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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' REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES

Date: September 17, 2018
Time: 10:00 a.m.
Court: 5A, Hon. Michael W. Fitzgerald

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I. INTRODUCTION

In their Memorandum in Support of Motion to Strike Affirmative Defenses (the "Opening Brief"), Plaintiffs established that the Appropriations Clause bars Defendants' non-statutory defenses because this case involves Government claims for the recovery of public money. Plaintiffs also showed that each of the defenses at issue must fail for independent reasons.

In their Opposition brief (the "Opposition," or "Opp."), Defendants offer a host of misstatements of governing authority, including Supreme Court and Ninth Circuit authority clearly prohibiting the use of non-statutory defenses to defeat the Government's recovery of money wrongly paid from the public fisc. Defendants also expressly acknowledge the invalidity of many of their defenses, and decline to argue in defense of others. Yet they urge the Court not to strike any of their defenses—even those that they acknowledge are invalid—on the grounds that discovery into their invalid defenses might overlap with discovery into Plaintiffs' affirmative claims.

The Opposition brief only confirms that the Court should grant Plaintiffs' Motion to Strike. Because Defendants have asserted legally invalid defenses whose continued presence in this case will impede the efficient conduct of discovery and impose unwarranted burdens on this Court and on Plaintiffs, the Court should strike those defenses.

II. THE APPROPRIATIONS CLAUSE AND *RICHMOND* BAR DEFENDANTS' NON-STATUTORY DEFENSES

In the Opening Brief, Plaintiffs established that each of Defendants' non-statutory defenses (Affirmative Defenses Nos. 2-3, 6-8, 10-11, 14) is barred, as a matter of law, by the Appropriations Clause's requirement that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" and the Supreme Court's clear holding that "payments of money from the Federal Treasury are limited to those authorized by statute." U.S. Const., art. I, § 9, cl. 7; *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 416 (1990). Although *Richmond* addressed the doctrine of estoppel, its holding applies equally to all non-statutory doctrines. Defendants do not—and, in light of *Richmond*'s explication of the Appropriations Clause, cannot—argue otherwise.

Instead, Defendants raise a series of faulty arguments in an effort to impose novel, unwarranted limits on *Richmond* and the cases applying it. First, they claim that *Richmond* applies only to non-statutory claims. Second, they contend that the "ordinary rule" is that *Richmond* does not apply to defenses. Third, they assert that the one "narrow exception" to that "ordinary rule" is that *Richmond* bars non-statutory defenses only when the payment in question is "contrary to a statutory appropriation." Fourth, they contend that their non-statutory defenses do not conflict with any relevant statutes. Each of these arguments badly misreads the law, including governing Supreme Court and Ninth Circuit authority. The Appropriations Clause, as interpreted in *Richmond* and subsequent cases, bars each of Defendants' non-statutory defenses.

A. ***Richmond* Applies to the Government's Non-Statutory Claims**

Defendants assert that the rule articulated in *Richmond* applies only to statutory claims, and that *Richmond*'s estoppel bar therefore "is inapplicable to the Government's non-statutory claims." Opp. at 7-8. Nothing in *Richmond* itself suggests such a limitation, and no court has ever adopted it. Nor could any such rule be harmonized with the basis for the Supreme Court's rationale in *Richmond*, which was that the Appropriations Clause bars application of estoppel because "payments of money from the Federal Treasury are limited to those authorized by statute." *Richmond*, 496 U.S. at 416. Under *Richmond*, the relevant—and constitutionally dispositive—question is whether Congress affirmatively authorized the payment at issue. If it did not, the particular legal theory the Government employs to recover that unauthorized payment is irrelevant. For that reason, legions of courts—including the Ninth Circuit—have applied *Richmond* to bar defenses to non-statutory claims asserted by the Government.[1]

Defendants cite no cases articulating the rule on which they rely. Instead, Defendants purport to infer that rule from two cases in which District Courts denied the Government's motions to strike some non-statutory defenses. Opp. at 7-8, citing *United States ex rel. Dye v. ATK Launch Sys., Inc.*, 2008 WL 4642164 (D. Utah Oct. 16, 2008) and *United States ex rel. Jordan v. Northrup Grumman Corp.*, 2002 WL 35454612 (C.D. Cal. Aug. 5, 2002). But *Dye* refutes Defendants' argument: in it, the District Court relied on *Richmond* in striking an estoppel defense as to all causes of action, including non-statutory claims, thus disproving Defendants' assertion that it held that *Richmond* does not apply to non-statutory

