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11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA  
13 WESTERN DIVISION  
14

15 P. VICTOR GONZALEZ, *QUI TAM* ) NO. CV 05-8818 AHM (FMOx)  
PLAINTIFF, ON BEHALF OF HIMSELF, )  
16 THE UNITED STATES OF AMERICA, ) UNITED STATES' *AMICUS CURIAE*  
AND THE STATE OF CALIFORNIA, ) BRIEF IN RESPONSE TO  
17 Plaintiff, ) DEFENDANTS' MOTION FOR JUDGMENT  
ON THE PLEADINGS  
18 v. )  
19 ) Date: January 24, 2011  
Time: 10:00 a.m.  
20 PLANNED PARENTHOOD OF LOS ) Judge: Hon. A. Howard Matz  
ANGELES, et al., ) Courtroom: 14  
21 Defendants. )  
22 \_\_\_\_\_ )

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1 The United States of America (the "government") respectfully  
2 submits this *amicus curiae* brief in response to defendants' Motion  
3 for Judgment on the Pleadings, set for hearing on January 24, 2011.  
4 This brief does not take a position on the merits of defendants'  
5 Motion or the *qui tam* plaintiff's (the "relator's") action, but  
6 rather is intended to address certain assertions in the Motion  
7 regarding the False Claims Act, 31 U.S.C § 3729 *et seq.* ("FCA"),  
8 that the government believes are incorrect or require  
9 clarification.

10 I. THE GOVERNMENT'S INTEREST IN THIS CASE

11 The relator, P. Victor Gonzalez, filed this whistleblower  
12 action pursuant to the *qui tam* provisions of the FCA, 31 U.S.C. §  
13 3730 *et seq.*, on December 19, 2005. The government gave notice  
14 that it was not intervening in the action on November 1, 2007. The  
15 government does not presently take a position on the merits of the  
16 action.

17 Notwithstanding its non-intervention, however, the government  
18 remains deeply concerned that case law interpreting and applying  
19 the FCA develop in a manner that is consistent with the language  
20 and purposes of the FCA. The FCA is the government's principal  
21 tool for fighting fraud in government programs. In addition, the  
22 government is the real party in interest in every case brought  
23 pursuant to the *qui tam* provisions of the FCA, including cases in  
24 which the government does not intervene, because the government  
25 receives a minimum of 70% of any recovery. See 31 U.S.C. §  
26 3730(d)(2); United States ex rel. Killingsworth v. Northrop Corp.,  
27 25 F.3d 715, 720 (9th Cir. 1994).

28

1 Because defendants' Motion contains inaccurate or misleading  
2 assertions regarding (1) the impact of ambiguity in a billing rule  
3 on FCA liability, (2) the supposed "government knowledge" defense,  
4 and (3) the impact of communications between the government and a  
5 defendant on the latter's FCA liability, the government submits  
6 this *amicus curiae* brief to correct those assertions. This *amicus*  
7 *curiae* brief does not address any of the other issues raised by  
8 defendants' Motion, but the government's silence on those issues  
9 should not be construed as tacit approval of defendants' positions  
10 on those issues.

11 II. AMBIGUITY IN A BILLING RULE DOES NOT, AS A MATTER OF LAW,  
12 PRECLUDE FCA LIABILITY

13 Defendants assert that ambiguity in the billing rules  
14 governing Medi-Cal reimbursement of contraceptive drugs dispensed  
15 by defendants precludes FCA liability as a matter of law.<sup>1</sup> First,  
16 defendants assert that ambiguity precludes a finding of "falsity"  
17 under the FCA. (Mot. 7:16-19, 9:1). Second, defendants assert  
18 that ambiguity precludes a finding of scienter under the FCA as a  
19 matter of law. (Mot. 7:20-22, 8:24-25). Neither assertion is  
20 correct.

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21  
22 <sup>1</sup> Notwithstanding that defendants' Motion repeatedly refers  
23 to the pertinent billing rules as "regulations" (Mot. 7:11-15,  
24 10:15-16, 11:19-20), the only billing rule discussed in the Motion  
25 is the "at cost" billing rule contained in the Family PACT manual,  
26 which is not a regulation. (Mot. 3:11-22, 10:15-16). The  
27 government does not address in this brief whether the "at cost"  
28 provision in the Family PACT manual is ambiguous, but insofar as  
defendants are suggesting that, in the context of a cost-based  
billing limitation, the plain meaning of the word "cost" can  
include profit, the government disagrees. Absent a special  
definition to the contrary, "cost" in such a context cannot include  
profit. See, e.g., Merriam-Webster's Collegiate Dictionary 262  
(10th ed. 1999) (defining "cost" as ". . . the outlay or  
expenditure (as of effort or sacrifice) made to achieve an object .  
. . .").

