *ex rel*. BENJAMIN POEHLING,

Plaintiffs,

v.

UNITEDHEALTH GROUP, INC. *et al*.,

Defendants.

No. CV 16-08697 MWF (SSx)

[PROPOSED] ORDER RE PLAINTIFFS' MOTION TO STRIKE AFFIRMATIVE DEFENSES

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[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION TO STRIKE AFFIRMATIVE DEFENSES

On July 30, 2018, the Court heard the motion of the United States (the "Government") and *Qui Tam* Plaintiff Benjamin Poehling ("Relator") to strike Affirmative Defenses Nos. 2-3, 6-8, 10-11, and 14 in the Answer of defendants UnitedHealth Group, Inc.; United Healthcare Services, Inc.; United Healthcare, Inc.; UnitedHealthcare Insurance Company; Ovations, Inc.; Optum, Inc.; OptumInsight, Inc., and each of the Medicare Advantage organizations (collectively, "United defendants"). After considering the briefs and arguments, the Court hereby GRANTS the motion and ORDERS as follows:

The Court finds that the United defendants' Affirmative Defenses Nos. 2-3, 6-8, 10-11, and 14 are insufficient pursuant to Rule 12(f) and the authorities cited in Plaintiffs' Memorandum in support of the Motion. Accordingly,

The Court hereby STRIKES United defendants' Affirmative Defenses Nos. 2-3, 6-8, 10-11, and 14.

IT IS SO ORDERED.

DATED:____________________ By:______________________________

Hon. Michael W. Fitzgerald
United States District Judge