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[1] *See, e.g.*, *Industrial Customers of Northwest Utilities v. Bonneville Power Admin.*, 767 F.3d 912, 925, 927-28 (9th Cir. 2014) (in evaluating reasonableness of potential "quasi-contractual or common law" action by Government for recovery of subsidies, *Richmond* likely would bar estoppel defense); *United States v. Fowler*, 913 F.2d 1382, 1385-86 (9th Cir. 1990) (*Richmond* barred estoppel defense in Government's action for reimbursement of payment made under government insurance contract); *United States v. Hughes Aircraft Co.*, 1991 WL 11693422, at *1-*2 (C.D. Cal. Jan. 17, 1991) (*Richmond* barred estoppel defense; Government's claims included payment by mistake and unjust enrichment, as set forth in subsequent opinion in *United States v. Hughes Aircraft Co.*, 1991 WL 133569, at *1 (C.D. Cal. Apr. 5, 1991)); *United States ex rel. Monahan v. Robert Wood Johnson Univ. Hosp.*, 2009 WL 4576097, at *2, *7 (D.N.J. Dec. 1, 2009) (*Richmond* barred estoppel defense in case including causes of action for payment by mistake and unjust enrichment); *United States v. Manhattan-Westchester Med. Servs., P.C.*, 2008 WL 241079, at *1, *3 (S.D.N.Y. Jan. 28, 2008) (*Richmond* "applies equally to Plaintiff's False Claims Act claims and common law claims"); *United States v. Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763, 768-69 (N.D. Tex. 2002) (relying on *Richmond* in striking estoppel defense in action including common-law causes of action); *United States v. Inc. Vill. of Island Park*, 888 F. Supp. 419, at 430, 452-53 (E.D.N.Y. 1995) (*Richmond* barred estoppel defense in action including claims for unjust enrichment and payment by mistake); *United States v. Swick*, 836 F. Supp. 442, 445 (S.D. Ohio 1993) (*Richmond* barred defense of estoppel in breach-of-contract suit).

claims. *Dye*, 2008 WL 4642164, at *1 (Government's claims include "payment by mistake, unjust enrichment, and breach of contract"), *2, *2 n.12 (relying on *Richmond* in striking estoppel defense as to all claims). And *Jordan* does not even address whether *Richmond* bars only non-statutory claims; it appears that no party even raised that argument. *Jordan*, 2002 WL 35454612, at *9-*20. More importantly, even if *Jordan* supported Defendants' argument, it would stand alone against the vast majority of cases—including Ninth Circuit cases—applying *Richmond* to bar defenses to non-statutory causes of action.[2] *See* Footnote 1, *supra*.

In sum, *Richmond*'s bar on the use of non-statutory doctrines to compel the Government's payment or to frustrate its recovery of money not appropriated by Congress applies equally to statutory and non-statutory claims.

B. ***Richmond* Is Not Limited to Offensive Uses of Estoppel**

Defendants assert that the "ordinary rule" is that "a party is not barred from using equitable estoppel against the government *defensively*," even in cases

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[2] Defendants falsely assert that Plaintiffs' argument in the Opening Brief relating to *Richmond* was limited exclusively to the availability of defenses to Plaintiffs' FCA claims, and did not reach the Government's common-law causes of action. Opp. at 7. This is manifestly untrue—nothing in the Opening Brief articulates or supports any such limitation. Plaintiffs repeatedly and explicitly stated the broader general proposition that "judicially-created doctrines cannot bar the Government from recovering money paid in the absence of a statutory appropriation." Opening Br. at 5; *see also*, *generally*, *id.* at 5-9. Defendants further state that "all of the cases [Plaintiffs] cite[] for applying *Richmond* to non-statutory affirmative defenses involved defenses to statutory False Claims Act counts," not defenses to common-law claims. Opp. at 7. Again, this is simply false. In the relevant section of the Opening Brief, Plaintiffs cited numerous cases applying *Richmond* to bar defenses to non-statutory claims, including many of the cases cited in Footnote 1 above. *See* Opening Br. at 6 (citing *Fowler*), 7 (citing *Hughes*), 8 n.5 (citing *Monahan*, *Manhattan-Westchester*, *Cushman & Wakefield*, and *Island Park*). Defendants also contend that Plaintiffs somehow waived the argument that *Richmond* applies to defenses to non-statutory causes of action by not addressing it directly in the Opening Brief. But waiver cannot result from Plaintiffs' failure to anticipate an argument that has never been articulated by any court and that is contradicted by the substantial authority cited in Footnote 1 above.

involving payments from the public fisc. Opp. at 6. The Ninth Circuit disagrees. *See, e.g.*, *Industrial Customers of Northwest Utilities v. Bonneville Power Admin.*, 767 F.3d 912, 925, 927-28 (9th Cir. 2014) ("*ICNU*") (holding that *Richmond* would bar estoppel defenses in government action for recovery of subsidies under quasi-contractual or common-law theories); *Fowler*, 913 F.2d at 1385-86 (applying *Richmond* to strike estoppel defense, and not alluding to any "ordinary rule" against applying *Richmond* to defenses). Indeed, courts nationwide routinely apply *Richmond* to affirmative defenses, *see* Footnote 1 above, sometimes explicitly rejecting the "ordinary rule" Defendants propose. *See, e.g.*, *Manhattan-Westchester*, 2008 WL 241079, at *3 ("The [*Richmond*] principle applies equally where a party seeks to use the doctrine of estoppel to prevent the Government from recovering public funds that have already been paid") (citations omitted); *Incorporated Village of Island Park*, 888 F. Supp. at 452-53 (citing *Fowler* in holding that "[a]lthough in [*Richmond*], the issue of estoppel was raised in the context of a claim against the government for benefits, the same result would necessarily follow in an action for return of funds wrongfully paid from the federal treasury").[3]