1 A. Ambiguity Does Not Preclude Falsity

2 Even assuming, *arguendo*, that the Family PACT "at cost"  
3 billing rule were ambiguous, the ambiguity of the rule would not  
4 preclude a finding that defendants violated the rule, and that  
5 defendants' claims for Medi-Cal reimbursement thereby were rendered  
6 false. The Ninth Circuit in United States ex rel. Oliver v. The  
7 Parsons Co., 195 F.3d 457, 463 (9th Cir. 1999), cert. denied, 530  
8 U.S. 1228 (2000), has squarely held that ambiguity in a regulation  
9 may be relevant to whether a defendant acted with knowledge of  
10 falsity (*scienter*) under the FCA, but is not relevant to whether a  
11 claim is false.

12 In Parsons, the Ninth Circuit held that ambiguity in a  
13 regulation (a federal cost accounting standard) does not preclude a  
14 finding that a defendant's representation of compliance with the  
15 regulation was false. 195 F.3d at 462-63. The court explained  
16 that "it is [the defendant's] compliance with these regulations, as  
17 interpreted by this court, that determines whether its accounting  
18 practices resulted in the submission of a 'false claim' under the  
19 Act." While "the reasonableness of [the defendant's]  
20 interpretation of the applicable accounting standards may be  
21 relevant to whether it knowingly submitted a false claim, the  
22 question of 'falsity' itself is determined by whether [the  
23 defendant's] representations were accurate in light of applicable  
24 law." Id. (emphasis added). The court explained that if ambiguity  
25 were relevant to falsity rather than *scienter*, a defendant who  
26 submitted a claim with the requisite knowledge of its falsity  
27 nevertheless would be able to "avoid liability by successfully  
28 arguing that its claim reflected a 'reasonable interpretation' of

1 the requirements." Id. at 463 n.3.

2 The defendants' Motion relies on Hagood v. Sonoma County Water  
3 Agency, 81 F.3d 1465, 1477-78 (9<sup>th</sup> Cir. 1996) (Mot. 7:15-8:14), but  
4 Hagood did not hold that ambiguity negates falsity. Rather, Hagood  
5 held that, where a statute granted the government agency discretion  
6 to determine the precise nature of the defendant's obligations  
7 under a federal project, and the defendant conformed its conduct to  
8 the agency's determinations, the defendant did not make or use  
9 false statements or records to avoid an obligation to pay money to  
10 the government under the FCA's reverse false claims provision.<sup>2</sup>

11 The same argument regarding the meaning of Hagood that  
12 defendants make in their Motion was advanced by the defendant in  
13 Parsons and rejected by the Ninth Circuit:

14 "Hagood does not stand for the proposition that a 'reasonable  
15 interpretation' of a regulation precludes falsity. . . . In  
16 Hagood, the statute itself granted discretion in deciding the  
17 cost allocation that the plaintiff claimed was false . . . .  
18 Unlike Hagood, this case involves regulations that, while  
19 unquestionably technical and complex, are not discretionary.  
20 Their meaning is ultimately the subject of judicial

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22 <sup>2</sup> The relator in Hagood alleged that the defendant water  
23 agency had violated the FCA's reverse false claims provision, 31  
24 U.S.C. § 3729(a)(7), by inducing the Army Corps of Engineers to  
25 refrain from updating an old allocation of the costs of building a  
26 dam. The Army Corps' failure to update the cost allocation  
27 allegedly resulted in an insufficient allocation of costs to the  
28 defendant. The court found that the statute governing the  
allocation of costs merely required that costs be allocated  
"equitably . . . as determined by the [Army Corps];" that the  
statute was "imprecise" and gave the Army Corps "fairly wide" and  
arguably "too much" discretion to decide whether to update the old  
allocation; and that by agreeing to the old cost allocation the  
defendant "did merely what the [Army Corps] bid it to do." 81 F.3d  
at 1477-1478.

1 interpretation, and it is [defendant's] compliance with these  
2 regulations, as interpreted by this court, that determines  
3 whether its accounting practices resulted in the submission of  
4 a 'false claim' under the [FCA]."