Defendants' only authority for the "ordinary rule" they propose is an opinion not certified for publication—an opinion that Defendants cite in plain violation of Ninth Circuit rules (and that, in any event, stands for the opposite of the

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[3] The rule that Defendants propose does not make sense as a matter of either law or logic. The Appropriations Clause has never been read, and cannot sensibly be read, to mean that equity cannot compel the payment of money that Congress has not appropriated, but can prevent the Government from recovering money mistakenly paid in the absence of such an appropriation. Indeed, there is no cogent reason why the Appropriations Clause would *prohibit* the use of an equitable doctrine prospectively to obtain money in a legal proceeding, but would *allow* the use of the same equitable doctrine retrospectively to prevent recovery if the recipient simply defrauded the Government rather than litigating the dispute in open court. Such a rule would privilege fraud and punish open, good-faith disputes.

proposition for which Defendants cite it). *See* Opp. at 9 (citing unpublished 2002 decision); 9th Cir. R. 36-3(c) ("Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit" except in circumstances not applicable here). Defendants also quote language from *United States v. Hatcher*, 922 F.2d 1402 (9th Cir. 1991), out of context, but neglect to advise the Court that *Hatcher* did not hold that *Richmond* is inapplicable to defensive uses of estoppel. Instead, in *Hatcher*, the Ninth Circuit distinguished *Richmond* and *Fowler* on the basis that the plaintiff sought to use estoppel to avoid a non-monetary contract obligation, not to make a "direct demand[] on the public fisc," and thus did not trigger *Richmond*'s prohibition on the use of estoppel in cases involving the public fisc. *Hatcher*, 922 F.2d at 1410, 1410 n.9. The court would not have needed to draw that distinction if, as Defendants contend, its holding was that *Richmond* does not apply to defenses at all.

C. ***Richmond* Bars Non-Statutory Defenses that Would Enable Retention of Payments Made in the Absence of a Statutory Appropriation**

Because *Fowler* disproves their argument that *Richmond* applies only to affirmative uses of estoppel, Defendants seek to limit it, contending that *Fowler* represents only a "narrow exception" to their proposed rule. Opp. at 6. According to Defendants, *Richmond* applies to non-statutory defenses only when the case involves payments "made in direct contravention of a statutory appropriation." *Id*. Governing law and the great weight of authority contradict that assertion.

First, *Richmond* and the Appropriations Clause refute Defendants' argument. Both make clear that the constitutional question is whether a payment was affirmatively *authorized* by Congress, not whether Congress explicitly *prohibited* it. U.S. Const., art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); *Richmond*, 496 U.S. at 416 ("payments of money from the Federal Treasury are limited to those authorized by statute"), 424 ("Money may be paid out only through an appropriation made by law"; "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress"); 425 ("not a dollar of [public money] can be used in payment of any thing not thus previously sanctioned [by Congress]"). In sum, "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976). This authority refutes Defendants' attempt to predicate the applicability of *Richmond*, and of the Appropriations Clause itself, upon the existence of a statutory prohibition, rather than on the absence of a statutory appropriation.

Second, despite Defendants' assertions to the contrary, in cases involving the wrongful payment of public funds, *Richmond*'s reach is comprehensive, not narrow. In *Richmond*, the Supreme Court stated its intent to "settle the matter of estoppel as a basis for money claims against the Government," and chided courts of appeals for "search[ing] for an appropriate case in which to apply estoppel against the Government," despite the Supreme Court's reversal of "every finding of estoppel that we have reviewed." *Richmond*, 496 U.S. at 422. The Ninth Circuit's aversion to the use of estoppel—even as a defense—in cases involving public funds is equally resolute: "we have very occasionally applied estoppel against the Government in immigration cases. … But we know of *no* Ninth Circuit case estopping the government from recovering an erroneous monetary payment …." *ICNU*, 767 F.3d at 928. Defendants' assertion that *Richmond* must be read narrowly, and that non-statutory defenses therefore may frustrate the Government's recovery in actions involving the public fisc, improperly seeks to unsettle this settled law.

Third, *Fowler* itself refutes Defendants' argument that it represents an exception to a general rule against applying *Richmond* to bar affirmative defenses. In *Fowler*, the Ninth Circuit did not allude to any "ordinary rule" or describe its holding as an "exception." *See generally Fowler*, 913 F.2d 1382. *Fowler* did not adopt any requirement that a payment be "contrary to a statutory appropriation" before applying *Richmond*. *Fowler* does not even discuss any "statutory appropriation." *Id*. Nor could it, because in that case, the eligibility criterion giving rise to the Government's right to recover its mistaken payment—an insurance-policy claimant's residence in a county not eligible for government-issued flood insurance—was created by agency discretion, not by any statutory prohibition. *Fowler*, 913 F.2d at 1384 (Government's payment was erroneous because plaintiffs' "property was in a county that was ineligible for federal flood insurance"); 42 U.S.C. § 4013(a) (directing FEMA to issue regulations defining the locations of properties eligible for flood insurance). In asserting that the defendants in *Fowler* "were indisputably ineligible under the governing statutory appropriation," Opp. at 6, Defendants misrepresent the facts of that case. Similarly, in *ICNU*, the Ninth Circuit held that *Richmond* likely would bar any estoppel defense to the Government's claim for rescission of subsidies, even though the Government's payment of those subsidies "likely did not violate the Appropriations Clause." *ICNU*, 767 F.3d at 923, 928. In short, contrary to Defendants' contentions, *Fowler* and *ICNU* stand for the proposition that *Richmond* bars non-statutory defenses to Government claims for the recovery of public money, even in the absence of specific statutory appropriations language prohibiting the underlying payments.

Fourth, like the Ninth Circuit in *Fowler*, the vast majority of courts considering *Richmond* hold that it bars estoppel defenses even in the absence of specific statutory prohibitions on the payments at issue.[4] Defendants cite only two cases to the contrary, *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574 (Fed. Cir. 1993), and *Jordan*, 2002 WL 35454612. Because both are contrary to the Ninth Circuit's *Fowler* and *ICNU* decisions, which hold that *Richmond* bars estoppel defenses even in the absence of a statutory prohibition on payment, they are not the law in this Circuit.[5]

Thus, the relevant question is not whether a "statutory appropriation" explicitly prohibits the use of Defendants' non-statutory defenses. Instead, the question is whether any statute affirmatively authorizes the use of those defenses to defeat the Government's claims for the recovery of money wrongly paid from the

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[4] *See, e.g.*, *Hughes Aircraft*, 1991 WL 11693422, at *1-*2 (applying *Richmond* in granting summary judgment to Government on estoppel defense without identifying any "statutory appropriation" conflicting with payment); *United States v. City Nursing Servs.*, 2016 WL 320766, at *1, *4 (S.D. Tex. Jan. 27, 2016) (relying on *Richmond* in granting summary judgment on estoppel defense in case alleging fraudulent billing for services not provided); *United States ex rel. Liotine v. CDW Gov't, Inc.*, 2012 WL 2807040, at *15 (S.D. Ill. Jul. 10, 2012) (relying on *Richmond* in striking estoppel defense in FCA suit arising from fraud in connection with sales under a government contract); *Monahan*, 2009 WL 4576097, at *2, *7 (relying on *Richmond* in striking estoppel defense in case in which misconduct underlying the FCA claim involved misrepresentations, omissions, and regulatory violations, without analyzing whether misconduct was "contrary to a statutory appropriation"); *Dye*, 2008 WL 4642164, at *2 (relying on *Richmond* and cases applying it in striking estoppel defense in FCA case alleging breach of government contract); *Manhattan-Westchester*, 2008 WL 241079, at *3 (applying *Richmond* in striking estoppel defense without citing any "statutory appropriation" conflicting with payment); *Cushman & Wakefield*, 275 F. Supp. 2d at 768-69 (relying on *Richmond* in striking estoppel defense in action alleging submission of false underreporting of the amount of mail submitted to Postal Service); *Swick*, 836 F. Supp. at 445 (*Richmond* barred defense of estoppel in government suit for breach of contract).

[5] The court in *Jordan* distinguished *Fowler* on the grounds that it "involved a statutory appropriation, namely, flood insurance under the National Flood Insurance Act," whereas the case before it involved payment under a contract. While that distinction is legally immaterial—payments under a contract still must be authorized by a statutory appropriation—even it would require the application of *Richmond* here. Medicare payments are made pursuant to a statutory appropriation, and Defendants do not contend otherwise.

public fisc. There is no such statutory authority supporting the defenses at issue, and Defendants have not identified any. Accordingly, the Appropriations Clause, as interpreted by the Supreme Court and the Ninth Circuit, bars those defenses, and the Court should grant the Motion.

D. <u>The Court Should Strike the Non-Statutory Defenses Because They Conflict With the FCA and Medicare Statutes</u>

Independently, the Court should grant the Motion because, as set forth in the Opening Brief, the non-statutory defenses conflict with both the False Claims Act, which grants the Government a remedy for the concealment or avoidance of the return of Government money, including "any overpayment," 31 U.S.C. §§ 3729(a)(1)(B), 3729(b)(3), and the Medicare statute, which directs CMS to adjust Medicare Advantage payments based on beneficiaries' "health status," 42 U.S.C. §§ 1395w-23(a)(1)(C), 1395w-23(a)(2)(C).