5 Parsons, 195 F.3d at 463.

6 Any lingering doubt that adherence to a reasonable  
7 interpretation of an ambiguous regulation does not preclude falsity  
8 in the Ninth Circuit was put to rest by United States v. Bourseau,  
9 531 F.3d 1159 (9th Cir. 2008).

10 "Appellants argue that their statements were not false under a  
11 reasonable interpretation of the applicable regulations. Some  
12 courts hold that the government must prove that a claim is  
13 false under any reasonable interpretation of applicable law to  
14 succeed under the FCA. [Citation omitted.] We reject this  
15 approach. See Parsons, 195 F.3d at 463 (holding that the  
16 reasonableness of an interpretation may be relevant to the  
17 knowledge requirement but not the falsity requirement)."

18 Id. at 1164, n.2.<sup>3</sup>

19 Defendants contend that there "appears to be some tension"  
20 between Hagood and Parsons (Mot. 11:23), and purport to resolve  
21 this supposed tension by arguing that "Hagood -like this case -  
22 addressed the effect of an admittedly ambiguous statute, whereas  
23 Parsons addressed a finding regarding the defendant's reasonable  
24 interpretation of a regulation." (Mot. 11:24-25; emphasis added).  
25 This argument fails for several reasons. First, as discussed  
26 above, and as confirmed in Parsons, defendants misread Hagood,

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27  
28 <sup>3</sup> Defendants also rely on various reported district court cases and cases from other circuits (Mot. 8:15-25, 9:1, n.4, 5), but none of them is authoritative law in the Ninth Circuit.

1 which does not support the proposition that ambiguity precludes  
2 falsity. Second, for purposes of determining the impact of  
3 ambiguity on falsity under the FCA, there is no logical reason to  
4 distinguish between ambiguous regulations and ambiguous statutes.  
5 Third, no such distinction was drawn by the court in Bourseau, even  
6 though that case appears to have involved the interpretation of  
7 both regulations and statutes. See 531 F.3d at 1165, 1167.<sup>4</sup>

8 Finally, defendants argue that this Court should give  
9 deference to the opinion expressed by the deputy Director of  
10 Medical Care Services for the California Department of Health  
11 Services ("CDHS") that the pertinent provision of the Family PACT  
12 manual was ambiguous, notwithstanding that CDHS auditors may have  
13 held a contrary view. (Mot. 10:7-11:2). The government currently  
14 takes no position on whether principles of judicial deference to an  
15 agency's interpretation of its enabling statutes and regulations  
16 should be applied to these facts. The government notes, however,  
17 that even where deference is owed, deference applies only where the  
18 agency's interpretation is based on a "permissible" or "reasonable"  
19 construction of the statute or regulation at issue. Chevron,  
20 U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S.  
21 837, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984); Thomas Jefferson  
22 University v. Shalala, 512 U.S. 505, 114 S.Ct. 2381, 2384, 129  
23 L.Ed.2d 405 (1994). Thus, although defendants fail to quote all of  
24 the pertinent language in the Family PACT manual provision at  
25 issue, any conceivable analysis of the supposed ambiguity of that

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27 <sup>4</sup> Even if defendants' argument had merit as an abstract  
28 legal matter, moreover, as noted above the only billing rule  
discussed in the Motion is contained in the Family PACT manual.  
See Mot. 2:11, 3:13-22; see also footnote 1, supra. The Family  
PACT manual obviously is not a statute.

1 provision must start with an examination of the full text of that  
2 provision by this Court.

3 B. Ambiguity Does Not Invariably Preclude Scienter

4 Defendants also suggest that, under the FCA, ambiguity  
5 precludes a finding of scienter as a matter of law. (Mot. 7:19-  
6 22). This is incorrect. Although ambiguity can be relevant to  
7 scienter, it cannot preclude liability unless a defendant can show  
8 that, at the time it submitted the claims or engaged in the conduct  
9 at issue, it believed in good faith, and without recklessness or  
10 deliberate ignorance, that its conduct was lawful and proper. The  
11 mere fact that a defendant can show that its conduct was consistent  
12 with a reasonable interpretation of the pertinent rules is  
13 insufficient, absent proof that it actually believed in that  
14 interpretation at the time it submitted its claims, and that its  
15 belief was neither reckless nor deliberately ignorant. See  
16 Parsons, 195 F.3d at 463 (reasonableness of defendants'  
17 interpretation of applicable rules "may be relevant" to scienter);  
18 Bourseau, 531 F.3d at 1165, n.2 (same). See also Parsons, 195 F.3d  
19 at 464 ("A contractor relying on a good faith interpretation of a  
20 regulation is not subject to [FCA] liability, not because his or  
21 her interpretation was correct or 'reasonable' but because the good  
22 faith nature of his or her action forecloses the possibility that  
23 the scienter requirement is met.").