As to the FCA, Defendants argue that it provides a statutory remedy but does not constitute a "statutory appropriation," and therefore is irrelevant. They cite no authority articulating this arbitrary distinction or relying upon it as the basis for any decision. Nor is this proposed distinction compatible with the Appropriations Clause and *Richmond*. Congress's exclusive power to appropriate money necessarily implies that the other branches cannot frustrate statutes giving the Government the right to recover money wrongfully paid. Accordingly, courts reject Defendants' argument that equitable doctrines may defeat Government rights to recovery that Congress created by statute. *See, e.g.*, *Hughes Aircraft*, 1991 WL 11693422, at *1-*2 ("Certainly, there has been no authorization for the payment of money from the Treasury based on fraud. Therefore, if the government succeeds on its claim under the False Claims Act …, a successful estoppel defense would impermissibly obligate the Treasury to the payment of funds which were never appropriated"); *Valley Ice & Fuel Co. v. United States*, 30 F.3d 635, 640 (5th Cir.

1994) ("The government is entitled to recoup the refund under the relevant law [citing statute]. … Equity has no power to change this wholly legal result"); *United States v. Guy*, 978 F.2d 934, 938 (6th Cir. 1992) ("applying equitable estoppel against the government in this case would frustrate the purposes of the statutorily granted authority" for the Government to recover tax refund overpayments).

Plaintiffs also established in the Opening Brief that Defendants' non-statutory defenses would frustrate Congress's direction to adjust payments for "health status." Opening Br. at 7-8, citing 42 U.S.C. § 1395w-23(a)(1)(C). Defendants contend that this conflict between the governing statute and their non-statutory defenses is irrelevant, because it is not the "basis for [the Government's] claims," and the Government has not sued them for violating that section.[6] Opp. at 11. This is a red herring. *Richmond*'s prohibition on non-statutory doctrines to create rights to unappropriated public funds applies here because of Defendants' assertion of various affirmative defenses, not because of Plaintiffs' affirmative claims. Consequently, *Richmond* prevents the application of those defenses if they would frustrate a statutory limit or conflict with a statutory requirement for the payment of public funds. In the Opening Brief, Plaintiffs demonstrated that Defendants' non-statutory defenses would create a right to retain money the Government wrongly paid as a result of the submission of invalid diagnosis codes, and those defenses therefore conflict with the statutory requirement that CMS adjust for "health status." Opening Br. at 7-8. Defendants assert no argument to the contrary in their Opposition, and they accordingly have conceded this issue.

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[6] The Government, of course, could not sue Defendants for a direct violation of the relevant statutory provision, because that section imposes obligations on CMS, not on Defendants or MAOs. 42 U.S.C. § 1395w-23(a)(1)(C) (directing "the Secretary" to create a risk-adjustment payment methodology that adjusts for "health status").

Because Defendants' non-statutory defenses conflict with the statutory directive to adjust MA payments for "health status," those defenses must fail.

Accordingly, although the *Richmond* bar does not depend upon a showing that non-statutory defenses conflict with an express statutory provision, the existence of two such conflicts in this case is an independent reason why this Court should grant Plaintiffs' motion to strike Defendants' non-statutory defenses.

III. THE COURT SHOULD STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES FOR INDEPENDENT REASONS

A. Defendants' Estoppel Defenses (Affirmative Defenses Nos. 2, 8) Cannot Succeed

As Plaintiffs explained in the Opening Brief, both Supreme Court and Ninth Circuit authority hold that "[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." Opening Br. at 10, citing *United States ex rel. Hagood v. Sonoma Cty. Water Agency*, 929 F.2d 1416, 1421-22 (9th Cir. 1991) (quoting *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60 (1984)). Defendants do not attempt to distinguish these cases or dispute this rule. Indeed, they do not even address it. Nor do Defendants deny that this rule necessarily bars application of their estoppel defenses if Plaintiffs succeed on their affirmative claims—the only circumstance in which those defenses could be at issue. By declining to address this argument, Defendants have conceded it, and the Court should strike Defendants' estoppel defenses.

Independently, the alleged Government actions upon which Defendants premise their estoppel defenses do not rise to the level of "affirmative misconduct" necessary to permit an estoppel defense. *Socop-Gonzales v. I.N.S.*, 272 F.3d 1176, 1185 (9th Cir. 2001) (*en banc*). Defendants assert only that Government officials "were aware of United's practices," advised United that it need not perform "'twoway looks' to identify and delete unsupported codes," and accepted United's annual bids despite United's assertion that it was not reviewing medical records for the purpose of validating provider-submitted codes. Opp. at 12. As a matter of law, the provision of faulty advice and the acceptance of performance despite knowledge of misconduct does not rise to the level of "affirmative misconduct." *See Socop-Gonzales*, 272 F.3d at 1181, 1184 (I.N.S. agent's erroneous advice to withdraw appeal and submit an application for adjustment, which directly resulted in deportation order, did not constitute "affirmative misconduct"); *Jordan*, 2002 WL 35454612, at *12 (Government's continual review, investigation, and approval of defendant's quality and manufacturing procedures did not constitute "affirmative misconduct" justifying estoppel defense in defective-parts case); *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 to justify the application of equitable estoppel") (citation omitted); *United States ex rel. Baker v. Cmty. Health Sys., Inc.*, 2011 WL 13115254, at *5 (D.N.M. Dec. 7, 2011) (allegation that Government "was fully informed" of the alleged misconduct and continued to authorize claims despite that knowledge did not rise to level of "affirmative misconduct"). Accordingly, the accusations cast in Defendants' brief cannot justify application of estoppel against the Government, and the Court should strike Defendants' estoppel defenses.

B. **<u>Defendants Concede that their Government Knowledge and Unjust Enrichment Defenses (Affirmative Defenses Nos. 3, 11, 14) Are Invalid</u>**

In the Opposition, Defendants concede that their government knowledge defenses and their unjust enrichment defense are legally invalid. Opp. at 15 ("United has no quarrel with the proposition that government knowledge goes to elements on which the government—not United—bears the burden of proof"), 19 ("the government is correct" that "the doctrine of unjust enrichment has no application").[7] And they offer no argument or analysis to refute or distinguish the binding authority Plaintiffs cited in the Opening Brief.[8] Instead, Defendants assert that they merely pled these defenses out of "an abundance of caution." *Id.* at 15, 19. Because Defendants concede that these defenses are legally invalid, the Court should strike them. *See, e.g.*, *Cabrera v. Alvarez*, 2013 WL 3146788, at *2 (N.D. Cal. Jun. 18, 2013) (striking defenses that merely asserted that plaintiff had not met its burden of proof, which were "improperly pled as affirmative defenses");

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[7] Defendants also assert that the Government could somehow have been "enriched" by their provision of insurance to Medicare beneficiaries, despite authority clearly establishing that when the Government subsidizes a benefit to a third-party, the government itself receives nothing of value. *United States v. Speqtrum, Inc.*, 47 F. Supp. 3d 81, 97 (D.D.C. 2014); *United States v. Sci. Applications Int'l. Corp.*, 626 F.3d 1257, 1279 (D.C. Cir. 2010). But Defendants cite no authority for their illogical assertion that the Government's FCA and payment by mistake claims can be barred by the doctrine of "unjust enrichment" when any benefit the Defendant supposedly conveyed was provided to third party beneficiaries, not to the Government itself.

[8] Defendants state that some courts have allowed a defense of unjust enrichment "in varying contexts," although not in actions involving fraud or payment by mistake. Opp. at 18-19. But Defendants acknowledge that their unjust enrichment defense is legally invalid because they have alleged the existence of a contract governing the relationship of the parties. Opp. at 19. Defendants' cases do not call this result into question, and one of them explicitly supports it. *See Kizer v. PTP, Inc.*, 129 F. Supp. 3d 1000, 1005-06 (D. Nev. 2015) (holding that an unjust enrichment defense would not apply if the governing contract was valid). Similarly, Defendants note, without analysis, that some courts have declined to strike government knowledge defenses. All three cases Defendants cite, however, acknowledge that government knowledge is not an affirmative defense, and decline to strike it only because the courts believed the issues raised by the invalid defense would be relevant to plaintiffs' affirmative claims anyway. *Jordan*, 2002 WL 35454612, at *8 (citing *Hagood*); *Baker*, 2011 WL 13115254, at *6-*7 (holding that the court would treat government knowledge as a potential inference pertaining to scienter, not a defense to liability); *United States ex rel. Fisher v. Ocwen Loan Serv., LLC*, 2016 WL 3031713, at *11 (May 25, 2016) (noting that government knowledge "is not a complete defense to liability" and treating it only as information potentially relevant to scienter). While Plaintiffs agree with those cases that government knowledge is not a defense, they disagree with the notion that the continued assertion of that invalid defense is harmless, as set forth below.

Quintana v. Baca, 233 F.R.D. 562, 564-66 (C.D. Cal. 2005) (striking defenses that are not "affirmative defense[s]," even where they relate to the merits of the plaintiff's affirmative case); *Manhattan-Westchester*, 2008 WL 241079, at *3 ("[w]here a defense must fail as a matter of law," court should strike it).

C. The Court Should Strike Defendants' Failure to Mitigate, Ratification, and Assumption of Risk Defenses (Affirmative Defenses Nos. 6, 7, 10) as to Plaintiffs' FCA Claims

Defendants moved to strike Defendants' defenses of failure to mitigate, ratification, and assumption of risk, articulating, in the Opening Brief, the reasons why those defenses are invalid as to Plaintiffs' FCA claims. Defendants do not respond to the overwhelming authority described in Plaintiffs' Opening Brief. Instead, they merely state that they do not know whether they intend to assert those defenses to Plaintiffs' FCA claims, and offer a cursory string-cite of three cases that purport to support their ratification defense to FCA claims, without also addressing Defendants' failure to mitigate and assumption of risk defenses.[9] Opp. at 12 n.8. Rather than provide any substantive argument in support of these defenses, Defendants assert that the Court cannot strike them as to Plaintiffs' FCA claims because Plaintiffs have not argued that they are invalid as to the Government's remaining common-law claims. Opp. at 11-12.