24 III. THE GOVERNMENT'S POSSESSION OF INFORMATION REGARDING A  
25 DEFENDANT'S ALLEGED FALSE CLAIMS DOES NOT CONSTITUTE A DEFENSE  
26 TO AN FCA ACTION

27 Defendants further assert that their "[o]penness [a]bout  
28 [t]heir [b]illing [p]ractices [p]recludes a [f]inding of [both]



1 [f]alsity and [k]nowledge." Mot. 11:18-19 (emphasis added).

2 Again, however, neither assertion is correct.

3 A. Government Knowledge Does Not Preclude Falsity

4 Defendants' argument regarding the falsity element of an FCA  
5 violation is incorrect, because the government's possession of  
6 information regarding a defendant's alleged FCA violations is not  
7 relevant to whether a claim is false under the FCA. See Bourseau,  
8 531 F.3d at 1165 (" . . . courts decide whether a claim is false or  
9 fraudulent by determining whether a defendant's representations are  
10 accurate in light of applicable law. [Citation omitted].  
11 Applicable law is subject to judicial interpretation."). As an  
12 obvious example, if a government official detects that a claim is  
13 false and withholds payment from a defendant, the claim is still  
14 false, even though the government has avoided being damaged. See  
15 also United States ex rel. Butler v. Hughes Helicopter, Inc., 71  
16 F.3d 321, 326 (9th Cir. 1995) (since the 1986 amendments to the  
17 FCA, "government knowledge is no longer an automatic bar to suit. .  
18 ."); United States ex rel. Hagood v. Sonoma County Water Agency,  
19 929 F.2d 1416, 1421 (9th Cir. 1991) ("That the relevant government  
20 officials know of the falsity is not in itself a defense.").

21 B. Government Knowledge Does Not Invariably Preclude  
22 Scienter

23 Evidence of government knowledge can be relevant to whether a  
24 defendant submitted claims with the requisite scienter, but only if  
25 the evidence shows that:

- 26 ● the government was aware that the defendant had
- 27 engaged in the conduct or practice at issue;
- 28 ● the government communicated to the defendant the

1 government's agreement with or assent to the conduct  
2 or practice; and

- 3 • in reliance on the government's agreement or assent,  
4 and without acting recklessly or with deliberate  
5 ignorance, the defendant in good faith concluded  
6 that its conduct or practice was proper and that the  
7 claims it thereafter submitted were not false.<sup>5</sup>

8 Accordingly, in assessing defendants' argument, the Court  
9 should determine whether the factual allegations before the Court  
10 (construed in the light most favorable to the relator) compel the  
11 conclusion that, in good faith and without recklessness or  
12 deliberate ignorance, defendants concluded that their billing  
13 conduct was proper based on CDHS' prior approval of or assent to  
14 that conduct. While the government currently takes no position on  
15 that question, the government notes that (1) at least some of the  
16 facts before the Court seem to suggest that, at least on certain  
17 occasions, CDHS communicated to defendants its disapproval of  
18 defendants' billing practices (see, e.g., First Amended Complaint,  
19 Exs. 2a, 2b, 14), and (2) it appears that there are no facts before  
20 the Court showing good faith reliance by defendants on any of CDHS'  
21 communications with defendants.

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24  
25 <sup>5</sup> Because government knowledge is relevant to scienter but  
26 not falsity, government knowledge cannot preclude FCA liability  
27 absent proof that the defendant concluded, in good faith and non-  
28 recklessly, that its conduct was proper based on its belief that  
the government had approved its conduct. See, e.g., Butler, 71  
F.3d at 328 (government knowledge can be relevant to scienter);  
Parsons, 195 F.3d at 463 (falsity depends on the court's assessment  
of whether the defendant's representations were accurate in light  
of applicable law as determined by the court).

1 IV. CONCLUSION

2 The United States of America respectfully requests that the  
3 Court consider the foregoing points and authorities when ruling on  
4 defendants' Motion for Judgment on the Pleadings.

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6 Dated: December 13, 2010

Respectfully submitted,

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