Defendants are incorrect. Under Rule 12(f), a court may grant a motion to

[9] Two of Defendants' cases do not disagree with the authority that Plaintiffs cited in the Opening Brief, which stands for the proposition that only the Department of Justice can waive or ratify violations of FCA claims. Opening Br. at 12-13. Instead, they permit waiver defenses to proceed only to determine whether DOJ waived the Government's claims. *United States ex rel. Landis v. Tailwind Sports Corp.*, 308 F.R.D. 1, 5 (D.D.C. Feb. 12, 2015); *Monahan*, 2009 WL 4576097, at *7. Because Defendants do not contend that DOJ waived the Government's FCA claims, these cases do not support Defendants' ratification defense. Only *Jordan*, 2002 WL 35454612, at *8, declines to strike a waiver defense not premised on DOJ's statements. Because it is contrary to the great weight of authority set forth in the Opening Brief, the Court should not follow it.

strike a defense as to one cause of action, even if it denies the motion as to other causes of action. *See, e.g.*, *Basque v. Cty. of Placer*, 2017 WL 950503, at *1, *5 (E.D. Cal. Mar. 10, 2017) (striking defense as to one cause of action but denying as to others); *Gomez v. J. Jacobo Farm Labor Contractor, Inc.*, 188 F. Supp. 3d 986, 997-98 (E.D. Cal. 2016) (striking affirmative defenses with prejudice as to some causes of action and without prejudice and with leave to amend as to others); *McIntosh v. Cub Crafters, Inc.*, 2014 WL 644505, *3, *5 (E.D. Wash. Feb. 19, 2014) (striking affirmative defense as to all but one claim); *Jordan*, 2002 WL 35454612, at *21 (granting motion to strike defenses of waiver, lack of damages, and duty to mitigate as to some causes of action but denying motion as to others).[10] Defendants cite no authority in support of their argument to the contrary. Accordingly, the Court should strike Defendants' failure to mitigate, ratification, and assumption of risk defenses as to Plaintiffs' FCA claims.

IV. <u>AMPLE PREJUDICE SUPPORTS STRIKING DEFENDANTS' INVALID DEFENSES</u>

Defendants argue that the Court should not strike any of their defenses—even those they concede are legally invalid—because Plaintiffs would suffer no prejudice by being forced to litigate those defenses through discovery, summary judgment motions, and, potentially, trial. *See* Opp. at 2-3. They are wrong.

As courts repeatedly recognize, the burden of litigating invalid defenses is exactly the type of prejudice that merits granting a motion to strike. *See Heller*

[10] *See also F.D.I.C. v. Musser*, 2017 WL 878208, *6, *8, *9 (E.D. Pa. Mar. 6, 2017) (striking certain affirmative defenses as to some causes of action and declining to strike same defenses as to other causes of action); *Gates v. District of Columbia*, 825 F. Supp. 2d 168, 170-72 (D.D.C. 2011) (same); *Sewell v. Allied Interstate, Inc.*, 2011 WL 32209, *4-*5 (E.D. Tenn. Jan. 5, 2011) (same); *Dye*, 2008 WL 4642164, at *4 ("Defendant's Eleventh Defense will be stricken as to Plaintiff's False Claims Act claim, but will not be stricken as to the remaining claims"); *S.E.C. v. McCaskey*, 56 F. Supp. 2d 323, 326 (S.D.N.Y. 1999) (striking defense as to one claim but denying as to others).

Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989) ("motions to strike remove unnecessary clutter from the case, [and] they serve to expedite, not delay"); *Kennedy v. City of Cleveland*, 797 F.2d 297, 305 (6th Cir. 1986) (motions to strike may avoid unnecessary "expenditure of time and money that must arise from litigating spurious issues"); *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5th Cir. 1982) ("a Rule 12(f) motion to dismiss a defense is proper when the defense is insufficient as a matter of law"); *United States v. Assocs. in Eye Care, P.S.C.*, 2014 WL 12606508, at *1 (D. Ky. Nov. 14, 2014) (quoting *Kennedy*, *supra*); *Manhattan-Westchester*, 2008 WL 241079, at *3 ("[w]here a defense must fail as a matter of law, its inclusion prejudices the plaintiff because it will increase the duration and expense of trial"); *F.D.I.C. v. White*, 828 F. Supp. 304, 307 (D.N.J. 1993) ("a motion to strike can save time and litigation expense by eliminating the need for discovery with regard to legally insufficient defenses"). Indeed, even the authority Defendants cite implicitly recognizes that invalid defenses prejudice the plaintiffs. *See Quintana*, 233 F.R.D. at 564-66 (noting that courts "often require a showing of prejudice" on a Rule 12(f) motion to strike defenses, but striking all defenses that the court found were not legally sufficient affirmative defenses).

Defendants contend that the Court should allow these defenses—including admittedly invalid defenses—to proceed because the discovery that Defendants seek concerning them might overlap with discovery that Defendants believe is relevant to elements of Plaintiffs' affirmative claims.[11] *See* Opp. at 14-17, 19-20.

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[11] Defendants insinuate that Plaintiffs seek to avoid this discovery because it will reveal harmful information. Opp. at 1. Nothing could be further from the truth. Leaving aside Defendants' gross mischaracterization of the discovery taken to date, which is not properly the subject of this motion, Plaintiffs filed this motion because of the tremendous, undeniable, and unwarranted burden that Defendants have imposed and continue to impose upon the Government through the discovery and litigation of defenses that are invalid as a matter of law, and that therefore have no place in this litigation.

That is a reason to grant the motion to strike, not a reason to deny it. The issues relevant to Plaintiffs' affirmative claims might overlap with some issues implicated by Defendants' invalid defenses, but those issues are not coextensive. Striking Defendants' legally invalid defenses will enable the Magistrate Judge to tailor discovery to the matters actually at issue and will prevent Defendants from seeking wide-ranging discovery merely for its relevance to the invalid defenses.

For example, Defendants contend that the Government's payment by mistake claim requires a showing that the government made payments "under an erroneous belief which was material to the decision to pay." Opp. at 16. Defendants therefore contend that they are entitled to discovery concerning "what [the Government's] beliefs about those facts and circumstances were …." *Id.* Defendants also claim that the government's knowledge is relevant to materiality and to their own scienter. *Id.* at 17. From this, Defendants conclude that the Court should not strike their government knowledge affirmative defenses, because discovery into the government's "beliefs" is relevant both to their admittedly invalid defenses and to elements of Plaintiffs' FCA and payment by mistake claims.

This is a non-sequitur. Striking Defendants' government knowledge defenses will not deprive them of the ability to take any discovery that is relevant to other issues in the case. It merely will force Defendants to justify that discovery by reference to claims and legally sufficient defenses that are actually at issue. To use Defendants' examples, the Government's knowledge is relevant to its payment by mistake claim only to the extent that it pertains to the Government's erroneous belief that the specific diagnosis codes that Defendants submitted were valid. Similarly, the Government's knowledge is relevant to Defendants' scienter only if "the defendant knew that the government knew" about the false information (among other limitations). *United States ex rel. Spay v. CVS Caremark Corp.*, 875

F.3d 746, 758 (3d Cir. 2017); *see also United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682 n.27 (5th Cir. 2003) (concurring op.) (Government's knowledge is not relevant to the defendant's scienter "if the person making the false statement did not know that the government knew it was false"). Striking the government knowledge defenses will enable the Magistrate Judge to evaluate the relevance of discovery that Defendants seek in light of these limiting legal principles, rather than accepting Defendants' assertion that all government knowledge is relevant by definition because Defendants have asserted a government knowledge defense.

Striking invalid defenses also will enable the Magistrate Judge to consider the relevance and burden of discovery in light of broader legal disputes. For example, Defendants contend that they are entitled to limitless discovery into the views of Government agents—even agents who had no expertise in or responsibility for the issues on which Defendants seek their opinions[12]—on virtually any risk-adjustment topic, in an effort to establish that it was "objectively reasonable" for Defendants to knowingly refuse to return money received in payment for the submission of invalid diagnosis codes. Opp. at 17-18. But it cannot be "objectively reasonable" to interpret contractual and regulatory provisions requiring the deletion of known invalid codes to mean the opposite of what they say, so no such discovery is necessary. Those provisions are unambiguous, and do not require interpretation. *See* Am. Compl. in Intervention, Dkt. 171, at ¶ 104. And in any event, even the existence of a reasonable interpretation of an obligation does not preclude liability. *United States ex rel. Oliver v. The Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999) (reversing lower

[12] As an example, Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment repeatedly offers the opinion testimony of Jeffrey Grant, a CMS employee who has not worked on Medicare Part C issues for the Government since January 2006, and who, when he was working on Medicare Part C for the Government, was not responsible for the issues about which Defendants demanded his opinions.

court ruling that defendant could not be liable because its misconduct was premised upon "a reasonable interpretation" of an ambiguous standard). Moreover, Defendants cannot affirmatively assert that they adopted an "objectively reasonable" interpretation of governing regulatory and contractual language without first waiving privilege as to that supposed belief, something Defendants have, to date, declined to do. *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991). When disputes arise concerning Defendants' discovery, the Magistrate Judge must be empowered to evaluate these arguments on their merits. Declining to strike the defenses at issue would deprive her of the ability to do so, because it would permit Defendants to circumvent these arguments by framing their discovery requests as relevant to their invalid blame-the-Government defenses.

The Court need not resolve these disputes in this motion. Instead, as Rule 12(f) allows, the Court should promote the efficient supervision of this litigation by striking invalid defenses whose continued presence will impose unwarranted discovery and litigation burdens on the Court and the parties.

V. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Opening Brief, the Court should strike Defendants' Affirmative Defenses Nos. 2-3, 6-8, 10-11, and 14.

Dated: August 27, 2018

Respectfully submitted,

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